

QUEBEC'S BOUNDARIES IN THE EVENT OF SECESSION

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I INTRODUCTION

On 30 September 1996, the Governor in Council of Canada submitted three questions to the Supreme Court of Canada on the legality and consequences of unilateral secession by the Province of Quebec:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?¹

To no one's great surprise, the Court concluded in August 1998 that unilateral secession was contrary to both Canadian constitutional law and public international law.² As David Schneiderman reports, it had been the federal government's deliberate strategy 'to craft a series of questions confining the Court's deliberation to a few, seemingly contentious matters'.³ However, the anticipated answers were

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¹ *Reference re Secession of Quebec* [1998] 2 SCR 217, 218.

² The Supreme Court's unanimous judgment was handed down on 20 August 1998. Having answered the first two questions in the negative, the Court did not have to consider the third question.

³ David Schneiderman, 'Introduction' in David Schneiderman (ed), *The Quebec Decision* (1999) 6. David Schneiderman is Executive Director of the Centre for Constitutional Studies at the University of Alberta.

never much in doubt and the result pretty much a foregone conclusion.⁴ This was so much the case that Quebec refused to participate in what it saw as nine federally-appointed individuals deciding on the Quebec people's right to self-determination.⁵ The Supreme Court was therefore obliged to appoint Me André Joli-Cœur as *amicus curiae* to present the sovereigntist arguments.⁶

The Court's reply to the first two questions was generally as predicted by the Chrétien government.⁷ But the Court went further than anticipated and crafted what has been described as a 'lucid and politically artful verdict'.⁸ While Quebec had no right to unilateral secession, there was, the Court decided, a constitutional duty on the part of the federal government and the provinces to negotiate the terms of secession should Quebecers democratically and unambiguously express a will to secede.⁹ And the Court proceeded, in effect, to set out the legal framework for such an eventuality. As Schneiderman so aptly concludes, 'the federal government got what it wanted then, but much more than it bargained for'.¹⁰

Surprisingly, both federalists and separatists celebrated the decision – surely as much 'a testament to the Court's political adroitness as to governments' ability to "spin" events'.¹¹ However, controversy over the meaning and consequences of the ruling has since inserted itself into the national unity debate. This article deals with the issue at the heart of the debate: the duty to negotiate. The potential impact of this newly-defined obligation will be more particularly assessed as it affects the territorial issue. After briefly considering the position of federalists and sovereigntists on the question of Quebec's boundaries prior to the Supreme Court ruling, the article will then consider whether the Court's pronouncements have settled the issue once and for all. In light of the Court imposed obligation on all parties to negotiate in good faith, how might the issue of Quebec's borders be resolved?

⁴ Schneiderman reports that sovereigntists 'likened the Supreme Court to the Leaning Tower of Pisa – the Court, they argued, leaned in only one direction, toward the federalist side'. *Ibid.*

⁵ Nathalie Des Rosiers, 'From Québec Veto to Québec Secession: The Evolution of the Supreme Court of Canada on Québec-Canada Disputes' (2000) 13 *Canadian Journal of Law & Jurisprudence* 171, 171-2.

⁶ According to Schneiderman 'André Joli-Cœur, a Quebec City lawyer and self-appointed *souverainiste*, took up the cause with a great deal of energy, filing a series of briefs and expert opinions, making what probably was the best possible case for a unilateral declaration of independence'. Schneiderman, above n 3, 6.

⁷ Jean Chrétien, born in Shawinigan Quebec, was sworn in as Prime Minister of Canada on 4 November 1993 after his party, the Liberal Party of Canada, had won a majority of seats in the House of Commons. As Prime Minister, he was re-elected Member of Parliament for the riding of St-Maurice Quebec on 27 November 2000, his Liberal Party winning a third consecutive majority of seats in the House of Commons.

⁸ Gregory Millard, 'The Secession Reference and National Reconciliation: A Critical Note' (1999) 14 *Canadian Journal of Law & Society* 1.

⁹ *Reference re Secession of Quebec* [1998] 2 SCR 217, 265.

¹⁰ Schneiderman, above n 3, 8.

¹¹ Millard, above n 8, 2. See also Robert Young, 'A Most Politic Judgement' (1998) 10(1) *Constitutional Forum* 14, 15-16.

II THE TERRITORIAL DEBATE PRIOR TO THE SUPREME COURT'S RULING

On the eve of the Court's ruling, opinion remained deeply divided on the issue of Quebec's boundaries in the event of secession. And of course, this question was an integral part of the whole debate over the right of the Quebec people to independence.

Separatist scholars had long been convinced that the principle of self-determination legitimated Quebec's bid for independence.¹² While acknowledging that key international instruments provided that the right of peoples to self-determination should normally be exercised internally, that is to say, within the framework of an existing State, sovereigntists insisted that Quebec met the conditions giving rise to external self-determination, understood as a right to independence. Daniel Turp, for instance, argued that:

the repatriation of the *Constitutional Act, 1982* without Quebec's consent and the rejection of the Meech Lake Accord (including the five conditions put forth by Quebec) amounted to a denial of the Quebec people's right to internal self-determination.¹³

However in 1992, a panel of eminent international experts had categorically rejected this argument:

[O]ne cannot reasonably maintain that the Quebec people is a colonial people, nor that it is deprived of the right of its own existence within Canada as a whole or to participate in the democratic process... Consequently, the Quebec people effectively exercises its right to self-determination within the whole of Canada and is not legally justified in invoking such right to found a possible independence.¹⁴

¹² Daniel Turp, 'Le droit de sécession en droit international public' (1982) 20 *Canadian Yearbook of International Law* 24, and Jacques Brossard, *L'accession à la souveraineté et le cas du Québec* (1976) 203-30.

¹³ Daniel Turp, 'Le droit de faire sécession: l'expression du principe démocratique' in Alain Gagnon and François Rocher (eds), *Replique aux détracteurs de souveraineté* (1992) 49, reprinted in Daniel Turp, *The Right to Choose-Essays on Quebec's Right of Self-Determination* (2001) 489, 503. [Author's translation.]

¹⁴ Thomas Franck, 'The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty' in *Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté: Projet de Rapport* (1992), [3.09] <http://www.mri.gouv.qc.ca/la_bibliotheque/territoire/integrite_plan_an.html> at 23 May 2003. The other co-authors of the Report were Rosalyn Higgins, Alain Pellet, Malcolm Shaw and Christian Tomuschat. In fact, Patrick Monahan reported that '[i]nternational law commentators and publicists who have examined Quebec's right to self-determination are virtually unanimous in concluding that Quebec is not subject to any systematic discrimination that would permit it to claim the right to secede from Canada'; Patrick Monahan, 'The Law and Politics of Quebec Secession' (1995) 33 *Osgoode Hall Law Journal* 1, 21. In support, Monahan referred to Lawrence Eastwood, 'Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia' (1993) *Duke Journal of Comparative & International Law* 299, 342; Gregory Marchildon and Edward Maxwell, 'Quebec's Right of Secession under Canadian and International Law' (1992) 32 *Virginia Journal of International Law* 583, 618; Sharon Williams, *International Legal Effects of Secession by Quebec* (1992) 20-2.

