Can Quebec Separate ?

David Matas *

Introduction

The separation of Quebec from Canada is a primary plank in the platform of the Parti Quebecois, the official opposition in the legislature of the Province of Quebec. If one day the P.Q. should form the government of Quebec, it will propose to the National Assembly a law authorizing it to request from Ottawa the transfer of powers to Quebec.[1] Until recently, the position of the party was that if Ottawa should oppose separation, Quebec would separate unilaterally, without a referendum on the issue of separation. Whether separation occurred unilaterally or by agreement with Ottawa, the party would submit to the Quebec electorate, by way of referendum, a proposed constitution for its approval.[2]

However, at its recent congress held in November, 1974, the party changed its proposed process of separation. If Ottawa were not to object to separation, there would still be no referendum on separation submitted to the Quebec voters. If Ottawa were to object, then the question of separation would be presented to the voters by means of a referendum; only if the voters in this referendum supported separation in the face of Ottawa's objections would Quebec unilaterally separate from Canada.[3] If the voters favored separation, there would be a second referendum on a proposed constitution.

The P.Q. proposals raise the question whether the party is legally entitled to do what it proposes to do. The platform assumes that Ottawa and Quebec can together effect a separation, regardless of the opinions of the other provinces. It further assumes that Quebec can unilaterally effect a separation provided it has the popular support of its electorate as manifested in a referendum. Whether or not these assumptions are correct is only of academic or political interest if the P.Q. does not become the government of Quebec. However, if the P.Q. should form the government and, in

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* Of the firm of Norton, O'Sullivan, Schwartz and Associates, Winnipeg.

1 *Le Devoir,* Nov. 18, 1974, p.2.

2 *Globe and Mail,* Sept. 26, 1974.

3 *Supra,* f.n.1.

particular, should declare unilaterally that it is separate from Canada and start legislating in areas of federal jurisdiction, the question of the legality of its proposals will become of real, immediate and practical importance.[4]

The Present Constitution

Canada's present constitution does not expressly allow a province to separate, either unilaterally or in consort with Ottawa. This is not to say that it could not have been allowed: it is not perverse for a constitution to provide for a right to secede, even unilaterally. Indeed, another constitution legislated by Britain (as is Canada's *British North America Act*), the *West Indies Act*,[5] does give that right.

The *West Indies Act* associates six[6] West Indian states with England.[7] The Act gives the United Kingdom Parliament responsibility over external affairs, defence and citizenship, while the associated states have legislative responsibility over all other matters.[8]

A state may terminate the status of association with the United Kingdom through a special procedure.[9] In order to terminate, the state legislature must pass a bill supporting termination by a two-thirds majority.[10] If the bill passes the legislature, it must be submitted to a referendum and supported by two-thirds of the votes cast.[11] Once termination is approved by referendum, the royal assent is given and the status of association is terminated as from the date provided in the termination bill.[12] No legislation or Order in Council must emanate from the United Kingdom in order to effect the termination.

Nor does the Canadian constitution contain an implied power of separation. British Columbia, Prince Edward Island and Newfoundland were entitled to be admitted to Confederation without legislation by the British Parliament, through British Orders in

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[4] R. A. Mayer, *Legal Aspects of Secession* (1968) 3 Man.L.J.61, states a contrary opinion.

[5] *West Indies Act*, 1967, c.4 (U.K.).

[6] Antigua, Dominica, Grenada, Saint Christopher Nevis and Anguilla, Saint Lucia and Saint Vincent.

[7] *Supra*, f.n.5, s.1.

[8] *Ibid.*, s.2.

[9] *Ibid.*, s.10.

[10] *Ibid.*, Sch.2, s.2(b).

[11] *Ibid.*, Sch.2, s.2(c).

[12] *Ibid.*, s.10.

Council, after addresses from the Canadian Parliament and the provincial legislatures. However, once admitted by addresses and Orders in Council, as British Columbia and Prince Edward Island in fact were, these provinces were not entitled to leave by other addresses and Orders in Council. The admitting Orders in Council took effect as if they had been enacted by the United Kingdom Parliament, and they could only be reversed by an Act of that Parliament.[13] Rupert's Land and the Northwest Territories were also admitted to Canada by a British Order in Council after an address from the Canadian Houses of Parliament.[14] The Parliament of Canada is entitled to establish, by legislation, new provinces out of these territories.[15] However, once a province is established by the Canadian Parliament under this power, as were Alberta and Saskatchewan, the Canadian Parliament is not competent to alter the Act establishing the province.[16] Only the United Kingdom Parliament could effect such an alteration.

