Les Cahiers de droit

Quebec, Canada, and the Glorious Revolution

John Remington Graham

Volume 37, Number 4, 1996

URI: https://id.erudit.org/iderudit/043417ar
DOI: https://doi.org/10.7202/043417ar

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Publisher(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (print)
1918-8218 (digital)

Explore this journal

Cite this article

Graham, J. R. (1996). Quebec, Canada, and the Glorious Revolution. *Les Cahiers de droit*, *37*(4), 1015–1036. https://doi.org/10.7202/043417ar

Article abstract

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The British North America Act of 1867 (Constitution Act of 1867) is then viewed against Sir John Macdonald's misinterpretation of the American Civil War.

Events leading to the present constitutional impasse between Quebec and Canada are reexamined, so as to reveal the underlying cause.

The author expounds the principle of the Glorious Revolution, as explained by Sir William Blackstone, and shows why, in light of the constitutional custom giving legitimacy to the reign of William and Mary, and the present constitutional order of Canada under Elizabeth II, a reference to the Supreme Court cannot resolve the crisis now erupting in Quebec.

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John Remington GRAHAM*

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The resolution of this crisis can only be accomplished by statesmanship, buttressed by patriotism and courage.

La théorie de la sécession des états sous la constitution américaine, telle que reconnue par la Nouvelle Angleterre durant la guerre de 1812 et par le Sud durant la guerre civile américaine, est retracée jusqu'à ses origines historiques authentiques et mise à jour afin de reconsidérer la sagesse de James Buchanan et l'erreur d'Abraham Lincoln en 1860 et 1861.

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* B. A. 1963, LL. B. 1966, of the Minnesota Bar.

Les Cahiers de Droit, vol. 37, n° 4, décembre 1996, pp. 1015–1036
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L'Acte d'Amérique du Nord britannique de 1867 (la Loi constitutionelle de 1867) est ensuite étudié à l'encontre de l'interprétation erronée qu'a fait Sir John Macdonald de la guerre de sécession aux États-Unis.

Les événements menant à l'actuelle impasse constitutionnelle entre le Québec et le Canada sont revus à nouveau de façon à en révéler la cause sous-jacente.

L'auteur examine le principe de la Révolution anglaise de 1688-1689, tel qu'expliqué par Sir William Blackstone, et démontre pourquoi, à la lumière de la coutume constitutionnelle légitimant le règne de Guillaume d'Orange et Mary, et par extension de l'ordre constitutionnel du Canada sous Élizabeth II, un renvoi à la Cour suprême ne peut pas résoudre la crise actuelle du Québec. Une solution à cette crise peut être élaborée uniquement par l'habilité politique des chefs d'État, étayée de patriotisme et de courage.

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1. Secession and the American Constitution

On August 8, 1787, the debates of the Philadelphia Convention turned once again to the question of how representatives should be apportioned among the several States in the lower house of the Congress. It was supposed that the problem was how to develop a durable formula, both practical and just over long political ages.

Nathaniel Gorham arose to speak. He was a statesman of excellent reputation from Massachusetts. He had served as a president of the United States under the Articles of Confederation. He had been the chairman of the committee of the whole in the Philadelphia Convention, as a presiding officer second only to George Washington.

Gorham did not think that the United States were or should be more than a practical and cooperative arrangement for peaceful coexistence and mutual defense among those free, sovereign, and independent States which extended over that part of North America lying to the east of the Mississippi River, to the the north of Spanish Florida, and to the south of the huge stretches then controlled by the British Crown. He expected the continental situation to modify naturally over coming years. In this light, it is not surprising that he frankly asked : « Can it be supposed that this vast country, including the western territory will one hundred and fifty years hence, be one nation ?[1] »

It is sufficiently evident that the delegates attending the Philadelphia Convention did not believe they represented a fully integrated Nation[2], nor did they believe that they proposed an indissoluable Union, as may be conveniently illustrated from a great multitude of available records.

Judge Edmund Pendleton served as President of the Virginia Convention which adopted the United States Constitution for his State. In answering those who claimed that the new federal government might oppress the people of Virginia and other States, Pendleton predicted what would happen if the federal government were usurped by those unfriendly to Virginia, her people, and her welfare : « Who shall dare resist the people ? No, we will assemble in convention, wholly recall our delegated powers, or reform them to prevent such abuse, and punish those servants who have perverted powers, and designed for our happiness to their own emolument[3] ».

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1. Quoted in Madison's Notes : J. ELLIOT (ed.), *Debates on the Federal Constitution*, Vol. 5, 2d ed. (Philadelphia : J.B. Lippincott & Co., 1859), at 392 and in M. FERRAND (ed.), *Records of the Federal Convention of 1787*, Vol. 2, 2d ed. (New Haven : Yale university Press, 1937), Vol. 2, at 221.
2. King George III conceded American independence in the first article of the Treaty of Paris by him approved on September 3, 1783 : « His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign, and independent States ». — H.S. COMMAGER (ed.), *Documents of American History*, Vol. 1, 9th ed. (New York : Appleton-Century-Crofts, 1973) at 117. In *Ware* v. *Hyton*, 3 Dallas 199 at 224 (U.S. 1798), Justice Samuel Chase, a signer of the Declaration of American Independence, held that the document was a « declaration, not that the united colonies jointly, in a collective capacity, were independent States, but that each of them was a sovereign and independent State, — that is, that each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power on earth ».
3. J. ELLIOT (ed.), *op. cit.*, note 1, Vol. 3, at 37 (June 5, 1788).

Again, James Madison attended as a federalist delegate to the Virginia Convention. He had been so prominent as one of the framers in the Philadelphia Convention that he is often called the « father of the American constitution ». In answering those who « expressed fears that the new Union might become dangerous, Madison answered : « If we be dissatisfied with the national government, if we choose to renounce it, this is an additional safeguard to our defence[4] ».

In the Virginia Convention, the ratification of the new instrument of Union was made subject to the express caveat « that the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them whensoever the same shall be perverted to their injury or oppression[5] ». The phrase « people of the United States » was understood to mean the people of New Hamphsire, of Massachusetts, of Rhode Island, of Connecticut, of New York, of New Jersey, etc., as appears plainly in the records of the Philadelphia Convention[6]. This point becomes even clearer from Madison's statement in *The Federalist*, No. 39, where he said that the United States Constitution came into effect by the « ratification of the several States, derived from the supreme authority in each State, — the authority of the people themselves[7] ». The right of a State to secede from the Union derives from the principle, stated by John Marshall as a federalist delegate to the Virginia Convention, « It is the people who give power, and can take it back[8] ».