Quebec's strategy had therefore shifted to the principle of effectiveness.¹⁵ Relying on arguments of legitimacy and popular will, sovereigntist scholars pointed out that while international law might not confer upon the Québécois people a positive right to independence, neither did it prohibit secession.¹⁶ International law was, in fact, neutral with respect to secession, and in certain circumstances, it might well adapt to recognise effective political realities. And indeed, federalist commentators¹⁷ did acknowledge that the consequences of a unilateral declaration of independence, if successful, might eventually be 'regulated internationally'.¹⁸

The debate surrounding secession had also been joined by a number of international legal scholars. Professor Franck, one of the distinguished authors of the 1992 opinion, argued that, while the legal vacuum might not confer a positive entitlement to secede, peoples had a right, understood as a privilege, to attempt secession:

It cannot seriously be argued today that international law *prohibits* secession. It cannot seriously be denied that international law *permits* secession. There is a *privilege* of secession recognized in international law and the law imposes *no duty* not to secede.¹⁹

Yet Professor Christakis argued that international law not only did not permit secession, but was in fact hostile to all secessionist endeavours:

[W]e believe that it is wrong to regard international law as affording such an 'indirect right', such a 'privilege' to secessionist groups. International law neither 'permits' nor 'authorizes' secession. Rather what it does ... is to erect against it important obstacles, by *protecting* the State against secessionist movements. Law is hostile to secession and scarcely 'permits' it. It does no more than *take into account reality* when secession succeeds against all odds... Thus, as J. Crawford has commented, 'a secessionist group informed that international law permits it to secede or confers on it the privilege to do so, could be disappointed by the consequences'.²⁰ [author's translation]

Though Antonio Cassese agreed that state practice and the overwhelming view of states remained opposed to secession, and that this was one of the few areas on which full agreement existed among all states, he did emphasise that secession 'is a

¹⁵ Bruce Ryder, 'The Arguments of the *Amicus Curiae*' in David Schneiderman (ed), *The Quebec Decision* (1999) 79.

¹⁶ Jacques Frémont and François Boudreault, 'Supraconstitutionnalité canadienne et sécession du Québec' (1997) 8 *National Journal of Constitutional Law* 163, 203.

¹⁷ Peter Hogg, *Constitutional Law of Canada* (1992) 128 and Williams, above n 15, 9.

¹⁸ James Crawford, *The Creation of States* (1979) 268. According to Crawford, secession is 'neither legal nor illegal in international law, but a legally neutral act the consequences of which are, or may be, regulated internationally'.

¹⁹ Thomas Franck, 'Supplément au dossier: Rapports d'experts de l'*amicus curiae*' TAB 3, §2.11, in the matter of the *Reference re Secession of Quebec* (emphasis in the original).

²⁰ Théodore Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (1999) 82-3 (emphasis in the original), citing James Crawford, 'Response to Expert Reports of the *Amicus Curiae*' §17, in the matter of the *Reference re Secession of Quebec*.

fact of life, outside the realm of law'.²¹ As Christopher Quaye commented: 'The legitimacy of any secessionist movement depends on whether or not that movement succeeds, and, to a certain extent, without any regard to how that success is brought about.'²²

Thus, there was a fair consensus among Québécois, Canadian and international experts that in accordance with the principle of effectiveness, the criteria for statehood in the event of Quebec's unilateral secession would be 'the maintenance of a stable and effective government over a reasonably well-defined territory, to the exclusion of the metropolitan/predecessor State in such circumstances that independence is in fact undisputed or manifestly undisputable'.²³ But at the same time, opinion on how to interpret the territorial control criterion remained divided.

According to federalist scholars, while international law was prepared to acknowledge political realities once the independence of a seceding entity had been firmly established, it would only do so in relation to the territory that entity had effectively come to control.²⁴ Professor Woerhling warned that:

If secession gave rise to hostilities and if the federal government forcibly gained control over part of the territory of Quebec, the secessionist government managing to retain control of the rest, at the end of the hostilities the territory would have to be divided between the former surrounding State and the new State born of the secession.²⁵

In such circumstances, federal control or indeed Native control over part of Quebec's territory would constitute the reality against which Quebec's claim to effective statehood would be assessed.

Of course, if Quebec succeeded in asserting effective control over the entire provincial territory and if the effectiveness of its claim to statehood was recognised by the international community, federalists conceded that as a newly-independent

²¹ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995) 123.

²² Christopher Quaye, *Liberation Struggles in International Law* (1991) 240.

²³ Crawford, above n 19, 266.

²⁴ See Patrick Monahan, 'The Law and Politics of Quebec Secession' (1995) 33 *Osgoode Hall Law Journal* 1, 24; Neil Finkelstein, George Vegh and Camille Joly, 'Does Québec Have a Right to Secede at International Law?' (1995) 74 *Canadian Bar Review* 225, 256; Suzanne Lalonde, 'Quebec Secession and the Principle of Effectiveness' (1997) 76 *Canadian Bar Review* 258, 259.

²⁵ José Woerhling, *Éléments d'analyse institutionnelle, juridique et démolinguistique pertinents à la révision du statut politique et constitutionnel du Québec*, Document de travail no. 2, 58-9, 102. The Crees of northern Quebec in their well-documented study *Sovereign Injustice* have proposed a number of peaceful measures that would deny effective control over their lands: constitutional challenges in Canadian courts; continued application of federal as well as Aboriginal laws; federal collection of income and other taxes; provision of federal programs and services to Aboriginal communities, etc. Grand Council of the Crees of Quebec, *Sovereign Injustice: Forcible Inclusion of the James Bay Cree Territory into a Sovereign Quebec* (1995) 166.

state, it would benefit from the full range of international principles protecting its territorial integrity.²⁶ However, the crux of the matter was that the principle of effectiveness offered no firm guarantees.²⁷ While Quebec was attempting to assert effective control, Canadian federal authorities would, for their part, be entitled to resist such attempts by all lawful means. International law favoured and defended the right to territorial integrity and consequently authorised states to oppose claims to secession. And in the domestic context, Quebec could not rely upon the Canadian Constitution to protect its provincial boundaries, for the decision to proceed by way of a unilateral declaration of independence would involve a break in legal continuity. It would amount to a repudiation of the Canadian constitutional order. As Monahan explained: '[I]f Quebec was attempting to ignore the Constitution and secede unilaterally, it could not be heard to complain that the borders of the new State differed from those permitted under the existing Canadian Constitution'.²⁸

Still, sovereigntists dismissed the threat of partition, insisting that the principle of *uti possidetis* would effectively guarantee Quebec's territorial status quo in the event of secession.²⁹ This fairly obscure colonial principle had been resurrected and indeed transformed by the Yugoslavia Arbitration Commission [hereinafter Badinter Commission]³⁰ in its third advisory opinion to the International Conference for Peace in Yugoslavia. In 1992, when Yugoslavia was on the point of disintegration, the Badinter Commission recommended that the issue of boundaries be resolved according to the principle of *uti possidetis*; that the internal boundaries dividing the former Yugoslav Republics should automatically become the international boundaries of the new states: *Uti possidetis, ita possideatis* – as you possess, so may you continue to possess.³¹

Only a few short months later, the sovereigntist Parti Québécois under Jacques Parizeau commissioned five renowned international legal experts to advise his

²⁶ Patrick Monahan, 'Cooler Heads Shall Prevail: Assessing the Costs and Consequences of Quebec Separation' (1995) 65 *C D Howe Institute Commentary* 1, 15.