Even if the express power of entry could be interpreted as an implied power of exit for those provinces that could have been admitted to Confederation without British legislation[17] or that were admitted to Confederation without British legislation,[18] the implied power of exit would not apply to Canada's original provinces. These provinces were expressly united by the *B.N.A. Act*,[19] and only an express amendment could repeal the unification. When Nova Scotia wished to leave Confederation in 1868, it did not feel free to do so without amendment to the *B.N.A. Act*. It requested such an amendment from Britain, and when the request was refused,[20] it carried on as part of Confederation.[21]

Amendment at Home

For a province to separate in conformity with statute law, the Canadian constitution has to be amended. The constitution can be amended either in Canada (for some types of amendments), or

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[13] *British North America Act*, 1867, 30-31 Vict., c.3, s.146 (U.K.).

[14] Order in Council of Her Majesty, Queen Victoria, 23 June 1870, pursuant to *Rupert's Land Act*, 1868, 31-32 Vict., c.105.

[15] *British North America Act*, 1871, 34-35 Vict., c.28, s.2 (U.K.).

[16] *Ibid.*, s.6.

[17] B.C., P.E.I., Nfld., Sask., Alta., Man.

[18] B.C., P.E.I., Sask., Alta.

[19] *Supra*, f.n.13, s.3.

[20] 1868 Journals of N.S., App.No.9, p.2.

[21] A full account of this affair may be found in 1869 Can. Sess. Paper No.9.

in England (for all types of amendments). Because the restricted powers of amendment given to the provincial legislatures and the Canadian Parliament by the *B.N.A. Acts* do not, as will be shown *infra,* allow separation to be effected in Canada, separation by amendment must be effected in Britain.

The provincial legislatures have the exclusive power to amend their own constitutions, except as regards the office of Lieutenant-Governor.[22] This power does not encompass a power to separate. First of all, a separation would involve an amendment of the office of Lieutenant-Governor, as his power of reservation of bills for the signification of the pleasure of the Governor-General would disappear.[23] More importantly, separation is not just an amendment to the constitution of the separating province: it is an amendment to the constitution of Canada.

The Canadian Parliament has exclusive power to amend the constitution of Canada.[24] While some provisions of the constitution are expressly excluded from this power, the power to amend the office of Governor-General is not one of them. Because the power to amend the office of Lieutenant-Governor is expressly excluded from the provinces' power to amend, and because Parliament has exclusive power to legislate on those matters coming within the class of subjects expressly excepted from the provincial powers,[25] Parliament can amend the office of the Lieutenant-Governor of a province. Nonetheless, Parliament's power of amendment is not broad enough to effect a separation.

This is because the power of amendment does not allow Parliament to transfer the powers within its jurisdiction. The authority to legislate over enumerated subject matters is given to it exclusively, and cannot be abandoned. The power to amend is not a power to alter the whole nature of that which is amended.[26] No matter what changes are to be made in the Canadian constitution, Parliament alone can legislate on the enumerated heads of subject matter within its exclusive jurisdiction.[27] Certainly, the amendment power

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[22] *B.N.A. Act,* 1867, *supra,* f.n.13, s.92(1).

[23] *Ibid.,* ss.55, 90.

[24] *Ibid.,* s.91(1).

[25] *Ibid.,* s.91(29).

[26] "... the amendments that may be made under sub-sec. 1 [of s.92 of the *B.N.A. Act,* 1867] must necessarily be such that they do not purport to destroy or take away or give to others the law making powers of the legislature": *Re Initiative and Referendum Act* [1917] 1 W.W.R. 1012, 1022 (Man.C.A.) *per* Richards J.A.

[27] *Ibid.,* 1017 *per* Howell J.A.

was not intended to be used to substitute a new constitution for the present one, but was intended merely to give Parliament power to alter details of structure or machinery for the more efficient operation of the constitution, the essential design and purpose being preserved. Parliament can amend its constitution, but it cannot destroy it.[28] Although the Canadian Parliament can delegate its powers, transfer of its powers to the provinces is not a delegation but an abdication.[29]

If the *B.N.A. Act* is repatriated and the amendment power becomes that proposed in the Victoria Charter, as appears possible, then clearly separation could be effected in Canada. The Charter provides that amendments to the constitution that apply to one of the provinces alone may be made when authorized by Parliament and the legislature of the province to which the amendment applies.[30] Separation of a province from Confederation in reality applies to that province alone; although other provinces may be politically or economically affected by such an amendment, their own constitutions are not altered. Because they would be legally or constitutionally unaffected by such a change, the other provinces would have no *locus standi* to object to such a change.[31]

Amendment Abroad

The only clear and unequivocal way for Quebec to separate from Canada is for the United Kingdom Parliament to legislate the separation. The United Kingdom would not legislate this separation without the consent of the Canadian federal government. However, it would probably legislate separation on the request of Quebec and Ottawa, even if all the other provinces besides Quebec objected to the separation.

