

# Visible Federalism: A Strategy for the Federal Government in the Aftermath of the Referendum

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THIS PAPER WILL SUGGEST that the proper response of the federal government to the results of the Quebec referendum is to seize the initiative by formulating and releasing a solemn declaration. This simple and coherent political document might be called the "Proposal for Change."<sup>1</sup> As a comprehensive national unity package the Proposal for Change would be a sincere and workable response to the demands from Quebec for "change." If necessary, the Proposal for Change could be put to a national referendum, thereby giving the people of Quebec a chance to say "yes" to a positive proposal, rather than voting "yes" to threatening the break-up of the country.

The Proposal for Change must have symbolic resonance. It must be presented in a such a way that the individual proposals are not viewed as "routine," but together form a coherent package which conveys their importance and dignity. The content of the package should not be one-sidedly decentralist. In the long-run, Separatism cannot be defeated by winding down Canada. Unless the federal government shows leadership through its Proposal for Change, the other provinces will take advantage of separatist demands to push an excessively decentralist and right-wing agenda.

Instead, the Proposal for Change must respond to some of the demands of Quebec for greater control over national and local affairs, but at the same time, demonstrate the means by which Canada can be made to work better. This can be achieved through both constitutional and non-constitutional ideas which will be contained in the Proposal for Change. The aims of this document would include highlighting and strengthening the advantages of Federalism by:

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<sup>1</sup> Other possibilities include "Decision for Change" or "Declaration of Renewed Federalism."

- (i) raising the visibility of the operational federal presence throughout Canada, including Quebec;
- (ii) broadening the space in which an individual can achieve economic, personal and spiritual growth;
- (iii) achieving efficiencies in the delivery of government services through economies of scale;
- (iv) amplifying the voice of smaller communities when dealing with the larger world;
- (v) promoting democracy by achieving the checking-and-balancing effect of having two orders of government operating in the same community; and
- (vi) promoting tolerance and respect for diversity by requiring local majorities and factions to view themselves in the context of a much larger and even more diverse national community.

The Proposal for Change would respond to some of Quebec's Meech demands, but would also include nation building measures, such as strengthening the economic union and rebuilding the social union. While this would be a large and ambitious strategy on its own, the Proposal for Change should be supplemented with a specific program designed to pre-empt Quebec from holding any more referendums as manipulative as those in 1980 and 1995. The federal government must lay down the ground rules for secession.

The people of Quebec have been misled about the morality and legality of authorizing Quebec's secession by a simple majority on a vote whose timing, question and voting procedures were determined by a secessionist local government. The federal government must insist that secession requires a supermajority on a vote with a clear question, conducted according to rules that permit all Canadians to participate in the debate.

## I. THE PRINCIPLED CASE FOR FEDERALISM

THE PROPOSAL FOR CHANGE MUST INCLUDE, or be accompanied by, a strong argument outlining the benefits of Federalism for Quebec and Canada. Many Quebecois are not going to be persuaded by arguments that Canada is rated highly as a place to live by the United Nations, or that Canada is geographically impressive, or that Canadians are a kind and decent folk. A secessionist could argue that in its current form, Canada's positive features persist *despite*, rather than because of, its system of government. The limited "success" of the current "Canada," a secessionist could argue, are due to cultural, geographical, and economic factors which would persist even if Quebec separated. These factors would continue in an independent Quebec and in the rest of Canada. Both would continue to have the economic benefit and strategic security of bordering with the United States. Both

would continue to have an educated population with a culture of non-violence, respect for democratic process, and some commitment to economic equity. Citizens of the Republic of Quebec could still enjoy Canadians as neighbours. They could continue to visit the Pacific Ocean, the high Arctic or the Rocky Mountains whenever they choose.

The federal government must make the case that Federalism has strong advantages as a system of efficient, democratic and tolerant government. Moreover, it must demonstrate that the government in Canada has had a positive influence on Canadian society, and that a fractured Canada might be replaced by two parts which amount to government in a less efficient and stable manner, and whose societies in turn become more parochial and less tolerant. The case for Federalism should be outlined as follows.