²⁷ As Patrick Monahan has commented: 'Far from guaranteeing an independent Québec its current borders, international law provides that the borders would be, in a practical sense, up for grabs'. Patrick Monahan, 'International Law Isn't on Mr. Parizeau's Side' *The Globe and Mail* (Toronto) 19 May 1994, A21. See also José Woehrling, 'Les aspects juridiques d'une éventuelle secession du Québec' (1995) 74 *Canadian Bar Review* 293, 328 and Lalonde, above n 25, 260.

²⁸ Monahan, above n 27, 15.

²⁹ Jacques Parizeau, 'Frontières d'un Québec souverain: la situation est 'on ne peut plus claire' *La Presse* (Montreal) 25 May 1994, B3.

³⁰ The Arbitration Commission is often referred to as the Badinter Commission in honour of its president, Robert Badinter. See generally Matthew Craven, 'The European Community Arbitration Commission on Yugoslavia' (1995) 66 *British Yearbook of International Law* 333; Alain Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples' (1992) 3 *European Journal of International Law* 178; Peter Radan, 'The Badinter Arbitration Commission and the Partition of Yugoslavia' (1997) 25 (3) *Nationalities Papers* 537; Mark Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 *American Journal of International Law* 569.

³¹ *Opinion No. 3*, (1993) 92 *International Law Reports* 170, 172.

government on the question of Quebec's territorial integrity in the event of secession [hereinafter Quebec report].³² Relying heavily on the Badinter Commission's arguably novel interpretation of the colonial *uti possidetis* principle, the five experts assured the Parizeau government that in the event of secession, Quebec could assume legal entitlement, under international law, to its existing boundaries.³³ Since 1992, therefore, sovereigntists have argued that, irrespective of competing claims, the *uti possidetis* principle guarantees Quebec its current borders.³⁴

However, the Badinter Commission's interpretation of the *uti possidetis* principle as well as its subsequent application in the 1992 Quebec report has led to considerable debate among academics. This author, along with other scholars such as Antonopoulos,³⁵ Corten,³⁶ Delcourt,³⁷ Hannum,³⁸ Radan³⁹ and Ratner,⁴⁰ has argued that nothing either in the principle's colonial past or resulting from recent state practice justifies conferring upon *uti possidetis* the status of a binding rule of customary international law.⁴¹ *Uti possidetis* represents, we would argue, a valid option in resolving territorial issues following secession or dissolution, but not a binding solution imposed under the mantle of custom.

Though the issue of Quebec's borders was not directly before the Court in the *Reference on Quebec Secession*, the parties' submissions as well as the expert reports filed did address the question and reflected the deep divide between the federalist and sovereigntist positions.⁴² There was a general feeling that once the

³² The Badinter Commission delivered its third advisory opinion on 11 January 1992. The Quebec report, signed by Thomas Franck, Rosalyn Higgins, Alain Pellet, Malcolm Shaw and Christian Tomuschat is dated 8 May 1992.

³³ Franck, above n 15, [2.44].

³⁴ Patrick Monahan reports that 'Quebec Premier Jacques Parizeau repeatedly refers to this legal opinion (hereinafter the 'Five Experts' Opinion') as establishing the proposition that the borders of Quebec could not be put in issue if it were to secede from Canada'. Monahan, above n 27, 14.

³⁵ Constantine Antonopolous, 'The Principle of *Uti possidetis Iuris* in Contemporary International Law' [1996] *Revue hellénique de droit international* 29.

³⁶ Olivier Corten, 'Droit des peuples à disposer d'eux-mêmes et *uti possidetis*: deux faces d'une même médaille?' in Olivier Corten et al. (eds), *Démembrements d'États et delimitations territoriales: L'uti possidetis en question(s)* (1999) 403.

³⁷ Barbara Delcourt, 'L'application de l'*uti possidetis juris* au démembrement de la Yougoslavie: règle coutumière ou impératif politique?' in Corten, above n 37, 35.

³⁸ Hurst Hannum, 'Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?' (1993) 3 *Transnational Law & Contemporary Problems* 57.

³⁹ Peter Radan, 'The Borders of a Future Independent Quebec: Does the Principle of *Uti possidetis Juris* Apply?' [1997] *Australian International Law Journal* 200.

⁴⁰ Steven Ratner, 'Drawing a Better Line: *Uti possidetis* and the Borders of New States' (1996) 90 *American Journal of International Law* 590.

⁴¹ Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti possidetis* (2002).

⁴² Contrast James Crawford's report for the Department of Justice of Canada, 'State Practice and International Law in Relation to Unilateral Secession', <<http://canada.justice.gc.ca/en/news/nr/1997/factum/craw.html>> at 23 May 2003, with Thomas Franck's and Malcolm N Shaw's expert reports for the *amicus curiae*: Thomas Franck, 'Supplément au dossier: Rapports

Supreme Court started upon a discussion of the Québécois people's right to self-determination and secession, it would necessarily have to consider all the potential ramifications, including the determination of boundaries. Indeed, according to Malcolm Shaw, 'any court that is asked to consider the principle of self-determination and secession in international law is obliged to take into account the spatial dimension of such rights, otherwise a crucial part of the issue is ignored'.⁴³ The Supreme Court was therefore given a unique opportunity to air constitutional and international arguments that would determine Quebec's boundaries in the event of secession. It remains to be seen whether the Court did in fact clarify this contentious issue or simply muddied the waters further.

III THE SUPREME COURT RULING

The second question referred to the Court was the subject of much of the initial focus. Since the Canadian Constitution contains no provision for the secession or separation of a province or territory, it had been widely anticipated that the Court's analysis of the right to self-determination and secession would concentrate on international law. If the Court was to tackle the issue of Quebec's borders, it would do so in answering Question 2.

A Question 2

In answering the second question, the Supreme Court accepted the argument advanced by the *amicus curiae* that, while international law might not confer on Quebec a positive right to secede, international law equally did not prohibit secession.⁴⁴ In fact, the Court recognised that international recognition could be conferred upon such a political reality if independence emerged via effective control of the territory of what was now the province of Quebec.⁴⁵ However the Court did warn that this finding did not support the more radical contention that subsequent recognition of a unilateral declaration of independence could be taken to mean that secession had been achieved under colour of a legal right:

As a court of law, we are ultimately concerned only with legal claims. If the principle of 'effectivity' is no more than that 'successful revolution begets its own legality' it necessarily means that legality follows and does not precede the successful revolution.⁴⁶

d'experts de l'*amicus curiae*', Tab 1, in the matter of the *Reference re Secession of Quebec* and Malcolm Shaw, 'Supplément au dossier de l'*amicus curiae*', Tab 7, in the matter of the *Reference re Secession of Quebec*.

⁴³ Malcolm Shaw, 'Supplément à la duplique: Rapports additionnels des experts de l'*amicus curiae*', TAB 4, 21, in the matter of the *Reference re Secession of Quebec*.

⁴⁴ *Reference re Secession of Quebec* [1998] 2 SCR 217, 288.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* 290.