The position of the United Kingdom is that it will not amend the constitution of a self-governing member of the Commonwealth without the request of the government and legislature concerned. However, it will not countenance the objection of another government of the Commonwealth where the objector's constitution is

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[28] *Ibid.*, 1027-31 *per* Perdue J.A.

[29] *A.G.N.S.* v. *A.G. Can.* [1950] 4 D.L.R. 369 (S.C.C.).

[30] *Constitutional Conference Proceedings*, Victoria, B.C., June 14, 1971, p.65, art.50.

[31] *Report of the Joint Committee of the House of Lords and the House of Commons appointed to consider the Petition of the State of Western Australia*, 1935, ix, para.9.

not at issue. In a proposed separation of Quebec from Canada, only the constitutions of Quebec and Canada would be affected; therefore, the consent of Ottawa and Quebec would be required, while the consent of the other provinces would be irrelevant. Canada's consent to Quebec's request to depart from Confederation would be as essential as would be Quebec's consent to any proposal by Ottawa that Quebec be evicted from Confederation. This approach protects the United Kingdom Parliament from any appearance of taking sides in a dispute.

When the state of Western Australia applied to the British Parliament for separation from the Commonwealth of Australia, a joint committee of the House of Commons and Senate concluded that the United Kingdom Parliament was constitutionally incompetent to effect the separation because the Commonwealth was opposed to the change.[32] On the other hand, if the Commonwealth government had joined in the request, it would not have mattered that other states within the Commonwealth objected.[33] When Nova Scotia applied to the British government requesting separation, the government did deal with the request on its merits, despite the objection of Ottawa to the request,[34] and did take into consideration the wishes of another province, New Brunswick.[35] However, the situation is distinguishable. The Nova Scotia request to leave indicated that not only at the time of the request, but also at the time of Confederation the people of Nova Scotia did not wish to be part of Confederation. The province claimed that representations to the effect that Nova Scotia wished to be part of Canada had been a fraud on the British Parliament enacting the union legislation. Thus, the Nova Scotia address was not simply a request for repeal: it was a claim that the original Act had not been validly made. Such a claim had to be dealt with on its merits even though Ottawa objected, whereas a simple request for severance would not have been dealt with on its merits.[35a]

The fact that the British Parliament is not concerned with the attitudes of the other provinces toward the separation of a sister province does not mean that these provinces can make no effective objection. For example, the federal government itself could refuse to consent to a proposed separation because one or more provinces

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[32] *Ibid.*, x, para.13.
[33] *Ibid.*, ix, para.9.
[34] 1868 Journals of Nova Scotia, App. No.9, p.2.
[35] *Ibid.*, p.4.
[35a] *Supra*, f.n.31, 150.

object to the separation. However, the fact that Ottawa refused to obtain the consent of the other provinces when Newfoundland was admitted into Confederation[36] or when title to resources was transferred to the western provinces[37] suggests that Ottawa would not insist upon provincial consent if it were itself prepared to agree to the separation of Quebec from Canada.

Common Law Principles of Legality

Effectiveness

A unilateral secession by Quebec without an amendment to the *B.N.A. Act* is not necessarily illegal. A seceding government will be considered a legally valid government if it fulfils certain criteria laid down by common law. One of the most important criteria is that it must be in effective control of the territory it claims a right to govern.[38] Courts within the territory cannot refuse to give legal validity to the acts of a regime in control of a territory over which the courts have jurisdiction simply because the seceding regime is illegal in terms of the constitution of the federation abandoned. Whereas a court outside a seceding territory must determine the view of its government as to whether or not the seceding government is the lawful government and act upon that view, the courts within a seceding territory do not have the luxury of relying on the decision of another as to who is lawful government. They must decide themselves.

It is an historical fact that in many countries there are regimes recognized as lawful which derive their origins from unlawful acts. The law must take account of that fact. However, a court does not have to give effect to a secession as soon as it is proclaimed. A court cannot give legal validity to a regime simply because it seems likely to remain, nor can it assess which of two contending parties is more likely to maintain control and support the likelier of the two contenders. On the contrary, until such time as the courts can predict with certainty that the secession has succeeded, they must support the federation. If the courts held otherwise, they would in effect be saying that the federation, by striving to assert its lawful rights, was opposing the lawful ruler.