### **A. The Tide of History**

The federal government must illustrate that Quebec Separation runs against the tide of history. The “cutting edge” idea among advanced democracies is the evolution towards more political and economic integration. The European Union is exemplary. Promoters of the European Union are struggling to introduce many features of federal Canada, such as the elimination of border controls and a common currency. In many respects, the central organs of the European Union already have *more* direct authority over its citizens than does the central government of Canada. At the same time, unlike Canada, the E.U. has not yet overcome its “democratic deficit” — the lack of accountability by its central institutions to a directly-elected European Parliament.

### **B. Federalism as an Efficient Form of Government**

The federal government must respond to the argument that Federalism is synonymous with overlap and unnecessary duplication. Federalism permits great economies of scale. An example might be Premier Bouchard’s plans to close down many of Quebec’s “embassies” in foreign countries, allowing the Canadian embassy to exclusively represent Quebec interests.

Another response is that Federalism can produce efficiencies by creating unified or harmonized regulatory regimes. Transactions currently within Canada are actually simplified and facilitated by the role of the federal government in areas such as maintaining a common citizenship, a common currency, uniform laws in areas such as banking and intellectual property, and harmonized laws in areas such as public health insurance and pensions.

### **C. Federalism and the Amplification of the Voice of Smaller Communities**

The federal government must also point out that in dealing with the larger world, there is strength in Canadian unity. The people of Quebec must ask themselves how much clout would an independent Quebec have in negotiating trade deals with the United States or the other partners in the World Trade system?

### **D. Federalism and “Checks and Balances”**

One of the great benefits of Federalism which must be stressed is that it supplies a democratic “check and balance” that would otherwise be missing from our system. We permit temporary parliamentary majorities to wield almost unlimited authority for four or five years at a time. The existence of both federal and provincial orders of government, however, limit the excesses that would otherwise take place. Ideological extremism, corruption or ignorance on the part of one order of government is identified, criticized and resisted by the other order.

The existence of two different and sometimes competing orders of government ensure that no political party becomes too powerful. Absent Federalism, a single party that captures the government would have a monopoly on patronage in all forms, and might be able to perpetuate itself in power for an unhealthy length of time.

Quebec separatists indicate they would like their government to have all the levers necessary to manage the society. The possibility is that all the levers might be controlled for a decade or more by a party they may oppose. This is a disadvantage of Separation that must be highlighted.

### **E. Federalism and the Space for Individual Growth**

Federalism expands the sphere in which an individual can learn, pursue a career, conduct a business or participate in public affairs. The ultimate end of government is the freedom and welfare of the individual. Secessionists ask the people of Quebec to closet themselves in a smaller and more parochial world. United States immigration laws are becoming more restrictive. It must be stressed to the people of Quebec that their children may be confined to working in an economic space that is going to be one quarter or one fifth as large as their current one.

### **F. Federalism and Tolerance**

In a large federalist country, it is more difficult for an ethnic or ideological faction to take over the political and social system. To do so, it must form coalitions with other groups. For example, the Mulroney Government was an amalgam of Reformers, Conservatives and Bloc members. Every faction must develop the ability to consider matters from the perspective of other groups and interests. Perhaps one

of the reasons for Canada's culture of tolerance is that its national system of government constantly involves negotiation and accommodation among diverse groups and interests. Within any province in Canada, a minority will be less isolated and vulnerable because it can draw moral and political support from like-minded people in the larger nation. The national government has a useful role as a detached and impartial mediator when local disputes become heated. For example, the federal government's intervention in the Oka crisis was helpful for both the provincial government and the aboriginal community.

All of the above advantages of Federalism must be stressed by the federal government. However this alone will not save Canada. A strong case for Federalism must be accompanied by change.