For this reason, the Court did not pursue the question of Quebec's effective control of the provincial territory following a unilateral declaration of independence, concluding that the principle of effectiveness had no real applicability to the second question submitted. Having concluded that international law did not confer upon the Quebec people a legal right to secession, the Court felt it had satisfactorily answered Question 2.⁴⁷

The Court's analysis of Question 2, therefore, did very little to settle the territorial debate. It might be argued that the only significant contribution to this specific debate is the Court's view that the principle of effectiveness implied that 'successful revolution begets its own legality'. The Court's characterisation of a unilateral declaration of independence as revolutionary, occurring completely outside the constitutional framework of the predecessor state, supports the view of federalist academics like Monahan who have argued that Canadian constitutional law would not protect Quebec's territorial integrity.⁴⁸ But as to whether the *uti possidetis* principle would determine the boundaries of an independent Quebec, an issue addressed in the parties' submissions, the Court chose not to enter the fray. This was a significant omission given how central the principle had become to the position of the Quebec government. One could speculate that a decision one way or the other might well have destroyed any possibility of a peaceful resolution to Canada's constitutional problems.

B Question 1

While the Supreme Court's reply to Question 2 has been described by some commentators as 'pedestrian',⁴⁹ it is generally felt that its discussion of Question 1 concerning the existence of a right to secede under Canadian law makes a significant and original contribution to the development of international law.

According to the Court, four foundational constitutional principles were germane to the resolution of Question 1: federalism; democracy; constitutionalism and the rule of law; and respect for minorities.⁵⁰ These four organising principles functioned in symbiosis. No single principle could be defined in isolation from the others, nor could any one principle trump or exclude the operation of any other.⁵¹ These principles were said to assist in the interpretation of the Canadian Constitution, in the delineation of spheres of jurisdiction as well as in defining the scope of rights

⁴⁷ Ibid 288.

⁴⁸ As Monahan has argued, '[i]n that situation [UDI], Quebec would be attempting to jump outside the existing constitutional order. It could not pick and choose among parts of the Constitution, ignoring those provisions with which it disagreed while seeking to rely on others that operated in its favor'. Monahan, above n 27, 15.

⁴⁹ William Schabas, 'Twenty-Five Years of Public International Law at the Supreme Court of Canada' (2000) 79 *Canadian Bar Review* 174, 193.

⁵⁰ *Reference re Secession of Quebec* [1998] 2 SCR.217, 240.

⁵¹ Ibid 248.

and obligations and the role of political institutions. Observance and respect for these principles was also found to be essential to the 'ongoing process of constitutional development and evolution of our Constitution as a 'living tree'.⁵² The Supreme Court further noted that Canadians had 'long recognized the existence and importance of unwritten constitutional principles in our system of government'.⁵³ In fact, underlying constitutional principles might, in certain circumstances, give rise to substantive legal obligations that would limit government action.⁵⁴ Accordingly, the Court proceeded to discuss the foundation and substance of the four fundamental principles it had identified.⁵⁵

This review of the principles underlying the Canadian Constitution led the Court to a startling conclusion:

The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.⁵⁶

And further, at paragraph 92 of the judgment:

The rights of other provinces and the federal government cannot deny the *right of the government of Quebec to pursue secession*, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others.⁵⁷

One of Canada's leading constitutional experts, Peter Hogg, has described the duty to negotiate as the 'stunning new element that the Supreme Court of Canada added to the constitutional law of Canada'.⁵⁸ It may also turn out to be an original and innovative contribution to the international legal rules governing secession. For as Schabas notes, the principles identified by the Court – democracy, constitutionalism and the rule of law, and respect for minorities – are entrenched in such important international instruments as the human rights covenants, regional human rights conventions and the documents of the OSCE.⁵⁹ And these principles 'help to define relations between peoples, minorities and governments'.⁶⁰ However, to date, the Court's innovative 'duty to negotiate' seems to have raised as many questions as it has answered.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid 249.

⁵⁵ Ibid 250-63.

⁵⁶ Ibid 265.

⁵⁷ Ibid 267. Emphasis added.

⁵⁸ Peter Hogg, 'The duty to negotiate' (1999) 7 *Canada Watch* 1, 34.

⁵⁹ Schabas, above n 51, 193.

⁶⁰ Ibid.

C *The duty to negotiate secession*

As Ted Morton, a fairly vocal political scientist from the University of Calgary starkly puts it, '[a]s of August 1998, Quebec now has, in writing, a "constitutional right" to pursue secession and the rest of Canada has a "constitutional duty" to negotiate'.⁶¹ According to Morton, this unfortunate development was the direct result of the Liberal government's own 'lose lose strategy'.⁶² A complete victory for the federal government would have provoked a dangerous backlash in Quebec and might have contributed to the 'winning conditions' upon which a third referendum was said to depend. But to concede anything to Quebec was to give the sovereigntists more than they had before.⁶³ In an article published in the *Ottawa Citizen* the day after the ruling was handed down, Morton had this to say:

[P]rior to yesterday's ruling, a Quebec UDI had no legitimacy outside of Quebec. It was illegal. Period. Yesterday's ruling changed this. As one Southam editorialist has written: 'Canada cannot deal summarily with Quebec separatism. It is required by law to negotiate'. If this is what winning means, I would hate to see a loss!⁶⁴

It is true that as a matter of strict law, it is difficult to see where the obligation to negotiate has come from. It appears largely to be derived from the fundamental principles which the Supreme Court says underlie Canada's constitutional evolution. But as Hogg has pointed out, '[t]he vague principles of democracy and federalism ... hardly seem sufficient to require a federal government to negotiate the dismemberment of the country that it was elected to protect.'⁶⁵ According to Hogg, there is no historical basis for the proposition that a referendum in a province wishing to secede should impose an obligation of cooperation on the part of the central government:

In the United States, the attempt by the southern states to secede in 1861 was opposed by the federal government and was crushed by war. In Canada and Australia, more cautious attempts to secede by Nova Scotia in 1868 and by Western Australia in 1934 were successfully opposed by the federal government. ... Although the secession of the southern United States was complicated by the slavery issue, there is no doubt that the secessionist movements in the Confederacy, Nova Scotia, and Western Australia enjoyed the support of a majority of the people in those regions. Yet this fact was not regarded as sufficient to justify federal cooperation or even acquiescence.⁶⁶

⁶¹ Ted Morton, 'Liberal Party Wins, Canada Loses' in David Schneiderman (ed), *The Quebec Decision* (1999) 121.

⁶² *Ibid* 122.

⁶³ *Ibid*.

⁶⁴ *Ibid*.

⁶⁵ Hogg, above n 60, 34.

⁶⁶ *Ibid*.

Professor James Crawford of Cambridge University reached the same conclusion in his Report 'State Practice and International Law in Relation to Unilateral Secession':

In international practice there is no recognition of a unilateral right to secede based on a majority vote of the population of a sub-division or territory. ... Even where there is a strong and sustained call for independence (measured, for example, by referenda results showing substantial support for independence), it is a matter for the government of the state concerned to consider how to respond. It is not required to concede independence in such a case, but may take into account the national interest and the interests of all those concerned.⁶⁷

International law has had to try and find a way to reconcile the two competing principles of territorial integrity and self-determination in such a way as to promote lasting peace and security. In doing so, its bias has traditionally been in favour of preserving the territorial integrity of sovereign States. As the Commission of Rapporteurs concluded in their report on the Aaland Islands dispute in 1921:

To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their good wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.⁶⁸

The continued relevance of this conclusion is evident in such important international instruments as the *Declaration on Friendly Relations*.⁶⁹ While the *Declaration* proclaims that all peoples have a right of self-determination and not merely non-self-governing peoples,⁷⁰ it also attests to the priority afforded the territorial integrity principle and the international community's constant preoccupation with ensuring territorial stability.

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development. ...

⁶⁷ Crawford, above n 42.