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[36] See 1949 *Debates of the House of Commons*, 1st Sess., vol.1, p.84 (Rt Hon. L.S. St.Laurent), p.501 (Mr George Drew).

[37] See 1930 *Debates of the Senate*, p.348-9.

[38] *Madzimbamuto* v. *Lardner-Burke* [1969] 1 A.C. 645 (P.C.); rev'g [1968] 2 S.A.L.R. 284 (Rhodesia A.D.).

Furthermore, if the courts were to legalize the acts of the regime which they judged to be the likelier to succeed, they would, in effect, be taking part in the dispute. Finding that the secessionist regime is likely to succeed would be tantamount to joining the secession; saying that it is probable that the secessionist regime will not succeed means taking sides against the secession. The courts must remain out of the political battle so that they can carry on their primary tasks.[39]

Thirdly, if the courts were to recognize the acts of a secessionist regime simply because it seems likely to remain, they would be adopting the legally repugnant doctrine that might makes right.[40] The stronger of two contending parties is not entitled to the complete support of the existing judiciary on the basis of strength alone. Any other attitude on the part of the courts would encourage instability.[41]

Fourthly, the attitude of the courts to the legality of a regime can be a significant factor in determining the success of the regime. A holding by a court that a government is likely to continue may be a self-fulfilling prophecy.[42]

Just as one cannot say that a regime in control and likely to remain is the legal regime, by the same token one cannot state that the regime not in control and not likely to return is not the legal regime. The constitution of a regime not in control can still be the constitution of a territory. Kelsen states that in order for a constitution to be valid, it must be effective. Effectiveness is a necessary condition for validity of a constitution, although not a sufficient condition.[43] However, Kelsen's statement is not a rule of law, but merely a theory about law. His statement is not prescriptive; it is descriptive. Using Kelsen's theory to hold the constitution of a federation invalid in a seceding territory would be to confuse the science of law and law, and to confuse a statement of jurisprudence with a legal norm.[44] Kelsen's legal theory, which he intends to be positivist or pure, would be condemned on its own terms if it were used as a source of law.[45]

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[39] *Madzimbamuto* v. *Lardner-Burke* [1969] 1 A.C. 645, 737 *per* Lord Pearce.

[40] See A.M. Honore, *Reflections on Revolutions* (1967) 2 Ir.J. (N.S.) 268.

[41] *Madzimbamuto* v. *Lardner-Burke* [1968] 2 S.A.L.R. 284, 430 (R.A.D.) *per* Fieldsend A.J.A.

[42] *Contra per* Beadle C.J., ibid., 322.

[43] Hans Kelsen, *General Theory of Law and the State* (1961), 119; *Pure Theory of Law* 2d ed. (1967), 210.

[44] *General Theory, ibid.*, 163.

[45] J.M. Finnis, *Pakistan* (1972) A.S.C.L. 49, 53.

When Rhodesia unilaterally declared independence from England, the Privy Council held that the usurping regime was not the legal regime. If it were certain to remain, it would be the legal regime; however, Britain still claimed sovereignty over Rhodesia and was taking steps to regain control. Until the courts could say with certainty that these steps would not succeed, the usurping regime was illegal.[46]

If Quebec unilaterally declared itself separate from Canada and the Quebec government was in complete control of the territory of Quebec, and it appeared certain to remain in control, then the separatist regime would be the legal regime even without any amendment of the *B.N.A. Act*. If, on the other hand, the federal government continued to claim its right to legislate for the province of Quebec on matters coming within the classes of subjects presently assigned exclusively to the Canadian Parliament, and either remained in control of Quebec or, if not in control, took steps to regain control that might possibly succeed, then a separatist regime would not, by virtue of the principle of effectiveness, be legal.

Allegiance

A second principle that could lend validity to a unilaterally seceding regime is the principle that the sovereign in possession is entitled to the allegiance of its subjects.[47] The allegiance due is a temporary allegiance for the purposes of administration of the government and temporary protection of the public. It is not a general allegiance due for all purposes.[48] Disloyalty to the seceding regime is a crime not only insofar as the seceding regime is concerned, but also insofar as the federal regime is concerned, and will be treated as such should the federal regime return to control. Treasons committed against Henry VI of England were punished under Edward IV, although Henry VI was considered a usurper by Edward IV.