## II. THE RHETORIC AND SYMBOLISM OF CHANGE

### A. "Change" is Vague and can Create Misunderstandings

Many Quebecois voted "yes" in order to strengthen Quebec's bargaining power or out of a vague wish for "change." The rhetoric of "change" invites much confusion and misunderstanding. "Change" always sounds good, while the "status quo" has a dull and stodgy ring to it. But what particular "changes" does the Quebec electorate actually want? Americans who wanted "change" voted for Clinton in 1992, then the anti-Clinton Republicans in 1994. In the 1980 referendum, Trudeau promised "change." Perhaps some in Quebec thought he meant decentralist and ethnocentric change. But Trudeau instead produced the centralist and liberal *Charter of Rights*.

In the aftermath of the 1995 referendum, many Quebecois do not have a clear conception of what change they actually want, or what they actually to achieve with their "bargaining power."

### B. The Political Reality

The federal government must be able to satisfy the emotional demand of Quebec that their "yes" votes will be taken seriously. "Yes" voters must be deemed to have considered the status quo unacceptable. Therefore, being taken seriously means that the rest of Canada accepts "change." It is not enough to produce concrete and useful changes to the way Canada works. To respond to the emotional aspect of the Quebec referendum, the federal government must present its changes in a package that has symbolic resonance. The "packaging" must convey that the changes are weighty and important, and not just "politics as usual."

## C. Change by Way of Formal Constitutional Amendment

### 1. *Advantages of Constitutional Amendments*

The written constitution of Canada is widely regarded as an almost “sacred” text. Formally entrenched constitutional norms seem “sacred” because they are supreme over other forms of law, and because they are unlikely to ever be repealed or amended. Such amendments do, therefore, have the symbolic resonance needed to satisfy Quebecois that there has been important and durable “change.” Furthermore, thanks in large part to the previous federal government, many Quebecois have been convinced that they were dealt a constitutional affront by the “night of the long knives,” and that only a formal constitutional remedy can undo the damage.

### 2. *Disadvantages of Formal Amendments*

It is, however, extremely difficult to obtain a sufficient level of consensus to formally amend the constitution of Canada. Opening up the Quebec agenda, moreover, invites other provinces and aboriginal groups to demand that their constitutional agenda be considered as well. Furthermore, any proposal for formal constitutional amendment will inevitably be compared with earlier versions of that amendment in the Meech or Charlottetown Accords. Specifically:

- (i) if a Meech Lake or Charlottetown clause is proposed without change, critics say that those accords have already been rejected;
- (ii) if, however, the clause is varied in a pro-Quebec-nationalist direction, critics will say that Ottawa is pandering to Quebec; and
- (iii) if the clause is moderated to meet concerns about central authority or human rights, Quebec nationalists will cry that Ottawa is insulting them with the offer of a watered-down amendment.

The Proposal for Change should include a number of fresh ideas on both the constitutional and non-constitutional front so as to avoid comparisons with Meech Lake or Charlottetown.

### 3. *Timing of Constitutional Amendment*

There is no point in making constitutional overtures to the PQ government of Quebec, which is interested in outright independence, and not merely a revised form of Federalism. It would be a strategic mistake to make the proposals now, right after the referendum. The PQ government will deride and ridicule the proposals. Rather, the objective in the Proposal for Change should be to give Quebecois the confidence that there are realistic prospects for constitutional changes after the PQ is ejected from office. In the meantime, the federal government should use non-

constitutional means to substantially improve the operation of the federal system. These improvements would be for the benefit of not only the Quebecois, but Canadians generally.

In the next few years, the PQ government will become very unpopular as it seeks to deal with the provincial debt. Parizeau spent, spent, spent prior to the referendum, and avoided taking the drastic cutbacks needed to deal with the massive provincial debt in Quebec. It is enough, at this stage, for the federal government to include, in its Proposal for Change, the ideas for constitutional reform that will be pursued when Ottawa has a genuinely interested partner in Quebec City with which to negotiate.

#### **D. Non-Constitutional Changes**

Most of Quebec's five "Meech Lake" demands could be implemented in practice through non-constitutional means. Parliament could, for example, move immediately to establish a consultative role for provinces with respect to Supreme Court of Canada appointments. The Meech Lake Accord, unfortunately, gave Quebec City far more authority than Ottawa over the appointments. The federal government was relegated to the second-rate role of choosing from a list of names forwarded by Quebec City (imagine the list of names that would come from the current government of Quebec; Ottawa's "choice" would be among four or five hard-line Quebec nationalists).

