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Legal Aspects of the Redefinition of Québec's Political and Constitutional Status

Summary of additional observations, analyses and comments

In this update of our original study, we have taken into account all of the factors of the last decade that could lead us to reach different or new conclusions with regard to the redefinition of Québec's political and constitutional status. As in the original study, we have examined one by one the various possibilities for redefining Québec's status, both within the current Canadian constitutional framework and outside it.

First, a number of new elements have arisen with regard to Québec's demands for constitutional reform requiring formal constitutional amendments. One of these elements could marginally facilitate the working of the amending procedure, while several others would, on the contrary, be more likely to further complicate it. The elements that would be likely to cause a failure of the amending process include the following: the political necessity of a pan-Canadian referendum requiring a double majority; consultation of the territorial leaders and the representatives of the Aboriginal peoples (and, in the opinion of some English Canadian constitutional lawyers, the obligation to obtain their consent); the existence of provincial statutes providing for the legal obligation to have constitutional amendments approved by referendum; and, finally, the passage of a federal statute on regional vetoes, which would particularly slow down the process. Thus, all of these factors combine to reduce the likelihood of Québec's traditional demands for constitutional reform ever being met. On the other hand, the obligation to negotiate constitutional amendments proposed by a province, as laid down by the Supreme Court in the *Quebec Secession Reference*, could facilitate the working of the amending formula, although in a rather limited way given that the Supreme Court declared also that such an obligation was not justifiable. Lastly, a re-evaluation of the terms and conditions set forth in section 43 of the *Constitution Act, 1982*, in light of the precedents that have been set in the past decade, now leads us to conclude that, under this so-called "bilateral" procedure, constitutional amendments affirming Québec political authorities in their role of safeguarding and promoting the status of the French language and the distinct nature of Québec civil law could likely be made with only the consent of the Québec legislative assembly and of the federal Senate and House of Commons.

As for the likelihood of achieving the reforms desired by Québec otherwise than through formal constitutional amendments, certain initiatives taken by the federal authorities, the

other provinces and the territories since 1995 illustrate the possibilities, but also the limits, even the dangers, for Québec were it to take such a course. In particular, the 1999 framework agreement on social union—which was signed by the other nine provinces, the territories and the federal government, but which Québec eschewed because it did not contain the guarantees sought—demonstrates that there is often a risk of fragility in alliances between Québec and the Anglophone provinces. Other factors have evolved, becoming less favourable today than they were during the period immediately following the 1995 referendum. Once again, budget surpluses leave Ottawa with more leeway to act unilaterally. The declining support for sovereignty in Québec, and the resulting postponement of another referendum, have also dulled the sense of urgency in the rest of Canada about the need to effect reform.

Finally, in its 1998 decision, the Supreme Court of Canada confirmed that Québec could secede unilaterally, but added that a secession was constitutionally possible by means of the amending procedure. The Court affirmed that if a sufficiently clear majority of Québec voters, in response to a clear question, opted for secession in a future referendum, the federal authorities and the leaders of the other provinces would be obliged to negotiate the secession. However, the Court stopped short of stating what “clear question” and “clear majority” meant, asserting that these issues were, by nature, non-justiciable and should be settled by the political actors themselves. The federal government seized on that invitation, passing the *Clarity Act*, under which the House of Commons must determine, *before* a referendum is held, whether the question is “clear” and, *after* the results are announced, whether, in the event of a majority in favour of secession, the majority is a “clear” one. To avoid confrontation with federal authorities, bolster its negotiating position with English Canada and enhance its credibility in the eyes of the international community, a Québec government intent on holding a third referendum would have to have the referendum question approved by two-thirds of the members of the National Assembly and agree to submit the result of the negotiations to the public in another referendum. In the case of a positive result in a Québec referendum, the other provinces would of course have to be included in the negotiations, and nothing would prohibit the federal government from inviting other actors—such as the Aboriginal and territorial leaders—to participate as well, as it did in the case of the Charlottetown Accord. Nor would anything prevent the federal government from bringing other subjects—such as a discussion about Québec’s borders—to the negotiating table.

Were a Québec referendum to produce a clear majority in favour of secession, and were

Québec and the rest of Canada to agree on the terms and conditions of secession, there would nonetheless be a risk of something going awry in the implementation of the amending procedure, primarily because of the requirement to win approval in a referendum and obtain the consent of Aboriginal peoples established in Québec. There would, however, be ways of breaking the impasse, by calling into play certain concepts of Canadian constitutional law—such as the doctrine of necessity—or by Québec's unilaterally declaring sovereignty, which would succeed or fail depending on Québec's ability to exercise effective authority and on the reactions of the international community.

Finally, we re-examined the hypothesis of the redefinition of Québec's constitutional and political status outside the bounds of Canadian legality, that is, through unilateral secession. In its 1998 decision, the Court concluded that, while international law did not confer a right of secession on Québec, it did not preclude attempting secession, which could succeed and be recognized in international law under the aforementioned principle of effectivity. However, massive opposition by Allophones, Anglophones and, especially, the Aboriginal peoples would probably raise the issue of the territorial integrity of Québec in the event of unilateral secession. The Aboriginal peoples in particular could decide to exercise their own right to self-determination in order to continue to remain part of Canada, thereby giving the federal government a good reason, if it were so inclined, to assert maintenance of federal sovereignty over northern Québec. The Québec government takes the position, with regard to public opinion, that Québec's territorial integrity after unilateral accession to independence would be guaranteed under certain rules of international law, notably under the *uti possidetis* principle. To back that position, it relies primarily on a study conducted in 1992 by five specialists of international law at the request of the Committee to examine matters relating to the accession of Québec to sovereignty (the Pellet report). However, the position put forward in that report is criticized by other specialists of international law. That criticism is analysed in this study. Because of the fierce controversy over the conclusions of the Pellet report, it would be unwise to consider the report as establishing beyond doubt that the territorial integrity of Québec would be guaranteed under international law in the event of unilateral secession and that Québec's domestic borders would automatically become international borders, enforceable against Canada.