⁶⁸ 'The Aaland Islands Question', Report submitted to the Council of the League of Nations by the Commission of Rapporteurs, LN Council Doc. B7:21/68/106 (1921) 28. On the Aaland Islands dispute between Finland and Sweden, see Lalonde, above n 42, 64-78.

⁶⁹ *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*. Doc. off. A.G., 25th sess, Supp No 28, [131], UN Doc. A/5217 (1970).

⁷⁰ Although the *Declaration on the Granting of Independence to Colonial Countries and Peoples* recognises an inalienable right to complete freedom, this right is strictly limited to peoples subject to alien subjugation, domination or exploitation. And even in this context, article 6 warns that '[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the *Charter of the United Nations*.' Doc. off. A.G., 15th sess, Supp No16, [70], UN Doc. A/4684 (1960).

Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Clearly, these considerations still underlie the international community's response to secessionist claims. For example, as long as the process unfolding in Yugoslavia in the early 1990s was characterised as one of secession, pronouncements by various heads of state and international organizations reaffirmed the international community's commitment to the preservation of Yugoslavia's territorial integrity.⁷¹ Only once the conflict had been described by the Badinter Commission as one of dissolution⁷² was recognition formally extended to the breakaway Republics.⁷³

In any given context, the pre-eminence of one principle over the other has been determined by reference to the nature of the intended beneficiaries. Where the decolonisation of a territorial unit has been involved, United Nations practice suggests that the territory's right to self-determination has, in almost every instance, pre-empted the claims of an existing sovereign state to the territory based upon the territorial integrity principle.⁷⁴ However, once the colonial people has asserted its right to self-determination through the attainment of statehood, the stability imperative has reasserted itself. After decolonisation, though the self-determination principle is still deemed to confer a right to independence on the population of each new state as a whole, it has been interpreted as a right to freely determine its political status and to pursue its economic, social and cultural development without external interference.⁷⁵

⁷¹ See Peter Radan, 'Secessionist Self-Determination: The Cases of Slovenia and Croatia' (1994) 48 *Australian Journal of International Affairs* 183 and Delcourt, above n 38, 35.

⁷² *Opinion No. 1* delivered on 29 November 1991 (1993) 92 *International Law Reports* 162, 167.

⁷³ It must be acknowledged that during the Fall of 1991, pro-recognition forces within the European Union had been gaining steady momentum. Belgium and particularly Germany, firmly convinced that only recognition would curb the escalating violence, were putting intense political pressure on their European partners. The problem for the other member states, anxious to present a united front in dealing with the crisis, was how to extend recognition without, however, opening the long-feared floodgates of self-determination and secession. It fell to the Badinter Commission to articulate the legal principles that would justify the preferred solution, while at the same time minimising the impact of such a course of action. The Commission's characterization of the crisis as one of disintegration or dissolution was therefore an extremely attractive solution for the member States: it left the rules on self-determination and secession intact while at the same time allowing for recognition. See Lalonde, above n 42, 174-84.

⁷⁴ The only exceptions to this rule appear to be 'plantations', colonial enclaves, territories subject to rights of pre-emption, and leased territories. See Corten, above n 37, 417.

⁷⁵ Malcolm Shaw, 'Territory in International Law' (1982) 13 *Netherlands Yearbook of International Law* 61, 71 and Crawford, above n 19, 101-2.

Beyond the colonial context, the two conflicting principles have also been reconciled. As noted, once independence has been achieved, self-determination has been interpreted by the international community as a right that belongs to the population of a State as a whole and which serves to protect its national unity and political independence.⁷⁶ In this way, and as provided by the key passage in the *Declaration on Friendly Relations* reproduced above, territorial integrity has generally pre-empted claims to self-determination by individuals or groups residing within the boundaries of an independent sovereign State possessed of a government representing all of the people belonging to the territory.⁷⁷

However, in its ruling on Quebec's secession, the Supreme Court of Canada appears to have set the principles of territorial integrity and self-determination on a collision course.

The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.⁷⁸

Recognising perhaps the potential for conflict, the Court was careful to reject what it considered to be two absolutist positions. The first, that there would be, 'a legal obligation on the other provinces and federal government to accede to the secession of a province, subject only to negotiation of the logistical details of secession.'⁷⁹ As the Court acknowledged, '[n]o negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution'.⁸⁰ However, the Court was equally unable to accept the reverse proposition, 'that a clear expression of self-determination by the people of Quebec would impose no obligation upon the other provinces or the federal government'.⁸¹ These parties 'would have no basis to deny the right of the government of Quebec to pursue secession...'⁸²

According to the Court, the rejection of both these propositions could be reconciled since none of the rights or principles involved was absolute to the exclusion of the others.⁸³

⁷⁶ Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 *Virginia Journal of International Law* 1, 33 and Franck, above n 13, 58-9.

⁷⁷ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) 117.

⁷⁸ *Reference re Secession of Quebec* [1998] 2 SCR 217, 266.

⁷⁹ *Ibid.*

⁸⁰ *Ibid* 267.

⁸¹ *Ibid.*

⁸² *Ibid* 221.

⁸³ *Ibid* 268.

This observation suggests that other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec's rights, and similarly, that so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiations.⁸⁴

One can easily understand that in the context of good faith negotiations, the Court did not wish to give either party the right to insist, absolutely, on the merits of its position. But this approach appears better suited to some of the less contentious issues. If the question to be settled between the parties was the division of the national debt, it is possible to envisage, as the Court suggests, good faith negotiations in which the interests of neither party could trump those of the other. But when the very matter to be negotiated is whether Canada's territorial integrity will be preserved or whether 15% of its territory with 24% of its population will tear itself away to form an independent country, it is difficult to see how Quebec could exercise its right to pursue secession without denying Canada's internationally protected right to its territorial integrity.

To have any hope of success, the federal government and the provinces may have to be prepared to concede a right of independence for Quebec. Hogg, while insisting that the duty to negotiate rests upon a novel interpretation of the reconciliation of constitutional principles, acknowledges that the political reality within Canada was such that the federal government would have negotiated with Quebec had a majority of Quebecers clearly voted in favour of secession.⁸⁵ According to Hogg, there would have been little political support for a policy of attempted resistance to the wish of Quebec voters. The Court's decision therefore merely converted political reality into a legal rule.⁸⁶ However, Monahan insists that the commencement of secession negotiations remained only one of a number of options envisaged.⁸⁷ Other possibilities included holding a second referendum in Quebec or nationwide and establishing some form of independent national commission with a mandate to develop proposals for a renewed federation.⁸⁸

The prospects that the federal government and provinces would readily sit down at the bargaining table with Quebec to negotiate secession are also not encouraging on the evidence of the federal *Clarity Act*.⁸⁹ Assented to on 29 June 2000, the Act purports to clarify the Court's ruling that for a referendum result to give rise to an obligation to negotiate the secession of a province, it would have to be free of ambiguity both in terms of the question asked and the support achieved. Section 1

⁸⁴ Ibid.

⁸⁵ Hogg, above n 60, 34-5.

⁸⁶ Ibid 35. However Hogg does question 'why it is a *legal* rule, since it appears to have no legal sanctions.' Emphasis in original.

⁸⁷ Patrick Monahan, 'Doing the Rules. An Assessment of the Federal Clarity Act in Light of the Quebec Secession Reference' (2000) 135 *C D Howe Institute Commentary* 1, 11.