To avoid comparisons with Meech Lake and Charlottetown, it should be possible to devise a system of Supreme Court of Canada appointments which includes novel features, such as setting up a consultative committee consisting of members of the bar and the wider public, but which still gives the provincial government of Quebec a very powerful voice in the outcome.

### **III. NEW IDEAS FOR RESHAPING FEDERALISM**

THE FEDERAL GOVERNMENT IS BEING PRESSED on all sides by decentralist demands, many of which are traditionally right-wing in their purpose or effects. Someone must, however, speak for a vision of Canadian community, which includes an economic and social union. That "someone" must be the federal government, and in particular, the Prime Minister.

The Prime Minister cannot, however, resort to the traditional means of promoting the national vision for the following reasons:

- (i) Canada is still in a debt crisis;
- (ii) Ottawa is surrounded by right-wing provincial governments;
- (iii) even if they are good ideas, "old" ideas will be dismissed simply by being "old" and not responding to demands for "change";

- (iv) world conditions have changed dramatically; and
- (v) there is a genuine need for new ideas. Many of our problems such as massive national debt and an eroding sense of national unity are partly the product of old ideas that did not work.

The Prime Minister must articulate a "Renewed Federalism." It would renew the federal system in a way that makes it more efficient, and which shows how it is possible to meet some of the concerns in the right wing/decentralist camp while still maintaining an active, visible and nation-building role for the federal government.

### A. The Economic Union

The Agreement on Internal Trade (AIT) is a belated start on strengthening the Canadian economic union. The Proposal for Change should include a vision of how the AIT could be significantly strengthened. In particular, it could include a proposal that the internal free-trade regime be made legally binding, and that there be established a nationally binding system of dispute resolution. A strong argument can be made that the federal government has the authority to unilaterally implement such a regime under its trade and commerce powers.<sup>2</sup>

In any event, the Proposal for Change could include something similar to the following: the federal government is committed to strengthening the AIT, but will give federal-provincial co-operation one more chance. If adequate progress is not made, Parliament will take decisive action to ensure, in the interests of national unity and economic progress, that the level of economic integration within Canada constantly matches or exceeds the standards established by the North American Free Trade Agreement.

### B. The Social Union

The federal government must continue to play its role in equalizing the fiscal resources available to provinces to deliver health, education, and social security. The current system, however, tends to produce very little return in terms of national unity. Provinces complain about federal conditions attached to transfers and about eroding levels of financial support. In the meantime, the role of the federal government is largely invisible. Parliament allocates billions of dollars to help improve the lives of Canadians, yet it receives no political credit. Parliament is not seen, as it should be, as demonstrating a concrete and positive concern for the lives of individual Canadians. Ottawa must therefore try some new ideas.

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<sup>2</sup> See my forthcoming article in the annual *State of the Federation* publication by the Queen's Institute of Intergovernmental Relations.

In rebuilding Canada's social union, there should be some shift from federal transfers to provinces towards direct federal transfers to individuals in order to establish a direct, visible and positive relationship between the national government and the individual, and empower the individual to take advantage of programs offered by both the private sector and provincial governments. The federal government will thereby lessen its direct fiscal relationship with the provinces, and leave them free to deliver and regulate programs as they see fit. Among the many possibilities are:

- (i) an enriched program of student loans and grants for post-secondary education;
- (ii) replacing the role of the federal government in delivering labour market training and replacing it with a voucher system. Canadians would be issued vouchers with which they could purchase the training they consider appropriate from the private sector or provincial public institutions. The provinces would be left the exclusive role of actually delivering or regulating labour market training; and
- (iii) increasing the use of programs with "negative income tax" features in order to help poor Canadians.

The advantages of a direct-grant approach are as follows:

- (i) the federal government does not have to maintain an expensive bureaucracy to actually administer the programs;
- (ii) there is less overlap and duplication with respect to provincial program delivery;
- (iii) individual Canadians are empowered to make their own choices in education, training, and household spending, rather than having their lives dominated by bureaucrats;
- (iv) individual Canadians who receive direct transfers from the federal government will have an enhanced appreciation of the positive role it can play in their lives, rather than viewing it simply as a distant authority that levies heavy taxes; and
- (v) relatively small amounts of money can produce very large returns in terms of establishing a visible and positive role for the federal government.