Alexander Hamilton attended the Philadelphia Convention, and had tried to secure adoption of a centralized and unitary government of the

4. *Id.*, at 414-415 (June 14, 1788).
5. *Id.*, at 656 (June 27, 1788). Similar language is found in the ratifications of New York, J. ELLIOT (ed.), *op. cit.*, note 1, Vol. 1, at 327 (July 26, 1788), and Rhode Island, *Id.*, at 334 (May 29, 1790).
6. The language of the preamble, corresponding to the words in the first article of the Treaty of Paris, defining the United States as several States, each identified by name, was introduced by the committee on detail on August 6, was quickly adopted without dissent on August 7, and was then recast by the com mittee on style, having no power to make any substantive changes, so as to make reference to the United States, on September 12, in which form the preamble was approved on September 17, 1787, as appears in Madison's Notes, J. ELLIOT (ed.), *op. cit.*, note 1, Vol. 5, at 376, 382, 536 and 558; M. FERRAND (ed.), *op. cit.*, note 1, Vol. 2, at 177, 196, 565, 590, 651.
7. Mentor Edition 1961, p. 243. In the Virginia Convention, Madison defined the « people of the United States » as the parties to the new constitution, mentioned in the preamble, as the « people — but not the people composing one great body, but the people as composing thirteen sovereignties ». — J. ELLIOT (ed.), *op. cit.*, note 1, Vol. 3, at 94 (June 6, 1788).
8. *Id.*, at 233 (June 10, 1788).

United States, relegating the several States to mere administrative provinces. Yet, in *The Federalist*, No. 9, Hamilton acknowledged the new Union established by the United States Constitution as a « confederate republic », which he defined by quoting from a standard translation of the Baron de Montesquieu : « The confederacy may be dissolved, and the confederates preserve their sovereignty[9] ».

Enough has been said to explain why, during the War of 1812, the Hartford Convention believed it lawful and proper to suggest secession of the States of New England from the United States[10], — and why in 1860 and 1861 the people of the southern States felt they were merely exercising their established constitutional rights in electing conventions which withdrew their States from the Union[11].

Why were the people of the southern States tired of their « glorious Union » with the North ? The truest expression of this sentiment was written by the editor of the *Richmond Examiner* after the surrender of Lee's army at Appomattox :

> Foreigners have made a curious and unpleasant observation of a certain exaggeration of the American mind, an absurd conceit that was never done asserting the unapproachable excellence of its country in all things [...] But it is to be remarked that this boastful disposition of mind, this exaggerated conceit, was particularly Yankee. It belonged to the garish civilization of the North. It was Daniel Webster who wrote, in a diplomatic paper, that America was « the only great republican power ». It was Yankee orators who established the Fourth-of-July school of rhetoric, exalted the American eagle, and spoke of the Union as the last, best gift to man. This afflatus had but little place among the people of the South. Their civilization was a quiet one, and their characteristic as a people has always been [a] sober estimate of the value of men and things [...][12]

9. Mentor Edition 1961, p. 75.
10. The people of New England ardently opposed the War of 1812, because they enjoyed booming commerce with Great Britain and Canada. They refused to send their militia against York (Toronto) and Quebec. And the American war effort was so mismanaged that the people of New England saw the need to defend themselves as Wellington's veterans landed in Canada. Hence the Hartford Convention of 1814-1815, which was one of the most remarkable, yet least understood meetings in the history of the United States. The account of the secretary of the meeting is T. DWIGHT, *History of the Hartford Convention*, (Boston : Russell, Odiorne & Co., 1833).
11. In my opinion, the finest exposition of the right of secession, as upheld by the people of the South in their war for independence, is found in the first volume of A. STEPHENS, *Constitutional View of the Late War Between the States* (Philadelphia, Pa : National Pub. Co., 1868), reprinted by Sprinkle Publications 1994. Professor Clyde Wilson recommends A. BLEDSOE, *Is Davis a Traitor ?* (Baltimore : Innes & Co., 1866), reprinted by Fletcher & Fletcher.
12. E. POLLARD, *The Lost Cause* (New York : Treat & Co., 1867), reprinted by Bonanza Books 1974, pp. 51-52.

The animating spirit of the people of the southern States was a desire to preserve their culture and their way of life from being absorbed into a « great American melting pot » which they did not want[13].

From the southern point of view, the North adored the Union only because of its control of the legal and political apparatus. The southern people feared that this power, in the hands of politicians who did not understand their culture, would be abused to exploit their rights.

Another critical insight into the motives behind the American Civil War has been provided by Congressman Charles A. Lindbergh Sr. of Minnesota. Lindbergh revealed the contents of a so-called « Hazard Circular » which in 1862 was distributed among wealthier classes of the North. It said :

> The great debt that capitalists will see to it made out of the war, must be used as a means to control the volume of money. To accomplish this the bonds must be used as a banking basis. We are now waiting for the secretary of the treasurey to make this recommendation to Congress. It will not do to allow the greenback as it is called, to circulate as money any length of time, as we cannot control that. But we can control the bonds and through them the bank issues[14].

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13. For those who believe that the American Civil War was fought over slavery, it should be pointed out that President Abraham Lincoln did not think so. See, e.g., his letter of August 22, 1862, to Horace Greeley, found in H.S. COMMAGER (ed.), *op. cit.*, note 2, Vol. I, at 417-418. Honest scholars may read the neglected « other side of the story » about this « peculiar institution » of the Old South in R.L. DABNEY, *Defence of Virginia and the South* (New York : Hale & Son, 1867), reprinted by Sprinkle Publications 1991. Viewed in this light, the institution was virtually indistinguishable from villenage in England, as described by SIR W. BLACKSTONE, *Commentaries on the Laws of England*, Vol. 2, (Christian Edition, 1765) at 90-98. In 1861, slavery was a quickly dying institution in the South, incapable of lasting much beyond the beginning of the 20th century, as appears in C. RAMSDELL, « Natural Limits of Slavery Expansion », *Mississippi Valley Historical Review*, (1929), Vol. 16, at 151-171. Few have ever studied the edifying truth about the southern abolition movement, led by disciples of Thomas Jefferson. See, e.g., J.C. ROBERT, *Road from Monticello* (Duke Univ. Press, 1941). Nor is it generally understood that the conquest by « armies of freedom » from the North led to mass deaths of black people in the South, as appears in the testimony of Judge William Sharkey (reconstruction governor of Mississippi appointed by President Andrew Johnson) before the 39th Congress in the spring of 1866. See H.L. TREFOUSSE (ed.), *Background for Radical Reconstruction : Congressional Hearings*, (Boston : Little Brown & Co., 1970) at 27-29.