⁸⁸ Ibid.

⁸⁹ *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference* Chapitre E-20.2, <<http://laws.justice.gc.ca/en/C-31.8/33915.html>> at 23 May 2003.

of the *Clarity Act* provides that within thirty days after the government of a province tables in its legislative assembly its referendum question, the House of Commons will consider the question and, by resolution, set out its determination on whether the question is in fact clear. This right of adjudication has of course been denounced by Quebec, specifically in article 3 of *Bill 99*, Quebec's response to the federal *Clarity Act*.⁹⁰ Article 3 proclaims that it is for the Québécois people alone to determine the exercise of its right to choose its political system and legal status.⁹¹

The federal government has also signalled that it will insist on more than a bare majority before entering into negotiations on secession. Section 2(2) of the *Clarity Act* sets out some of the factors the House of Commons would take into account in considering whether there had been a clear expression of will by a clear majority of the population of a province in favour of secession:

- (a) the size of the majority of valid votes cast in favour of the secessionist option;
- (b) the percentage of eligible voters voting in the referendum; and
- (c) any other matters or circumstances it considers to be relevant.

Federalist commentators argue that section 2 of the *Clarity Act* is a reasoned and fair-minded interpretation of the Supreme Court's requirement that a *clear* majority favour secession.⁹² Of course, Quebec has insisted that a bare majority of votes cast, the 50% + 1 formula, would be sufficient to trigger the duty to negotiate secession.⁹³ The *Clarity Act* therefore leaves no doubt that the threshold for federal participation in secession negotiations would be very high indeed.

In the rather unlikely event that the federal government was satisfied that its threshold requirements had been met, and was therefore prepared to respond to Quebec's democratically expressed wish for independence, it seems fairly clear that it would in turn insist that Quebec negotiate the issue of its borders. Section 3(2) of the *Clarity Act* lists amongst the terms of secession which would have to be addressed before a constitutional amendment could effect the secession of a province from Canada, 'any changes to the borders of the province'.⁹⁴ And on this

⁹⁰ *Loi sur l'exercice des droits fondamentaux et des prerogatives du peuple québécois et de l'État du Québec*, <http://www.publicationsduquebec.gouv.qc.ca/dynamicsSearch/telecharge.php?type=28file=/E_20_2/E20> at 23 May 2003.

⁹¹ 'Le peuple québécois détermine seul, par l'entremise des institutions politiques qui lui appartiennent en propre, les modalités de l'exercice de son droit de choisir le régime politique et le statut juridique du Québec.'

⁹² Claude Ryan, 'Consequences of the Quebec Secession Reference: The Clarity Bill and Beyond' (2000) 139 *C D Howe Institute Commentary* 1, 10-12.

⁹³ Article 4 of *Bill 99* provides: 'Lorsque le peuple québécois est consulté par un referendum ... l'option gagnante est celle qui obtient la majorité des votes declares valides, soit cinquante pour cent de ces votes plus un vote.' See also Lucien Bouchard, 'Premier Lucien Bouchard Reflects on the Ruling' in Schneiderman, above n 3, 99-100.

⁹⁴ 'No Minister of the Crown shall propose a constitutional amendment to effect the secession of a province from Canada unless the Government of Canada has addressed, in its negotiations, the terms of secession that are relevant in the circumstances, including the division of assets

critical issue, there also appears to be little likelihood of agreement between the parties. Indeed, article 9 of Quebec's *Bill 99* proclaims that Quebec's territory and its boundaries can only be modified with the consent of its own National Assembly. In addition, article 9 charges the Quebec government with the duty and responsibility of defending Quebec's territorial integrity: 'Le gouvernement doit veiller au maintien et au respect de l'intégrité territoriale du Québec'.⁹⁵

D *The duty to negotiate Quebec's borders*

As previously noted, the Court did not address the territorial arguments put forward by some of the experts retained by the parties and based on the principle of *uti possidetis*, despite the important role the principle has played in the territorial debate surrounding Quebec's secession. However, the Court appeared to have settled the relevance of *uti possidetis* indirectly when discussing the duty to negotiate under Canadian constitutional law at paragraph 96:

Negotiations following a referendum vote in favour of seeking secession would inevitably address a wide range of issues, many of great import. After 131 years of Confederation, there exists, inevitably, a high level of integration in economic, political and social institutions across Canada. The vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces. Accordingly, while there are regional economic interests, which sometimes coincide with provincial boundaries, there are also national interests and enterprises (both public and private) that would face potential dismemberment. There is a national economy and a national debt. Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country that look to the Constitution of Canada for the protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec.⁹⁶

In addition, the Court's reference to 'the appropriate means of defining the boundaries of a seceding Quebec'⁹⁷ appears to be another specific statement that secession negotiations would have to address the issue of borders, at least with respect to Native lands and rights. These pronouncements are certainly difficult to reconcile with sovereigntist arguments that the *uti possidetis* principle would guarantee the territorial status quo in the event of separation. For this reason,

and liabilities, any changes to the borders of the province, the rights, interests and territorial claims of the Aboriginal peoples of Canada, and the protection of minority rights.'

⁹⁵ See note 92 above.

⁹⁶ [1998] 2 SCR 217, 269.

⁹⁷ [1998] 2 SCR 217, 288.

leading scholars like Professor Radan concluded in the aftermath of the decision that the Quebec territorial argument had finally been put to rest:

However, the Canadian Supreme Court effectively rejects the proposition that existing federal borders are sacrosanct in the context of a negotiated constitutional amendment for the secession of Quebec.⁹⁸

However, the territorial issue refuses to go away. *La Presse juridique*, a Quebec based legal journal, published a special issue devoted to the Reference on Secession.⁹⁹ Three Canadian academics,¹⁰⁰ one from Quebec, were asked their views on various issues that the journal felt had received insufficient scrutiny by the media. One of the questions directed to the panel of experts was whether the Supreme Court ruling had called into question Quebec's territorial integrity. Professor Morissette of McGill University responded in the negative. According to Morissette, the Court itself had not called Quebec's territorial integrity into question. The ruling had merely raised the possibility that the pursuit of secession and a fortiori the unilateral secession of Quebec, might bring in its wake calls for the readjustment of its borders. The outcome of this necessarily political process would rest upon the legitimacy of the secessionist project. 'An overwhelming majority in favour of secession should sweep away all desire to reduce the territorial extent of a soon-to-be sovereign Quebec.'¹⁰¹ Professor Morissette therefore believed that any attempt on the part of the federal government to redraw the boundaries of a soon-to-be independent Quebec would be politically untenable.

But we would argue that in the Quebec context, the size of the majority voting in favour of secession might not be sufficient to confer legal and political legitimacy on the process. The Native peoples of Quebec's north may be firmly opposed to any future secessionist project and yet their protest would likely have little impact on the province-wide referendum results. For this reason, the James Bay Crees have claimed a right to express their collective will through their own Cree referendums.¹⁰² And though the Court to a large extent avoided the territorial issue, it did take pains to recognise at paragraph 139 'the importance of the submissions made to us respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession'.¹⁰³ Furthermore, it was in this specific context that the Court

⁹⁸ Peter Radan, 'The Legality of Secession: Comparative Perspectives from American, Yugoslav, & Canadian Constitutional Law' *Fletcher's Charles Francis Adams Lecture Series*, Fletcher School of Law & Diplomacy, Tufts University, 26 April 2002, 35 [unpublished].