The duty of allegiance does not go so far as to require the subject to actively resist attempts by the deposed sovereign to return to power. However, if the citizen of a seceding province does resist the return to control of the federal government, he will not be guilty of treason in the eyes of the federal power. But it would be confounding all notions of right and wrong to suggest

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[46] *Supra*, f.n.38.

[47] Sir W. Blackstone, *Commentaries on the Laws of England* 15th ed., (1809), 77.

[48] *Supra*, f.n.39, 726 *per* Lord Reid.

that someone who did *not* resist the attempts of the federal regime to return to power in the seceding territory was guilty, by that act, of treason in the eyes of the federal regime.

The duty to obey the sovereign for the time being for the purposes of the administration of government and protection of the public is a duty both at common law and by English statute.[49] The Canadian Criminal Code carries forward the defence to the crime of resisting the return to power of the ousted sovereign.[50] It does not explicitly carry forward the offence of disobeying the sovereign for the time being, but this offence may be implicitly included in the Code. This is because a person who owes allegiance to Her Majesty in right of Canada may be guilty of treason;[51] "Her Majesty" is defined by the Canadian *Interpretation Act* as the Sovereign of the United Kingdom, Canada and Her Other Realms; [52] and the relevant United Kingdom statute enacts that references to the Sovereigu shall be construed as references to the Sovereign for the time being.[53]

Alternatively, if the offence is not set out in the Code, it remains an offence as part of the criminal law of England incorporated into Canadian law.[54] No person may be convicted of common law or British statutory offences,[55] but these offences remain part of the law of Canada nonetheless. The duties remain; only the penal sanctions are removed.[56] The fact that the duty to the sovereign for the time being is, in the English statute, in the preamble to the law that gives a defence to the subject resisting the rightful sovereign, and in the Canadian Criminal Code the defence is re-enacted but without the preamble, does not, of itself, remove the duty from Canadian law. A codifying statute that omits a preamble must be construed as if the preamble remained.[57]

The loyalty that a citizen owes to a sovereign in possession does not, however, require the courts to recoguize a seceding regime as lawful. The sovereign to whom the loyalty is owed is not just

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[49] *Treason Act*, 1495, 11 Henry VII, c.1. (U.K.).
[50] *Criminal Code*, R.S.C. 1970, c.C-34, s.15.
[51] *Ibid.*, s.46(2).
[52] R.S.C. 1970, c.I-22, s.28.
[53] *Interpretation Act*, 1889, 52 & 53 Vict., c.63, s.30 (U.K.).
[54] *Supra*, f.n.50, s.7(2).
[55] *Ibid.*, s.8.
[56] J.E. Cote, *The Introduction of English Law into Alberta* (1964) 3 Alta L.R. 262, 275.
[57] See *Powell* v. *Kempton Park Racecourse Co.* [1897] 2 Q.B. 242, 271 *per* A.L. Smith L.J.

the executive and the legislature. The sovereign includes the judiciary as well. While the law may well require the subject to obey the sovereign in possession, it does not require the repository of one part of the sovereign power, the judiciary, to acquiesce in the illegal assumption of power by the repository of another part of the sovereign power.[58] Thus, until such time as the courts have joined the secession, a seceding provincial government is not truly a sovereign in possession within the meaning of the law of treason.

Necessity

A third principle that can lead to the recognition of acts of a seceding regime is the principle of necessity. This general principle, based upon an implied mandate from the lawful sovereign, recognizes the need to preserve law and order in a territory controlled by a usurper.[59] If the ousted sovereign continues to legislate for the seceding territory, then no legal vacuum would exist, and there is therefore no implied mandate to fill it. Otherwise, such a vacuum would exist and would have to be filled.

The principle of necessity does not require the recognition of all legislation of the usurper. Only those laws that are directed to and reasonably required for ordinary orderly running of the territory; that do not impair the rights of citizens under the lawful constitution; that do not, in intent or in fact, directly help the secession; and that do not run contrary to the policy of the lawful sovereign, will be recognized under this principle.[60] These criteria amount to a test of public policy. Public policy in such a situation is a particularly unruly horse, but it is one that the courts must ride.[61]

When Rhodesia unilaterally declared independence, the Privy Council held [62] that the principle of necessity could not be invoked to validate the laws of the usurping regime because British legislation [63] and a British Order-in-Council [64] expressly negated any implied mandate that might have existed. The legislation and Order-in-Council suspended the power of the Rhodesian legislature to legislate for Rhodesia and gave that power to the British government. Lord Pearce, in dissent, held that there was an implied mandate despite the legislation and Order-in-Council because of a directive from the