14. Quoted and discussed in C.A. LINDBERGH, *Banking and Currency and the Money Trust*, (Washington, D.C. : National Capitol Press 1913), at 101-104. The legislation favored by the Hazard Circular took shape in the National Bank Act of 1863, 12 U.S. Stat. L. 670, the National Bank Act of 1864, 13 U.S. Stat. L. 111, the State Bank Note Act of 1865, 13 U.S. Stat. L. 484, the State Bank Note Act of 1866, 14 U.S. Stat. L. 146, and, ultimately, the Federal Reserve Act of 1913, 38 U.S. Stat. L. 251.

The idée fixe of « one nation indivisible » in the United States did not come from the founding fathers of the country, but from power brokers and financiers on the winning side of the American Civil War.

It so happens that in 1851 Texas had ceded her claims to what became the New Mexico Territory in exchange for $10,000,000 in federal bonds. When secession and war came ten years later, the civilian government sold the bonds to buy medicines and other supplies for wounded soldiers. After the last confederate troops surrendered, representatives and senators from ten southern States were all excluded from Congress, because they believed their States had the right to secede from the Union.The northern rump overrode the veto of President Andrew Johnson, and imposed martial law in time of profound peace over those southern States, treating them as conquered territories.

In this setting the military governor of Texas brought suit in the name of the State in the case of *Texas* v. *White*[15], invoking the original jurisdiction of the United States Supreme Court, and seeking an injunction enjoining those holding the federal bonds transferred to the State in 1851 from negotiating them further, and directing return thereof to the public treasury of Texas. In order to invoke original jurisdiction,Texas had to be a State of the Union. A motion was made to dismiss on the ground that Texas was not then a State.

Chief Justice Salmon P. Chase denied the motion, and allowed the case to proceed. The old Confederation, he said, was by express terms « perpetual », which is certainly true. And the new Union, he observed, was by express terms « a more perfect Union », which is also true beyond doubt. And because there was a perpetual Union made more perfect, Chase argued, the United States were « indestructible Union of indestructible States ». Texas, it was concluded, always was and remained a State. Therefore, original jurisdiction could be invoked. But Texas, was usurped between 1861 and 1865, it was said, and thus the bonds sold were not sold at all.

This opinion is pure sophistry and contradicts itself. Lord Camden would have said that Chase's pronouncement is « not bad law, but no law at all[16] ».

The old Confederation was perpetual, as most corporations are perpetual, which means that they exist until dissolved. But the old Confederation was, after all, dissolved, and it was dissolved without the consent of all the States, even though the articles stipulated that amendment required

15. *Texas* v. *White*, 7 Wallace 700 (U.S. 1869).
16. See Lord Camden in *Rex* v. *Wilkes*, 95 Eng. Rep. 737 (C. P. 1763). Cf. SIR W. BLACKSTONE, *op. cit.*, note 13, Vol. 1.

assent of all of the States. The new Union is undoubtedly more perfect, because it was established by the people of each of the several States, sitting in convention as sovereign powers, whereas the old Confederation was established only by legislative acts of the several States. The new Union is also more perfect, because it works as a functioning government, whereas the old Confederation proved to be dysfunctional after the Battle of Yorktown.

Chase's conclusion was a spectacular non sequitur in history and law, which demonstrably defied the meaning clearly intended by the framers of 1787.

But there must have been an overwhelming fatefulness in Chase's mind. The country, then having had a population of about thirty-one million, had suffered a million casualties in combat, and had lost perhaps another half million black people from starvation. This enormous conflict generated an expenditure amounting to something like three-fourths of the assessed value of all taxable property in the country, mounted an inconceivable national debt, and turned over a major part of the system of banking and currency to a network of domestic and foreign investors. In this situation, Chase could not admit from the bench that the war, which he had helped to prosecute as a member of Lincoln's cabinet, was after all illegal.

The dissenting opinion of Justice Robert Grier rests on a sounder kind of realism. A State, according to the established law of the country, is an institution which sends representatives and senators to Congress[17], and Texas then sent no representatives and senators to Congress. The question of secession, he said truthfully, had been tried and determined by battle[18], and, whether just or unjust, the result was beyond judicial competence to deny or undo. The question, therefore, was political, not legal, hence non-justiciable, and, in his view, the court should have simply dismissed for want of original jurisdiction. Grier's approach was surely right. His view was more pragmatic, more logical, and supported by good authority.

2. The British North America Act of 1867

Sir John Macdonald is one of the political legends of Canada. Certainly he played a decisive role in the Charlottetown and Quebec Conferences in 1864. He believed that the distribution of sovereignty among the several States of the American Union, explaining not only the residual powers of

17. In *Hepburn* v. *Ellsey*, 2 Cranch 452 (U.S. 1804), it was so held.
18. In the *Prize Cases*, 2 Black 265 (U.S. 1863), it was held that a state of war existed between the government of the Union and the seceding States.

the several States, but the right of each and every State to secede, was the essential cause of the American Civil War.

Given the way he viewed the American Civil War, it is not surprising that Macdonald developed a radically different theory of federalism in the British North America Act of 1867.

Whereas Amendment X of the United States Constitution says that all powers not granted to the government of the Union are reserved to the governments and people of the several States, Section 91 of the British North America Act of 1867 says that the dominion Parliament has power to make all laws for the peace, order, and good government of Canada, save as otherwise stipulated in favor of the several provincial Legislatures.

Whereas the Preamble and Article VII of the United States Constitution say that the federal government derives its authority from conventions of the people in and of the several States—i. e., thirteen distinct fountains of sovereignty which ratified in from 1788 through 1790, and which have since become fifty such fountains—, the Preamble of the British North America Act of 1867 clearly says that the instrument of confederation in Canada derives from the unified root of sovereign power in the imperial Parliament at Westminster.