### 1. Healthcare

Healthcare is an aspect of the social union that has special symbolic importance for Canadians. The Proposal for Change could include a plan whereby the federal government would continue to affirm many key aspects of the *Canada Health Act*, but at the same time allow somewhat more play for provincial experimentation.

One idea would be to establish a national commission on core medical services. This body could issue guidelines on what medical services (e.g., annual check-ups) can be legitimately removed by a province from the scope of universal coverage.

#### IV. THE PACKAGING OF THE PROPOSAL FOR CHANGE

THE PROPOSAL FOR CHANGE SHOULD BE a solemn political declaration. It should be approved by the House of Commons and Senate after wide public consultation, and expressed in a form that can, if necessary, be submitted to a national referendum. The federal government should *not* commit itself to obtaining the support of all of the provincial premiers for the Proposal for Change. To do so is to give a veto to every provincial premier, and invite endless delay and squabbling. The federal government should not even seek the formal approval of the premiers. To ask for consent, and then be denied it by several Premiers — including the current Premier of Quebec — would be to discredit the proposal.

Instead, the federal government might initiate a forum in which Canadians would be asked to address the broad outlines of a “Renewed Federalism.” Canadians would not be asked to address constitutional issues only. Instead, they would be asked for a broad vision of the future. Premiers would be invited to give their input as well, but the ultimate audience for the Proposal for Change would be the people of Canada, including the citizens of Quebec. If push comes to shove, the federal government could threaten to submit the Proposal for Change to a national referendum.

##### A. Contrast with the Charlottetown Accord

The Charlottetown Accord was defeated in about half of Canada’s provinces. But about a ten percent shift in opinion in even the most negative provinces would have produced a nation-wide victory. If the federal government learns the lessons of Charlottetown, it should be able to draft a Proposal that has a broad basis of support throughout the country. The Charlottetown Accord was too complex. The Proposal for Change, which is a set of political principles only, can be much more simple and concise.

The Charlottetown Accord asked Canadians to agree to permanent changes to their “sacred text.” The Proposal for Change, by contrast, would be a simple set of basic principles that can be revisited in the future. Canadians would not be asked to approve an irrevocable change to their federal system. Instead, they would be asked to approve a broad plan to deal with the next chapter in the very long story of Canadian evolution.

The Charlottetown Accord was a herculean attempt to respond to demands from many different special interest groups. The federal government acted as a broker of sectional interests. It failed in its duty to “speak for Canada”: to articulate

a vision of Federalism in which the national government continues to play an active and unifying role. It can do so by means which are less costly, more efficient, and which minimize overlap and friction with provincial programs.

### **B. Consolidating Decisions Already Under Review**

The Axworthy review of social programs has already taken place. The Martin budget included a major revision to the system of federal-provincial transfers. The healthcare system is under stress across Canada, and one way or another, changes will come. So, much thinking has already been done in many of the areas that would be included in the Proposal for Change. The task would be to shape federal policy initiatives into a *coherent* and *balanced* package of reform.

Let me put it another way. It could well be that within another three years Canadian Federalism will be substantially reworked anyway. But if the reworking comes in the form of a series of smaller initiatives, there will not be a coherent shape to the reforms. Furthermore, the people of Quebec will not see a specific response to their “demands for change.” Change will have indeed occurred, but in a fragmented and largely unnoticed manner. There is an old maxim about legal justice: “it is not enough that justice be done; it must be seen to be done.” In the current political climate in Canada, it is not enough that there be change; it must be seen that there is change. The Proposal for Change would be a way to consolidate those changes into an integrated and highly visible package.

Along with the Proposal for Change, the federal government must outline the terms by which Quebec can separate from Canada.