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[58] *Supra*, f.n.41, 428 *per* Fieldsend A.J.A.
[59] *Supra*, f.n.39, 729 *per* Lord Reid.
[60] *Ibid.*, 732 *per* Lord Pearce (diss.).
[61] See the remarks of Beadle C.J. in *Madzimbamuto, supra*, f.n.41, 331.
[62] *Supra*, f.n.39.
[63] *Southern Rhodesia Act*, 1965, c.76 (U.K.).
[64] *Southern Rhodesia Constitution Order*, S.I. 1965/1952 (U.K.).

lawful governor of Rhodesia, issued at the time of the Unilateral Declaration of Independence, calling on all citizens to maintain law and order in the country and carry on with their normal tasks.[65] The directive was never countermanded.

A seceding government that has its law declared valid by virtue of the doctrine of necessity is taking advantage of a necessity of its own making.[66] It should be pointed out that American cases which declared valid the laws of the states that seceded from the union at the time of the American civil war[67] were cases decided after the secession was over. In none of them did the courts pass judgment on the legality of the regime during the secession.[68]

However, the fact that a seceding government is taking advantage of a necessity of its own making does not render its acts automatically illegal. If its acts are entitled to retrospective validity after the secession is over, they are entitled to contemporaneous validity.[69] It is a question of public policy whether during or after a secession the courts should grant recognition to an act of a seceding government.

The doctrine of necessity assumes particular importance where sovereignty is divided. In a state with undivided sovereignty, the lawful government can avoid the invoking of the doctrine by legislating for the seceding territory. In a state with divided sovereignty, the lawful federal government cannot completely fill the legal vacuum caused by the secession. It is restricted to legislating on matters within the sphere of its limited sovereignty. Because sovereignty is divided in the United States, the union was not competent to legislate in all spheres at the time of the secession and civil war. A legal vacuum was created, and the courts found it necessary to recognize the acts of the seceding states as lawful in order to fill that vacuum. In Rhodesia, on the other hand, where sovereignty was not divided and the United Kingdom Parliament had power to legislate for Rhodesia in respect of all subject matters, no necessity arose to recognize the acts of the usurping Rhodesian regime. Parliament instead used its power to provide what the legal position was to be in Rhodesia during the usurpation.[70]

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[65] *Supra*, f.n.39, 737-8.

[66] *Supra*, f.n.41, 330 *per* Beadle C.J.

[67] See for instance *Texas* v. *White* 7 Wall. 700 (1868) (U.S. Sup. Ct.).

[68] *Supra*, f.n.39, 728 *per* Lord Reid.

[69] *Ibid.*, 733 *per* Lord Pearce (diss.).

[70] *Ibid.*, 728.

In Canada, although the sovereign is,[71] or may be,[72] indivisible, sovereignty is divided. Parliament and the provincial legislatures each have limited spheres of competence. The provincial legislatures are not subordinate to the federal Parliament,[73] and they have assigned areas of exclusive jurisdiction in respect of which Parliament cannot legislate. An emergency may allow Parliament to legislate in relation to new and special aspects, arising out of the emergency, of subjects otherwise assigned exclusively to a province.[74] Unless this emergency power is invoked, some at least of the acts of a seceding provincial government must, of necessity, be given validity.

Self-determination

Marcel Chaput[75] and Claude Morin,[76] two Quebec separatist advocates, both justify a claim that Quebec has a right to separate by reference to the right of self-determination of peoples. Chaput asserts that the United Nations Charter proclaims that right, and suggests that Canada, as a signatory to the Charter, is bound towards the Quebec people to honour that right.

The U.N. Charter does refer to the principle of self-determination of peoples,[77] but does not assert that principle as one of the principles which the Organization and Members shall follow.[78] The reference is in fact a good deal more indirect than that. The obligation on members is to develop friendly relations based on respect for the principle of self-determination: the primary obligation is to develop friendly relations. A member that does not itself respect the principle of self-determination is, perhaps, not entitled to the same measure of friendliness as a member that does respect the principle; members may even be justified in being unfriendly to a member that violates the principle. However, there is no positive obligation to be unfriendly to a member that does not

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[71] *In Re Silver Bros* [1932] 1 W.W.R. 764, [1932] 2 D.L.R. 673, 679 (P.C.) *per* Viscount Dunedin.