Given these contrasts with the intended meaning of the American constitution, it is plain enough that there is not now, nor has there ever been a formal or created legal mechanism for unilateral secession of a province from the dominion under the organic statutes comprising fundamental law in Canada.

3. Macdonald's Mistake

In truth, Macdonald misunderstood the American Civil War. On December 3, 1860, President James Buchanan said to Congress :

> The fact is that our Union rests upon public opinion, and can never be cemented by the blood of citizens shed in a civil war. If it cannot live in the affections of the people, it must one day perish. Congress possesses many means of preserving it by conciliation, but the sword was not placed in their hand to preserve it by force[19].

Buchanan worked tirelessly, using diplomacy until the very last hours of his presidency. Many patriotic southerners worked with him, as he promoted rational cooperation among the several States.

On March 4, 1861, President Abraham Lincoln said in his first inaugural address :

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19. H.S. COMMAGER (ed.), *op. cit.*, note 2, Vol. I, at 369.

> No State upon its own mere motion can lawfully get out of the Union [...] Resolves and ordinances to that effect are legally void [...] The Union is unbroken ; and, to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins me, that the laws of the Union be faithfully executed in all the States[20].

Using the mistaken pretext that a more perfect Union is necessarily an indissoluable Union, Lincoln plunged the country into the most brutal war of his century after only thirty-nine days in office, converting fraternal love into bitter hatred, and causing extreme injury to the civilization of the United States. The tragic circumstances of his death, causing deep grieving far and wide for many years, cannot erase Lincoln's gigantic blunder.

Macdonald did not understand this lesson of history, but Canada must not fail to appreciate it today. Incantations about the rule of law will not work. *Only statesmanship works.*

4. The Canadian Charter and Quebec

Because the old British North America Act of 1867 never included an amending formula, the many changes in that instrument before 1982 were all accomplished by acts of the imperial Parliament on petition of the dominion Parliament. It was generally accepted in London and Ottawa, especially after the Statute of Westminster 1931[21], that the mother country should graciously acquiesce as a mere « legislative trustee » for Canada, whenever a proper request was made.

The Canada Act of 1982 terminated this old formality used in the past for amending the fundamental law of Canada, changed the names of the several British North America Acts to the Constitution Acts, and added a Constitution Act of 1982, which ordained an entrenched Canadian Charter of Rights and Freedoms, and authorized several formulas for amending the fundamental law of Canada by the dominion Parliament acting alone or with some or all of the provincial Legislatures. It is important to recall how this Canada Act of 1982 was pushed through the imperial Parliament.

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20. *Id.*, at 386.
21. Section 4 provided, « No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion, as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested and consented to the enactment thereof ». Section 7(1) said, « Nothing in this Act shall be deemed to apply to the repeal, amendment, or alteration of the British North America Acts, 1867 to 1930, or to any order, rule, or regulation thereunder ». It appears from the proceedings of the dominion-provincial conference of 1931 leading to Section 7(1) that the provision was inserted, not to allow the imperial Parliament on its own initiative to amend the fundamental law of Canada, but to allow the development of procedures and conventions in Canada on applications for constitutional amendment.

The fundamental law of Canada includes not only organic statutes, but also a large body of constitutional customs and conventions, which are unwritten but understood, and often more important than anything in positive enactments.

These constitutional customs and conventions are marvelous in their operation, and have served to correct otherwise shortsighted or unworkable provisions in organic statutes, so much so that the British North America Act of 1867 (now the Constitution Act of 1867) really does not mean what it says.

The distinction between constitutional customs and constitutional conventions is not as precise as law students and academicians might like. Constitutional customs are organic rules which activate and perpetuate the government, are part of the common law taken as a body of legal custom built upon and consistent with natural law and right reason, and are sometimes recognized or settled in judicial decisions and enforced by judicial writs. Constitutional conventions, by contrast, are organic rules of political interaction between institutions of government, but are not really part of jurisprudence or enforced by judicial writs, although courts sometimes give them notice.

It is sufficient to observe here that many rules of good government in Canada are not written down in some statute book, but are determined by constitutional conventions which are established by political precedent, considered obligatory by leading statesmen, and founded on good reasons[22].

Prior the Canada Act of 1982, constitutional conventions limited the right of the dominion Parliament to petition the imperial Parliament for statutory amendments to the fundamental law of Canada.

John Diefenbaker was the prime minister in Ottawa whose government gave the country the Canadian Bill of Rights of 1960, which was an act of the dominion Parliament, subject to legislative repeal or suspension for good cause : it was eventually read as not only a rule of interpretation, but as a rule rendering federal statutes inoperative[23].

When he was asked whether a charter of freedoms or bill of rights could be entrenched in the fundamental law of Canada, so as to restrict and annul,

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22. See, e.g., E.C.S. WADE and G. PHILLIPS, *Constitutional Law*, 8th ed. (London : Longman, 1970) at ll-13, 79-80, also H. BRUN and G. TREMBLAY, *Droit Constitutionnel*, Cowansville, Éditions Yvon Blais, 1987, pp. 45-49. A single precedent, in which a principle is acknowledged by a political leader for a very good reason, is enough to establish a constitutional convention. See, e.g., SIR I. JENNINGS, *The Law and the Constitution*, 5th ed. (London : University of London Press, 1959) at 136.
23. As held by the majority in *R.* c. *Drybones*, [1970] S.C.R. 282.

not only federal legislation, but the legislation of all ten provinces, Diefenbaker made it absolutely clear that (whatever principle might govern some other subject matter) such a charter of freedoms or bill of rights, because it modifies authority to enact statutes, could not be consummated without the unanimous consent of all ten provincial Legislatures[24].

Up to the day Diefenbaker spoke on this question in the dominion Parliament, every petition to the imperial Parliament to modify the law-making powers of all provincial Legislatures was withheld or not granted until unanimous consent of all of provincial Legislatures was obtained, nor was there ever a case in which the law-making powers of any provincial Legislature were altered without first obtaining its consent.

The evidence was, therefore, lucid, as distinguished constitutional lawyers and attorneys general held, that a constitutional convention forbade application to the imperial Parliament for an amendment adding an entrenched charter of freedoms or bill of rights restraining both the provinces and the dominion of Canada, unless unanimous consent were first obtained.