## **V. THE “GROUND RULES” FOR SECESSION**

### **A. The Role of Canada**

In the past, many federalists have refrained from formulating a position on the procedures that would authorize a secession. It was thought that doing so might make the option appear more thinkable. It might also risk the impression that federalists are trying to rig the rules to win the game. But passivity on the federalist side is no longer a workable option. Thanks to the near-victory of the Parizeau side in the 1995 referendum, separation is now eminently thinkable. Once again, the separatists were allowed to rig the rules in their favour, including:

- (i) asking an ambiguous question;
- (ii) purporting to define a victory as 50 percent of the voters;
- (iii) purporting to define any “yes” vote as “irrevocable,” whereas “no” votes are considered just a temporary set-back;

- (iv) creating an impression that a separating Quebec could take with it all of its current territory, regardless of local preferences; and
- (v) attempting to limit the ability of citizens in the rest of Canada to fully participate in the debate.

Under the Canadian constitution, no province has the right to separate unilaterally. The amending formula must be consulted. That formula, incidentally, is essentially the same as the one with which Quebec concurred as a member of the "gang of eight" during the Patriation round of negotiations in the early 1980s.

The general amending formula is "7/50." But unanimity is required on certain matters, including "the office of the Lieutenant Governor," who is the federally-appointed head of the provincial executive. Secession would eliminate the role of the Lieutenant Governor, and so, in my view, technically requires the unanimous consent of all provinces.

It is by no means impossible that such consent would occur, given a clear and overwhelming choice by the people of Quebec to secede. But the federal government should make clear, in no uncertain terms, that it will uphold the rule of Constitutional Law. It has a constitutional duty to do so. The Constitution is the "supreme law of Canada." Unilateral secession cannot be tolerated. It must be negotiated and ratified through lawful means.

Unless the rule of law is upheld with respect to any Quebec move to secede, there is a real risk of chaos and, possibly, violence. Soldiers and police cannot be uncertain as to where civil authority lies.

It is simplistic for secessionist politicians to argue that the people of Quebec should have control over their own destiny. If and when they fracture Canada, they will radically alter a system that affects over twenty million other citizens. Such decisions must be made jointly.

## **B. More Than a Majority**

The federal government should stipulate that more than a simple majority of Quebec voters is required. Canada routinely follows the rule that fundamental constitutional change requires more than a simple majority vote in a referendum or legislature. Under our general amending formula, a supermajority is required (under the 7/50 or unanimity formulae). Again, the general amending formula in the current constitution is essentially the "gang of eight" proposal that had the support of Rene Levesque.

Fundamental change usually requires a supermajority for these reasons:

- (i) *binding the future*: the decision will irrevocably bind future majorities. A high level of consent should be required for a decision that cannot be undone by a simple majority in the future;

- (ii) *stability*: people should have some confidence in the durability of the fundamental rules which govern their lives. A climate of insecurity is created by permitting radical change as a result of a simple majority vote on a single occasion;
- (iii) *sobriety*: we all have a tendency to focus excessively on current issues, personalities and sentiments, rather than taking the longer view. Requiring a supermajority for radical change is a safeguard against making decisions in haste, and then repenting in the future;
- (iv) *voting regularity*: there is a strong chance that any referendum will be marked by disputes over voter eligibility, campaign spending rules, and ballot-counting. In addition, contingencies such as the weather will affect turn-out among certain minorities (e.g., the economically disadvantaged and elderly) which may skew the results. Requiring a supermajority on fundamental change obviates the possibility that the legitimacy of radical change will be shrouded by disputes over the rules under which the decision was made; and
- (v) *minority rights*: constitutions typically protect the rights of individuals and minorities, and not only the democratic rights of the majority to make decisions. A supermajority ought therefore be required to undermine these safeguards. A secession vote would jeopardize the constitutional rights of individuals and minorities under the Canadian Charter of Rights and Freedoms. These rights include the right to reside anywhere in Canada, to retain Canadian citizenship, to use the medium of expression of one's choice and to send one's children to publicly-funded minority language schools.