[72] F.R. Scott, *Comment on In Re Silver Bros* (1932) 10 Can.Bar Rev. 658, 663.

[73] *Hodge* v. *R.* (1884) 9 App. Cas. 117 (P.C.).

[74] *Fort Frances Pulp and Paper Co.* v. *Man. Free Press Co.* [1923] A.C. 695 (P.C.).

[75] P. Fox (ed.), *Politics: Canada* (1962), 42.

[76] *Le Jour*, Sept. 26, 1974, p.5.

[77] Art.1(2), 55.

[78] Art.2.

itself respect the principle of self-determination, and members are not in violation of the Charter if they maintain good relations with a member who does not respect the principle.

Secondly, the principle of self-determination set out in the Charter was meant to apply only to colonial situations. The Charter itself does not limit the principle to colonial situations, but the document must be interpreted in light of the practice that has grown up around it. Since the founding of the United Nations, the principle has been invoked by its organs only in the colonial context.[79] The organization has come out against applying the principle to secession of part of the metropolitan territory of a member from the rest of the member's territory. For example, the United Nations was politically and militarily active in ending the secession of Katanga from the Congo. Furthermore, U Thant, Secretary General at the time of the attempted secession of Biafra from Nigeria, rejected the right of Biafra to secede in particular, and the right to secede in general.[80] The U.N. General Assembly and Committees at no time discussed the Nigerian civil war or the statehood of Biafra.[81] The situation could hardly be otherwise, for the organization would find itself in an extremely difficult position if it were to invite or justify attacks on its own members because they were in violation of the principle of self-determination.[82] One international jurist has even gone so far as to say that to apply the principle of self-determination to the French Canadians, along with other people within the metropolitan boundaries of members, is "obvious nonsense".[83]

Even if the Charter does contain an obligation on members to respect the principle of self-determination, and even if that principle can be interpreted as applying to non-colonial situations, Canada's signing of the Charter and being a member of the United Nations would not entitle its own citizens to benefit from that

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[79] Goodrich, Hambro and Simons, *Charter of the U.N.* 3d ed. (1969), 29-34.

[80] Jan. 4, 1970, quoted in Rupert Emerson, *Self Determination* (1971) 65 A.J.I.L. 459, 464; 7 U.N. Monthly Chronicle 36. U Thant said:

> "So, as far as the question of secession of a particular section of a Member State is concerned, the United Nations' attitude is unequivocable. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State."

[81] D. Ijalaye, *Was Biafra at Any Time a State in International Law* (1971) 65 A.J.I.L. 551, 556.

[82] Van Dyke in *Human Rights* (1970), quoted by Ved P. Nanda, *Self Determination in International Law* (1972) 66 A.J.I.L. 321, 327.

[83] Rupert Emerson, "Self Determination", *Proceedings A.S.I.L.* (1966), 135, 137.

principle. Principles of the Charter become part of the law of Canada only if they are enacted by Parliament or the provincial legislatures, depending on the subject matter. The Canadian federal executive has the power to undertake obligations on behalf of Canada with other nations, but only Parliament and the legislatures can perform those obligations.[84] The legislative arm of the Canadian government can choose to perform the international obligations that the executive has undertaken, or it can choose not to perform them and leave Canada internationally in default. Until such time as Canada enacts a right of self-determination, it may be in violation of international obligations by not respecting a Quebec claim to determine itself; nonetheless, Quebec has no legal right to assert that claim against Ottawa.

Insofar as the right to self-determination is not a right founded on the U.N. Charter but is a right based on international common law, to which the Charter does nothing more than give expression, then that law is part of the law of Canada, even if not legislated by Parliament. Canadian courts acknowledge the existence of international common law and seek to determine what the international rule is on any issue. Having found it, they will treat it as incorporated into the domestic law insofar as it is not inconsistent with statute law or domestic common law.[85] However, the right of Quebec to secede, if there does indeed exist such a right at international common law, is inconsistent with Canadian statute law., *e.g.*, the *B.N.A. Act*. The *B.N.A. Act* takes precedence in Canada over international law.

Referendum

In light of the fact that the Parti Quebecois proposes to have a referendum on separation before declaring unilaterally that Quebec is separate from Canada, it is perhaps worth pointing out that a referendum cannot validate a separation that would otherwise be illegal. On the contrary, a referendum could invalidate a separation that would otherwise be legal. In the Canadian constitutional system, sovereignty rests with Parliament and the provincial legislatures; it does not rest with the electorate.[86] If Quebec can legally separate, that separation must be effected by legislation by the National Assembly. It cannot be effected by referendum.