« Diefenbaker's rule », if we may call it such, was a sagacious maxim, demanding restraint on the ambition of some future government of Canada from doing that which might antagonize a significant part of the population, by slighting their elected legislators, in this way inducing political or constitutional crisis. Even if this convention were judicially misunderstood or politically twisted, bad results anticipated from not following it were not less certain to follow, and these bad consequences are the main sanction against disobedience.

Professor Carroll Quigley rightly stated a melancholy truth: « The conventions of the system have been highly praised, and described as binding upon men's actions. They are largely praiseworthy, but their binding character is much overrated[25] ». They are as binding as politicians are wise and reputable.

When the bill proposing what eventually became the Canada Act of 1982 was pending in the dominion Parliament, then controlled by the liberal government of Pierre Elliot Trudeau, the National Assembly of Quebec was controlled by the separatist government of René Lévesque. It was clear that Lévesque's government would never consent to an entrenched charter of freedoms or bill of rights restraining the National Assembly of Quebec, at least not unless important reservations were first inserted[26].

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24. *House of Commons Debates (1960)*, at 5648 and 5469.
25. C. QUIGLEY, *Tragedy and Hope*, (New York: MacMillan Co., 1966) at 462.
26. The type of concerns involved are discussed by H. BRUN, « Droits collectifs et droits individuels : un difficile équilibre », *Contact*, Vol. 4, No. 2 (1990), pp. 33-35.

The opposition by the government of Quebec was not opposition to an enumeration of human rights, for the province already had an impressive Charte des droits et libertés de la personne : rather it was feared that judicial interpretation of such Canadian « freedoms » and « rights » would homogenize Quebec's unique civilization into an amalgamated Canadian wholeness which the people of Quebec have never wanted, and will never want as long as they feel their identity as a French Nation in North America[27].

In Canada frequent resort is made to the judicial branch of government by way of statutory references, — in effect, requests for advisory opinions[28]. In order to break the impasse, the governments of Quebec, Manitoba, and Newfoundland referred various related questions to their respective appellate courts, and from there the matter reached the Supreme Court of Canada, with every attorney general in the country present and arguing, in *Reference on the Resolution to Modify the Constitution*[29].

The most important question was whether a constitutional convention required consent of the provincial governments to a petition of the dominion Parliament to the imperial Parliament for adoption of what was to become the Canada Act of 1982. The answer given was in the affirmative, yet the court held that this consent did not have to be unanimous, as Diefenbaker had unequivocally said was needed for entrenching a charter of freedoms or

27. In *Montreal Tramways* c. *Léveillé*, [1933] S.C.R. 456, it was found, under the civil code of Lower Canada that a human foetus is a legal person in private litigation. Cf. SIR W. BLACKSTONE, *op. cit.*, note 13, Vol. I, at 129-130. In this respect, the law of Quebec was far advanced over other jurisdictions of North America, which eventually came around, and recognized that a human fetus is a legal person in such situations. See, e.g., P. KEETON (ed.), *Prosser and Keeton on the law of torts*, (St-Paul, Minn. : West Pub. Co., 1984) at 367-368. In *Tremblay* c. *Daigle*, [1989] R.J.Q. 1735 (Que. C.A.), it was again held in Quebec that a human fetus is a legal person in private litigation, but the judgment was reversed in *Daigle* c. *Tremblay*, [1989] 2 S.C.R. 530, no doubt because of a questionable interpretation of the Canadian Charter in *Morgentaler* c. *R.*, [1988] 1 S.C.R. 30. See the unanswerable commentary on this error by P.-A. CREPEAU, « L'affaire Daigle et la Cour suprême du Canada », in E. CAPARROS (ed.), *Mélanges Germain Brière*, Montréal,Wilson & Lafleur, 1993, pp. 197-215.

28. Unheard of in the United States, except under the express provisions in the constitutions of a few of the several States, as appears in the classic case of *Muskrat* v. *United States*, 219 U. S. 346 (1911). The American idea of keeping the judiciary strictly out of political business can be traced back to the Philadelphia Convention. On June 6, 1787, Elbridge Gerry made a speech which defeated a proposal to allow judges to sit with the president in reviewing bills passed by the legislative branch. According to Madison's Notes, Gerry said that it would be unwise to allow the president to be « covered by the sanction and seduced by the sophistry of the judges ». — J. ELLIOT (ed.), *op. cit.*, note 1, Vol. 5, at 165 and M. FERRAND (ed.), *op. cit.*, note 1, at 139.

29. *Reference on the Resolution to Modify the Constitution*, [1981] 1 S.C.R. 753.

bill of rights as against all the provincial governments. Only « a substantial measure of provincial consent » was required.

How the court managed to get around Diefenbaker's lucid statements, and other supporting evidence, still has many constitutional lawyers mystified. The court well stated the historical facts with fidelity to detail, then leaped for a conclusion which seemed to come out of nowhere.

Following was a dominion-provincial conference of 1981. At the meeting, while Lévesque was asleep in his bed, Trudeau and his justice minister secured the agreement of the premiers of the other nine provinces. The necessary papers were ceremoniously signed. A beaming Trudeau announced to the press that he and his colleagues had accomplished work comparable to the work of the Philadelphia Convention.

Interestingly, the delegates attending the Philadelphia Convention did not believe they were framing a constitution for North Carolina or Rhode Island if they chose to remain outside the Union, as they remained for some months after the inauguration of George Washington as president, or for Canada (what had been New France) which never did accept a formal invitation to join the United States[30].

Lévesque's government fought on, trying a tilt with windmills[31], but was overwhelmed.

Judicial pronouncements have done nothing whatever to convince the people of Quebec that they never had rights by constitutional convention or rules of honorable government to reject a charter of « freedoms » and « rights » they never wanted, that their cultural distinctness was not openly insulted by the rest of Canada, that they were not cunningly betrayed by a prime minister of the dominion and the premiers of nine provinces of Canada, and that they were not in effect made a colony of the rest of Canada under the Constitution Act of 1982. Nor have judicial pronouncements changed the facts of history. Nor can judicial pronouncements rectify the breach of faith and trust.

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30. Article XI of the Articles of Confederation provided : « Canada acceding to this Confederation, and joining in measures of the United States, shall be admitted into, and entitled to all the advantages of this Union, but no other colony shall be admitted into the same, unless such admission be agreed to by nine States ».