⁹⁹ Lucie Legault and France Rochon, 'Les effets du Renvoi' (1998) 6 *Presse juridique* 8.

¹⁰⁰ Yves-Marie Morissette (McGill University), Benoît Pelletier (University of Ottawa) and Donna Greshner (University of Saskatchewan).

¹⁰¹ 'Une majorité écrasante en faveur de la sécession devrait balayer sur son passage toute volonté de 'ré-arpentage' à la baisse d'un Québec bientôt souverain...' (Author's translation).

¹⁰² Grand Council of the Crees, 'Bill 99: A Sovereign Act of Dispossession, Dishonour and Disgrace' (2000) [67] <http://www.gcc.ca/Political-Issues/bill_99.htm>. See on this issue, Peter Radan, 'Constitutional Law and Secession: The Case of Quebec' (1998) 2 *Macarthur Law Review* 69, 75.

¹⁰³ [1998] 2 SCR 217, 288.

referred to 'the appropriate means of defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples'. It does not appear therefore that whether or not Quebec's borders are to be the subject of negotiations can be said to depend on 'a majorité écrasante' as Professor Morissette would have it.

Professor Pelletier of the University of Ottawa believed that the Court had indeed indirectly called into question Quebec's territorial integrity. Specifically, he relied on the following sentence in the Court's decision: 'Of course, secession would give rise to many issues of great complexity and difficulty.' However, Pelletier cautioned against interpreting the Court's next sentence as an invitation to partition Quebec: 'Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec.' According to Pelletier, the Court was simply suggesting that it would be difficult to separate Canada along the borders of Quebec.

The distinction that Professor Pelletier sought to establish is not entirely clear. Perhaps, he was cautioning against interpreting the Court's pronouncement as an assurance that Quebec's territory would definitely be partitioned. However the Court clearly felt that compromise and accommodation would have to characterise the separation process, particularly keeping in mind the federal government's fiduciary responsibilities towards Native peoples.¹⁰⁴ It is therefore difficult to envisage a secession process that would not call for some border and territorial adjustments. Partition may not be inevitable in the event of Quebec secession, but given the current positions of the various parties involved, in practice it would be difficult to avoid.

Professor Greshner of the University of Saskatchewan reiterated that 'the overriding duty on ROC (Rest of Canada) and Quebec is to negotiate in good faith.' She added that setting the agenda would be an essential step in good faith negotiations. Therefore,

[i]f ROC wants to add 'boundaries' to the agenda, it will be negotiating in good faith if it is acting for reasons that are in accordance with fundamental principles, such as protecting the rights of minorities. Quebec could propose other methods of protecting minorities as alternatives to giving up territory now within the province. What is inconsistent with good faith negotiations is for one party to refuse absolutely to talk about an issue. Thus, it would breach the duty to negotiate in good faith for Quebec to insist that boundaries can never be discussed, or for ROC to insist that changing the boundaries is the only method of upholding important principles.

Much as the Court had done when setting out the right to pursue secession and the corresponding duty to respond, Greshner warned that the constitutional principles which would inform the entire negotiation process implied the rejection of absolutist, unmoveable positions by either party.

¹⁰⁴ Grand Council of the Crees, above n 104, [101].

However, the difficulty with respect to the issue of boundaries, as we have attempted to demonstrate, is that there is an intrinsic all-or-nothing aspect to the territorial question. Either Quebec is entitled to insist on respect for its current borders or other interests must be respected and therefore given equal weight. Greshner approaches the problem in terms of negotiations between an intransigent federal government and a province of Quebec pursuing secession. However, as the Court stressed in its decision, these two parties may not be the only entities involved and other parties may have a role to play in the process.¹⁰⁵ It is certainly the position of the James Bay Crees that their constitutionally entrenched rights and status affords them a far greater role than that of minority groups within the province. They in fact categorically refuse to be included in this category.¹⁰⁶ And so while undoubtedly Quebec will propose measures to protect minorities as alternatives to giving up territory, Native peoples will almost certainly claim the right to decide whether such alternatives satisfy their legitimate aspirations. It is difficult to imagine any resolution of the territorial question in the event of secession without the participation and consent of Quebec's Native peoples. According to Rachel Guglielmo,

[t]he central claim of aboriginal peoples is not secession ... but their right to avoid any change of circumstance that is perceived to be harmful to their existing arrangements and future prospects; if any change is contemplated, the further related right claimed is the right to full consultation and participation, on the basis of parity with representatives of Quebec, not just as a formality or an afterthought designed merely to work out an arrangement that approaches Quebec's separation as a fait accompli.¹⁰⁷

In addition to the ongoing academic debate, the government of Quebec also commissioned a legal opinion from Alain Pellet following the tabling of the federal government's *Clarity Act*.¹⁰⁸ A renowned international legal scholar and the principal architect of the modern version of the *uti possidetis* principle, Pellet was asked to test the conformity of the Act with the concepts of a clear majority and a clear question as defined in the Court's decision. As a subsidiary matter, he was also asked to comment upon whether the Supreme Court had included the question

¹⁰⁵ At paragraph 92, the Supreme Court declares: 'Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec'. Ibid 267-8.

¹⁰⁶ Grand Council of the Crees, above n 104 [Conclusion 7].

¹⁰⁷ Rachel Guglielmo, 'Three Nations Warring in the Bosom of a Single State. An Exploration of Identity and Self-Determination in Quebec' (1997) 21 *Fletcher Forum of World Affairs* 14.

¹⁰⁸ Alain Pellet, 'Avis juridique sommaire sur le projet de loi donnant effet à l'exigence de clarté formulée par la Cour suprême du Canada dans son avis sur le Renvoi sur la sécession du Québec' *L'Action Nationale* (1999) <<http://www.action-nationale.qc.ca/00-2/pelletclarte.html>> 23 May 2003.

of boundaries within the list of topics subject to the duty to negotiate.¹⁰⁹ It is this subsidiary question that is of principal interest for the purposes of this study.

Pellet begins his analysis of the issues involved with a disclaimer. He alerts potential readers to the fact that the report represents a very preliminary opinion as he has been given little time in which to consider the principal elements of what is undoubtedly a complex problem. Indeed, Pellet was asked to comment on the draft bill tabled in the House of Commons on 10 December 1999 and his report is signed and dated the 13 December 1999. This brief interval no doubt accounts for the fact that the analysis of the territorial question is but two pages long.

On the issue of whether the question of Quebec borders would be included in any future negotiations on secession, Pellet begins by reproducing one of the principal conclusions of the 1992 Report, which was essentially drafted by him:

If Quebec were to attain independence, the borders of a sovereign Quebec would be its present boundaries and would include the territories attributed to Quebec by the federal legislation of 1898 and 1912, unless otherwise agreed to by the province before independence, or as between the two States thereafter.¹¹⁰

He goes on to state that nothing has occurred in the intervening years to cast doubt on this conclusion. On the contrary, Pellet argues that recent events in Central and Eastern Europe have in fact reinforced this position. Therefore and according to public international law, negotiations on Quebec's borders are possible but are not obligatory. However, Pellet concedes that the Court has not ruled out the possibility that the issue of Quebec's boundaries might be the subject of future negotiations. He therefore concludes that nothing in the Court's ruling precludes negotiations between the Parties dealing with the issue of Quebec's borders, adding however, that international law imposes no such obligation.¹¹¹

As the principal drafter of the Badinter Commission's third opinion and the 1992 Quebec Report, as well as the author of one of the expert reports supporting the amicus curiae's submissions in the Reference on Secession, it was inevitable that his opinion on the federal *Clarity Act* would echo the positions expounded in 1992. As noted, both Badinter's Opinion No 3 and the Quebec Report of 1992 relied heavily upon a novel interpretation and extension of the colonial principle of *uti possidetis* which was deemed to guarantee Quebec its current borders. It was therefore fairly predictable that Pellet would come to the conclusion that Quebec would be under no obligation to negotiate its borders.