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[84] *Reference re Weekly Rest Act* [1937] 1 W.W.R. 299, 307, 1 D.L.R. 673 (P.C.).
[85] *Reference re U.S. Military* [1943] S.C.R. 483, 517 *per* Taschereau J.
[86] *Supra*, f.n.26, 1022 *per* Richard J.A.

The attempts of Nova Scotia to separate from Canada and of Western Australia to separate from Australia both show that a referendum is not sufficient to found a separation. In the case of Nova Scotia, there was no referendum but 31,000 out of 48,000 electors signed a petition in favor of separation.[87] There was no question at the time what the will of the people was on the point: a referendum against Confederation would have undoubtedly succeeded. In the case of Western Australia, the referendum that was held showed the electorate to be in favor of separation by just under a two-thirds majority.[88] However, in neither case did Britain agree to legislate separation, despite the manifest popular support for such a move.

Newfoundland was admitted to Confederation after a referendum supporting entry. The majority vote in favor of entry actually represented less than 50% of those entitled to vote.[89] However, there was no provincial legislature in Newfoundland at the time. A commission appointed by London and responsible to it governed the island; [90] thus, a vote by referendum was considered the next best alternative to a vote by the legislature. If there had been a legislature, a vote by referendum would not have been necessary [91] or sufficient: the legislature itself would have been required to vote. Even with the favorable referendum, the approval of the Canadian Parliament to Newfoundland's entry was still necessary.

A law would be invalid which stated that separation would take effect if approved of by a majority of those voting in a referendum. Furthermore, the law would be invalid even if a statute passed by the legislature itself effecting separation would have been valid. The Manitoba *Initiative and Referendum Act* of 1916, which provided for laws to take effect when approved of by referendum, was found by the Manitoba Court of Appeal to be beyond the powers of the provincial legislature to enact.[92] The legislature could amend its own constitution, but it could not create a completely new constitution based, not on the sovereignty of the legislature, but on that of the people.

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87 192 *House of Commons Debates*, June 16, 1868, p.3, col.1665-8 (U.K.).

88 *Supra*, f.n.31, viii, para.6.

89 462 *House of Commons Debates*, Mar. 2, 1949, p.5, col.394 (U.K.).

90 See *Newfoundland Act*, 1933, 24 & 25 Geo. 5, c.2 (U.K.).

91 *Supra*, f.n.13, s.146.

92 *Supra*, f.n.26, 1022 *per* Richards J.A. The decision of the Manitoba Court of Appeal was affirmed by the Privy Council on another point: see *In re The Initiative and Referendum Act* [1919] 3 W.W.R. 1, 48 D.L.R. 18.

It is clear from the above that the National Assembly of Quebec cannot transfer the responsibility for any decision regarding separation from itself to the electorate. However, it can make its own decision conditional on support from the electorate shown by way of referendum. A legislature can make the coming into effect of a law conditional upon the happening of a certain event, such as the favorable vote of the people.[93] This is seen in the separation procedure set out for the West Indies Associated States: first, a law in favor of separation must be passed; only after the law is passed, and before the royal assent is given, does the referendum take place.[94]

Conclusion

Canada has had in the past a provincial political party elected to power on a platform which it was legally unable to realize. The Alberta Social Credit party of 1935 was elected on a platform of social credit that was, when legislated, in part disallowed by the Governor-General in Council, and in part held *ultra vires* by the courts.[95] The party carried on as the government of the province despite its inability to realize its philosophy. A similar fate may await the Parti Quebecois.

If the P.Q. should come to power and declare separation unilaterally, the courts will be put in an extremely difficult position. Each party to the dispute will be anxious to have the courts on its side. The courts may, for example, be tempted to give a wider scope to the doctrine of necessity than the letter of the law allows,[96] or they may hesitate to rely on the doctrine of necessity at all because of the almost unmanageably wide discretion it gives the courts.[97] Nonetheless, the decisions that the courts must make in such a situation are decisions that can be made according to established legal principles. They must not become mere exercises of prejudice or inclination by the individual judge.

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[93] *Supra*, f.n.26, 1018 *per* Howell J.A.

[94] *Supra*, f.n.5, Sch.2, s.2.

[95] *Re Alberta Bills* [1938] 3 W.W.R. 337, 4 D.L.R. 433 (P.C.); aff'g. [1938] S.C.R. 100.

[96] *Supra*, f.n.39, 734 *per* Lord Reid.

[97] *Supra*, f.n.41, 331 *per* Beadle C.J.