31. See especially *Reference on the Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793.

5. The Lake Meech Accord and the Charlottetown Accord

It is sufficient here to say that the Meech Lake Accord was a gallant attempt by patriots and statesmen, Brian Mulroney, John Turner, Robert Bourassa, David Peterson, and Jeanne Sauvé among them, to repair the injury done by the imposition of a constitution upon Quebec over her protest by the rest of Canada.

The Meech Lake Accord was a carefully brokered proposition for constitutional amendment, produced by the dominion provincial conference of 1987, signed by the premiers of all ten provinces and the prime minister of Canada.

The most important item would have inserted a new Section 2 in the Constitution Act of 1867[32], containing two pithy but all-important subparts : (l)(b) which said, « The constitution of Canada shall be interpreted in a manner consistent with the recognition that Quebec constitutes within Canada a distinct society », and (3) which said, « The role of the legislature and government of Quebec to preserve the distinct identity of Quebec is affirmed[33] ».

If this item had been the only item in the Meech Lake Accord, it could have passed under Section 38 of the Constitution Act of 1982, upon proposal by the federal Parliament, and the assent of seven provincial Legislatures representing at least half the population of Canada.

If the accord had been so simple, it might have quickly passed. Separatism in Quebec would be politically dead. The country could then have given some attention to such other problems as reforming the dominion Senate[34].

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32. In place of the old Section 2 of the British North America Act of 1867, 30 & 31 Vict., U.K., c. 3 (hereinafter cited : « Constitution Act of 1867 ») which had been repealed in 1893 by the Statute of 56-57 Victoria, Chapter 14.

33. Notwith the assurances of six leading constitutional lawyers at the dominion-provincial conference of 1990, there is good reason to believe that the Meech Lake Accord would have conferred special legislative rights to Quebec for preservation of her unique heritage, including special protection of the French language. While the Meech Lake Accord would not have granted any new power in express terms, the new proposed Section 2(1)(b) and (3), read together with, say, Section 92(16) of the Constitution Act of 1867 might have given the National Assembly of Quebec an implied discretion to enact legislation like Bill 101 (*Charter of the French language*, L.R.Q., c. C-11) without resort to the Notwithstanding Clause in Section 33 of the Constitution Act of 1982, schedule B of Canada Act of 1982 (1982, U.K., c. 11), in effect reversing *Ford* c. *Quebec (A.G.)*, [1988] 2 S.C.R. 712.

34. A large difficulty, which will probably take some years to solve in Canada. The composition of the United States Senate, as a key item in the Great Compromise, took up more time in the Philadelphia Convention than almost any other problem. Complaints about the Canadian Senate appear to be rooted in the fact that the body is an attempted copy

Unfortunately, other elements were fitted into the accord, and these elements included an item, not particularly controversial in itself, which, under Section 41 of the Constitution Act of 1982, required the assent of the dominion Parliament and all ten provincial Legislatures.

A premier of Manitoba signed in 1987, promising the support of his government, and another premier of Manitoba signed in 1990, promising the support of his government. The government of Manitoba first failed to act, then allowed a one-man veto on a parliamentary technicality to prevent the measure from reaching the floor, causing the accord to die from expiration of time under Section 39 of the Constitution Act of 1982.

A premier of Newfoundland signed in 1987, promising the support of his government, which then approved the accord soon thereafter, but then his government on his urging repealed its approval in 1990, although later in the year he again signed and again promised the support of his government, then on his urging his government rejected the accord a few days later.

The people of Quebec saw what happened, and they deduced that they had been insulted and let down again.

The Charlottetown Accord was an attempt to save the country from anticipated disintegration following the want on destruction of the Meech Lake Accord. The effort died because of over-exposure to the news media, which induced endless grandstanding at conferences. The undigested and wide-ranging proposals in the « final text » were submitted to a national vote.

If the report of the committee of the whole in the Philadelphia Convention had been submitted to a general referendum in the United States in 1787, it would and should have been voted down everywhere, which is what happened to the ill-fated Charlottetown Accord in the referendum of 1992.

Adopting a constitution is by the nature of things a public act. But framing a constitution has always been a dry and technical business, as ideas are suggested, discussed, modified, rejected, and fit into place. Letting journalists into the process of framing is a certain recipe for disaster[35].

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of the British House of Lords, which cannot be recreated or replicated by fundamental law in North America, as to which point insight may be found in the long speech of Charles Pinckney on June 25, 1787, reported in Madison's Notes, J. ELLIOT (ed.), *op. cit.*, note 1, Vol. 5, at 233-238, M. FERRAND (ed.), *op. cit.*, note 1, Vol. 11, at 397-404, also in Yates' Minutes, J. ELLIOT (ed.), *op. cit.*, note 1, Vol. 1, at 443-444, M. FERRAND (ed.), *op. cit.*, note 1, Vol. 1, at 410-412.

35. See the instructive anecdote on this point by William Pierce, one of the more obscure framers of the United States Constitution, reproduced in M. FERRAND (ed.), *op. cit.*, note 1, Vol. 3, at 86-87.

6. The 1995 Referendum and Its Aftermath

Nobody ought to be suprised that, after the Meech Lake Accord was sabotaged, and after Peterson, Turner, Sauvé, Mulroney, and Bourassa left public office, the people of Quebec elected strong separatists to guide their future : — Jacques Parizeau as premier of Québec, and Lucien Bouchard as leader of the opposition Bloc québécois in the dominion Parliament, and now premier of Quebec.

And nobody ought to be surprised that, in a second referendum on independence, proposed by Parizeau's government in 1995, the vote of the people of Quebec was 49.4 % « oui » and 51.6 % « non », which everybody knows (or should know) was an astonishing moral victory for separatism in Quebec, in the face of confused policies of Jean Chrétien as prime minister of Canada[36].

The fires of separatism are now more alive and well than ever in Quebec. There have been veiled or overt threats of taking territory from Quebec, of taking Canadian passports and money, — even shutting off electricity[37] —, but these remonstrations have only enhanced opinion, for want of a good alternative if nothing else, that Quebec ought to be a free, sovereign, and independent nation, with her own passports, her own currency and central bank, her own policy on trade and immigration, etc.