¹⁰⁹ 'À titre subsidiaire, il m'est également demandé d'indiquer si ma lecture de l'avis permet de déterminer si la Cour suprême a inclus la question des frontières comme objet des négociations visées par l'obligation de négocier sur laquelle cet avis insiste'.

¹¹⁰ Pellet, above n 110 [6]. (Author's translation.)

¹¹¹ Ibid.

Yet while it is true that no major event had occurred in the intervening years to radically transform the debate at the international level, Pellet was asked to comment specifically on the issue of Quebec's boundaries in light of the Court's discussion of the duty to negotiate. It is difficult to see how the Court's strong language on the question of boundaries is deemed not to have had little or no impact. If, as Pellet contends, Quebec would be automatically guaranteed its current borders unless and until the parties agree otherwise, the prospects for good faith negotiations appear fairly poor. Indeed, according to this scenario, a province, entitled to pursue its right to secession, would automatically have resolved in its favour the single most important issue in its bid for independence: the determination of its new borders. As Hilling comments:

According to this scenario, Quebec would accede to independence within the limits of the former Canadian province, including the territories of Native peoples. Why then would Quebec be interested in conducting negotiations with the Canadian party? Without even having to enter into talks, it would obtain the whole of its claims.¹¹²

However, armed with the legal opinion of such a respected scholar, there appears to be every likelihood that Quebec would resist any attempt to partition its territory, particularly the resource and energy rich lands of northern Quebec, largely inhabited by Native peoples. The conclusion seems unavoidable that even if there were agreement on the conditions triggering the duty to negotiate secession, such negotiations as they applied to territorial issues would be heading straight for deadlock.

IV THE POTENTIAL FOR STALEMATE

The Supreme Court specifically evoked the possibility that negotiations on secession might not lead to an agreement: 'No one can predict the course that such negotiations might take. The possibility that they might not lead to an agreement amongst the parties must be recognized'.¹¹³ The Court then went on to state that:

In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached. It is foreseeable that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse.¹¹⁴

But, having acknowledged the real possibility that the duty to negotiate might lead to an impasse, the Court then refused to offer any practical solutions as to what would inevitably become a highly charged political crisis. 'We need not speculate

¹¹² Carole Hilling, 'Débats' in Corten, above n 37, 445.

¹¹³ *Reference re Secession of Quebec* [1998] 2 SCR 217, 269.

¹¹⁴ *Ibid* 270.

here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated'.¹¹⁵ However, the Court did warn that:

[r]efusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole.¹¹⁶

It also held that to the extent that a breach of the constitutional duty to negotiate in good faith undermined the legitimacy of a party's actions, it might have important ramifications at the international level:

[A] failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.¹¹⁷

The Court returned to this issue in its discussion of Question 2, stating:

As we indicated in our answer to Question 1, an emergent state that has disregarded legitimate obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition, at least with respect to the timing of that recognition. On the other hand, compliance by the seceding province with such legitimate obligations would weigh in favour of international recognition.¹¹⁸

Of course, in the event of an impasse, it might be very difficult to assign blame. Accusations and recriminations would fly on both sides. What then might follow? It seems likely that, buoyed by what it considered a winning referendum in favour of independence, a sovereigntist Quebec government would feel entitled to 'go it alone'. In other words, the government of Quebec would probably feel justified in effecting the secession of Quebec from Canada unilaterally. But this scenario brings us right back to square one. Quebec, without the constitutional agreement deemed essential by the Supreme Court and without an internationally recognised right to

¹¹⁵ Ibid.

¹¹⁶ Ibid 268.

¹¹⁷ Ibid 272-73.

¹¹⁸ Ibid 289.

independence, would of course still have a right to attempt secession. But in that case, the success of its bid for independence would be judged by the international community according to the principle of effectiveness. And on the issue of boundaries, as we have noted, there has never been agreement between federalists and sovereigntists as to how the principle of effectiveness would apply. Federalists have always argued that in these circumstances, the territorial extent of the new State would be determined on the basis of actual and effective control whereas separatists have insisted, on the contrary, that *uti possidetis* would guarantee the existing territorial status quo. And on this issue the Supreme Court, in its wisdom, chose to remain silent.

V CONCLUSION

When the Canadian federal government submitted the issue of Quebec secession to the Supreme Court in September 1996, the country was still shaken following the close results of the 1995 Quebec referendum.¹¹⁹ In its wake, there was strong criticism over the federal government's perceived inaction prior to the referendum and this was combined with real concern over the specific wording of the referendum question.¹²⁰ The Chrétien government therefore turned to the Supreme Court, seeking reassurance and guidance. Indeed, according to Schneiderman, the reference to the Supreme Court was 'one of the key elements in a series of politically calculated moves made by the Chrétien government intended to counteract both the sovereigntist threat and the appearance of federalist ineptitude in the fact of that threat'.¹²¹ For at the time, both parties were firmly entrenched in their respective positions and there appeared no way out of what Ted Morton has called the 'Quebec neverendum'.¹²² The Court was therefore asked to wade into a highly charged political situation.

The Court's analysis of the right of self-determination and secession under international law was a disappointment to many commentators. Concluding, correctly, that there was no right to unilateral secession afforded by international law, the Court acknowledged that Quebec's bid for independence, if effective, might eventually be recognised by the international community but refused to settle the long-standing debate over how, in this context, Quebec's boundaries would be resolved.

However the Court's innovative imposition of a duty to negotiate, binding on all parties, was much heralded. No longer could the federal government and Quebec sovereigntists insist doggedly on the non-negotiable merits of their entrenched

¹¹⁹ The 1995 referendum was defeated by the narrow margin of 50.6 percent to 49.4 percent.

¹²⁰ In the 1995 referendum, Quebec voters were asked: Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Quebec and the agreement signed on 12 June 1995?

¹²¹ Schneiderman, above n 3, 1.

¹²² Morton, above n 63, 123.

positions, refusing even to consider compromise on any key issues. Quebec, the Court declared, had a right to pursue secession and the federal government and provinces had a duty to respond to that desire. But at the same time, Quebec had no absolute entitlement to independence and had to exercise its own rights while respecting the rights of the other parties to Confederation, including those of its Native peoples.

The Supreme Court's novel concept of a 'duty to negotiate' was a measured insistence on the ideals of compromise, accommodation and rationality. However, since 1998, there has been a growing realisation that a workable solution is not any nearer. The political debate deriving from the duty to negotiate may have explored new ground but the fundamental problems remain unaddressed. The prospect that the parties might ever reach the bargaining table for meaningful negotiations is not at all encouraging. The federal government has already signalled its resistance by insisting on its say in determining the clarity of the question and also the appropriate majority necessary before any such negotiations would be entertained. And should these conditions be met, a host of other divisive issues remain, chief among them the vexed question of boundaries and the spectre of partition.