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36. Shortly after the 1995 referendum, the House of Commons in Ottawa passed a resolution acknowledging that Quebec is a distinct society because of her main language, unique culture, and civil law tradition. While this motion appears to establish a constitutional convention, so also did Diefenbaker's concession on an entrenched charter of freedoms or bill of rights, yet Quebec was no better for it when the moment of truth arrived at the dominion-provincial conference of 1981. Learned opinion in Quebec regards this motion as a mere illusion of reform. Chretien's government also pushed through a Constitutional Amendments Act of 1996, which, among other things, purports to give two or three provinces in western Canada, where ill-will against Quebec is rife at the moment, the power to veto amendments to the fundamental law of Canada, even where the « seven-fifty » formula in Section 38 of the Constitution Act of 1982 is applicable. This Act appears to be unconstitutional, and it may well complicate the hope of reconciliation between Quebec and the rest of Canada.

37. So says the current premier of Newfoundland, yet he adds, in sharp contrast to his predecessor who destroyed the Meech Lake Accord, that Quebec should be recognized as a distinct society « with generosity and without reservation. It is a small price to pay for national unity ». G. IP, « Tobin issues Churchill warning », *Globe and Mail*, (20 November 1996) 2A. Special exemptions or privileges to some states unusually situated, granted in order to achieve unity, is nothing new in the formation of confederacies : — e.g., in the German Empire (1871-1918), Bavaria, Saxony, and Wurtemberg, each enjoyed special exemptions and privileges, as appears in J. BRYCE, *The Holy Roman Empire*, (London : MacMillan Co., 1911) at 483-485.

All else having failed, resort to litigation has been tried. In the nature of things, litigation cannot work, and it is unfair to expect the judiciary to remedy the situation. The judiciary can never avoid, by any holding, the bad consequences which have followed naturally as the inevitable sanction for disregarding Diefenbaker's paternal advice in 1960.

During the public debate preceding the 1995 referendum, an expedient was attempted to dampen the ardor of the « oui » campaign by the ingenious suit brought before the Superior Court of Quebec, entitled *Bertrand* c. *Bégin*[38].

The suit was brought to secure an injunction enjoining Parizeau's government from spending public money for the referendum, and from passing laws for the purpose of effecting the unilateral separation of Quebec from Canada, if the vote on the referendum signified a majority sentiment for independence.

In the United States, a suit of this kind surely would have been dismissed for lack of standing[39], or as raising a « political » or nonjusticiable question[40]. In Canada, however, Section 24 of the Constitution Act of 1982 has been read to give the judiciary much broader rights to adjudicate[41].

Justice Robert Lesage was certainly right in refusing an injunction which would have produced a most unfortunate reaction, and he was certainly right in what he declared by judgment: — that the legislation proposed by Parizeau's government, if enacted and consummated, would rupture and repudiate the existing constitutional order of Canada, and would take away the Canadian Charter of Rights and Freedoms.

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38. *Bertrand* c. *Bégin*, [1995] R.J.Q. 2500 (C.S.).
39. See, e.g., *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 at 346-348 (1936), where it was said that a court should not decide a constitutional question, for want of standing, where the issue is prematurely raised in advance of the need to decide it, or where the question is framed more broadly than necessary, or where no injury is immediately threatened by the statute challenged (a fortiori where the statute is no longer operative, and has not been reenacted), or where any of several other conditions exist.
40. See, e.g. *Massachusetts* v. *Mellon*, 262 U.S. 447 at 485 (1923) where it was said that a court ought to avoid as nonjusticiable abstract questions of power and sovereignty. See also the classic case of *Luther* v. *Borden*, 7 Howard 1 (U.S. 1849), where the court avoided as nonjusticiable the question of which of two state governments engaged in civil war was legitimate: the most convincing reason given was that the question involved such practical enormity as to lie beyond the remedial power of the judiciary.
41. In *Madzimbamuto* v. *Lardner-Burke*, [1969] 1 A.C. 645, relied upon in Bertrand's suit reported in *Bertrand* c. *Bégin*, note 38, 2500, the privy council of Great Britain addressed, as if it were a proper matter for judicial inquiry, the question of whether Ian Smith's government was the lawful government of Southern Rhodesia (now Zimbabwe). Some learned opinion holds that this decision went beyond traditional judicial restraints due to the highly unusual nature and posture of the case.

Lesage was correct in that there exists no statutory mechanism for unilateral secession of a province from the dominion of Canada. It is what he did not say that merits our notice.

Nobody will deny the truth, stated by two eminent constitutional scholars, that

> Le préambule de la Loi constitutionnelle de 1867 indique en effet que la fédération canadienne, lors de sa création, a desiré « une constitution reposant sur le même principe que celle du Royaume-Uni ». Ainsi, le Canada fédéral apparait avoir hérité à ce moment des grands principes du droit constitutionnel anglais tels qu'ils existaient alors[42].

And the British traditions which characterize the fundamental law of Canada — infused through the Preamble of the British North America Act of 1867 — include most explicit acknowledgment of very proper but revolutionary alterations in government, as needed to redress constitutional imbalance or injustice.

In 1688 and 1689, events transformed the foundations of government in England. Constitutional custom demanded that no parliament meet without royal writ. Yet a meeting of commons and lords was called without royal writ, a constructive abdication of James II was declared, and the reign of William and Mary was ordained. And so became manifest the extraordinary forms of fundamental law in England, on which the Crown of Elizabeth II indisputably depends. The whole constitutional order of Canada rests on this « Glorious Revolution ».

The principle of the Glorious Revolution is a constitutional custom, not a mere constitutional convention, yet it is of indefinite shape, and beyond judicial reasoning or treatment, because it is self-enforcing according to natural law, yet conferring upon the people in extraordinary situations a right to enjoy revolutionary modifications in their government *peacefully and lawfully, without taking up arms.*

Sir William Blackstone said that this extraordinary principle of fundamental law operates notwithstanding all other statutes, customs, and conventions, because « mankind will not be reasoned out of the feelings of humanity ». Then laying aside the particulars of the Glorious Revolution, and looking in years ahead, he said :

> It is not for us to say that any one or two of these ingredients would amount to such a situation, for there our precedent would fail us. In these, therefore, or other circumstances which a fertile imagination may furnish, since both law and history are silent, it behooves us to be silent too, leaving to future generations, whenever necessity and the safety of the whole shall require it, the exertion of those *inherent*

42. H. BRUN and G. TREMBLAY, *op. cit.*, note 22, p. 18.

> *though latent powers of society which no climate, no time, no constitution, no contract, can ever destroy or diminish*[43].[Emphasis supplied]

We have at the moment a political crisis in Quebec caused by imposition of a constitution upon the people over the protest of their elected government, and destruction of an accord in consideration of which their elected government was willing to signify approbation. The principle of the Glorious Revolution has, consequently, begun to operate in Quebec, and its demands cannot be enjoined by Canadian courts any more than the arrival of William of Orange could be enjoined by the chancellor of England, or the North Sea could be commanded by Cnut the Dane.

The main difficulty with Lesage's judgment is that it rests essentially upon *Rediffusion Ltd.* v. *Hong Kong*[44], in which the privy council of Great Britain suggested the *colonial legislature of Hong Kong* was so limited in its significance that parliamentary privileges otherwise immunizing its members did not apply, and that the *judicial authority of the British Empire* could, if circumstances were grave enough, interfere by injunction to enjoin any proceedings supposed to threaten the rule of law.

Law students have always been taught that sovereign authority and rights are enjoyed by the provinces of Canada[45]. Yet Quebec was effectively reduced to the status of a colony by the dominion-provincial conference of 1981. Those responsible for this fait accompli may deny it. Yet now, confirmatory of the way the Canada Act of 1982 was pushed through, the National Assembly of Quebec has been judicially treated as if it were a mere colonial legislature in practical fact.

Since the 1995 referendum, Guy Bertrand has continued his efforts before the Superior Court of Quebec to secure an injunction against the government of Quebec prohibiting another referendum on independence and any further measures to bring about the secession of Quebec from Canada. The government of Quebec objected, among other things, that no referendum had been called, and no question properly judicial was before the court. Yet Justice Robert Pidgeon held that the question was not necessarily unripe, and not necessarily nonjusticiable. And so he denied the motion to dismiss[46]. Thereupon, the attorney general of Quebec and his entourage respectfully left the court and declined to plead further.

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43. SIR W. BLACKSTONE, *op. cit.*, note 13, Vol. 1, at 245.
44. *Rediffusion Ltd.* v. *Hong Kong*, [1970] A. C. 1136.
45. The classic case to this effect, taught in every elementary course on Canadian constitutional law, is Liquidators of the *Maritime Bank of Canada* v. *Receiver General of New Brunswick*, [1892] A.C. 437.
46. *Bertrand* c. *Bégin*, [1996] R.J.Q. 2393 (C.S.).

We have on the record of history two very remarkable declarations in or of the provincial Legislature of Quebec.

On the day after the wreckage of the Meech Lake Accord in 1990, the premier of Quebec made a resonant speech. Bourassa was quiet, sober, patient, and moderate, no firebrand at all, and not a separatist at heart. Yet he said :

> Le Canada anglais doit comprendre d'une façon très claire que, quoiqu'on dise et quoiqu'on fasse, *le Québec est* aujourd'hui et pour toujours, une société distincte, *libre et capable d'assumer son destin et son développement.* [Emphasis supplied]

And in the spring of 1996, so as to make plain what is coming, regardless of judicial decrees, Bouchard's government introduced a motion, and, accordingly, it was resolved :

> L'Assemblée nationale réaffirme que *le peuple du Québec est libre d'assumer son propre destin, de déterminer, sans entrave, son statut politique, et d'assurer son développement économique, social, et culturel.* [Emphasis supplied]

In proceedings before Pidgeon, Bertrand argued that, although international law recognizes the right of a colony in some circumstances to withdraw from an empire, it does not acknowledge the right of a part of an integrated nation or of a confederacy of states to withdraw from the whole[47].

Yet, Quebec has already been judicially treated as a colony of Canada. And the scope of the right of a people to autonomy under international law is still much debated. While international law may not affirm, it surely does not deny the right of a people within a country to secede. For international law does recognize the reality of a new nation when it emerges[48].

In the autumn of 1996, only weeks after the attorney general of Quebec departed from Pidgeon's court, Chrétien's government caused the governor general to invoke Section 53 of the Supreme Court Act, thereby referring to the Supreme Court of Canada the question, among others, « whether the national assembly, legislature, or government of Quebec, under the constitution of Canada, has a right to proceed unilaterally toward secession of Quebec from Canada ».

The Chief Justice of Canada has meanwhile denied the request of the justice minister and attorney general in Chrétien's government for an accelerated hearing.

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47. Bertrand probably sought to anticipate H. BRUN and G. TREMBLAY, *op. cit.*, note 22, pp. 371-372, who assert the constitutional right of a province to secede from Canada, notwithstanding the want of a formal mechanism, on the basis of an incontestable expression of public will in a free and peaceable election, political wisdom, and international law.

48. See, e.g., *United States* v. *Palmer*, 3 Wheaton 610 (U.S. 1818).

The answer to the question, so far as the court can address it, is that there is no express provision allowing Quebec to secede from Canada under any of the Constitution Acts from 1867 through 1982.

But this answer is not the whole answer, and leaves out the most important point, which is that the principle of the Glorious Revolution came to Canada through the Preamble of the British North America Act of 1867.

The principle not only arrived, but it now operates in a manner incapable of judicial articulation, as politicians in Ottawa temporize, expecting judges to do for them what only statesmanship on their part, buttressed by patriotism and courage, can accomplish for Canada.

The principle gives the people of Quebec, through their elected government, a right frankly revolutionary, but a right peaceable and lawful, and a right acknowledged in constitutional tradition, to take charge of their destiny and development and to determine their national status[49] in extraordinary circumstances which, in the nature of things, cannot be judicially ascertained, prohibited, or remedied.

All understand that the advantages of continental union are great, and that conveniences may be lost to Quebec and Canada if such union is not repaired and maintained. But there is more to life than worldly advantages and conveniences. And if a continental union is not a continental friendship, it can only be an instrument of oppression in the hands of whatever majority should gain control of the federal structure. Such a friendship can only be repaired and maintained by real statesmen of honor, never by politicians making specious arguments and ominous threats, least of all by force of arms, or by inappropriate appeals to judicial power.

49. The formalities necessary for carrying out such transformations according to the principle of the Glorious Revolution, as adapted to circumstances of British parliamentary government in North America, are hardly without precedent. See, e.g., the observations of Judge W. STAPLES, *Rhode Island in the Continental Congress*, (New York: DaCapo Press, 1971) at 65-67.