Quebec governments have themselves consistently demanded supermajoritarian rules for constitutional change within the Canadian system. Quebec's "Meech Lake" demands included extending a Quebec veto over matters such as changes to federal institutions (the Senate, Supreme Court of Canada, admission of new provinces). The existing constitution gives Quebec and other provinces a veto (or with some provisions, the right to "opt out") of any provision that adversely affects provincial rights.

In general, over many decades, governments of Quebec have insisted that a government representing about a quarter of Canadians, and elected for provincial purposes only, should have the right to block constitutional changes, even if supported by a vast majority of Canadians as a whole. Implicit in the Quebec position are these two principles: (i) that minority rights (including the political rights of a province) should be protected from diminution by a simple majority; and (ii) in a federal system, common institutions should not be changed without a very high level of consent.

The kind of supermajority required can vary with the nature of the change involved. The American constitution requires an especially high level of consent of changes to the amending formula. Secession is about the most drastic and irreversible change, and federal declarations and legislation can reasonably propose special rules to deal with it.

According to the Supreme Court of Canada, the federal level of government has two kinds of authority under its “peace, order, and good government” power. It can deal with emergencies and can deal with subject matters of national concern (such as air transportation, radio and television broadcasting, the designation of a national capital region). The category involved must be well-defined and limited in scope and not intrude excessively on matters within purely provincial authority.

Both branches of authority, in my view, support the position that the federal level of government has the authority to enact legislation dealing with any referendums on the issue of secession that are conducted by any level of government. The break-up of Canada is never a purely provincial subject matter. Any affirmative vote in a referendum, even a consultative one, would immediately trigger a political and economic crisis in Canada.

Using its authority of referendums on secession, the federal government should consider enacting legislation defining basic principles that must be followed by any and all referendums dealing with the issue of secession. Among the basic principles it should be guaranteed that:

- (i) every Canadian can participate in the debate, regardless of where it is held;
- (ii) to facilitate partition of a province, if necessary, every provincial referendum on secession must provide for the tallying of votes on the basis of federal or provincial constituencies, as well as an all-province count;
- (iii) no level of government can hold a referendum more frequently than every fifteen years; and
- (iv) any referendum that in any way suggests the possibility of secession must include the ballot a question that unequivocally asks whether the voters favour outright independence.

The federal government should be also acting to seize a higher ground on the issue of direct democracy. The current amending formula is based entirely on consent by legislative bodies. The federal government should be advocating a formal amending formula which at least provides an alternative route to approving amendments: direct approval by the people (Prime Minister Trudeau has proposed a dual-track approach in his original Patriation proposal).

In the meantime, until there is a formal “direct democracy” track in the Canadian constitution, the federal government should enact a new law on consultative referendums. It would establish the basic principles under which the federal

government can hold its own consultative referendums. These principles would serve as a model against which provincial referendum laws could be assessed by public opinion. The law might further declare that before the House of Commons votes on any constitutional amendment in the wake of a consultative referendum, it may obtain the formal opinion of a designated official (say, the federal Chief Electoral Officer) on whether that referendum conforms to the "Basic Principles."

In challenging Quebec on the "pro-democracy" front, the federal government might wish to point out that Quebec governments have traditionally insisted not only on a veto, but a veto that can only be exercised by the provincial legislature. Quebec governments have shown no willingness to accept a Quebec veto which is placed in the hands of Quebec voters. Why do governments of Quebec propose that direct democracy can authorize separation, but not constructive improvements within the federal system?

In Bill C-110, the federal government says it will not move to amend the constitution on certain matters without the consent of each of five regions, including Quebec. The principle in Bill C-110 should be clarified so that it permits the consent of a province to be expressed by its people through a consultative referendum.

A mechanism could be proposed for relating the "legislative" and direct democracy tracks under the Bill C-110 principle. The legislature would first be given a chance to express its approval or disapproval. If it does not approve, the people of the province would be directly consulted. Perhaps a 60 percent affirmative vote might be required to "override" a provincial legislature that has formally voted against a proposal.

The "principle" in Bill C-110 should probably be expressed and developed through political statements, rather than formal legislation. As a piece of legislation, Bill C-110 is open to constitutional challenge. The House of Commons, as a distinct entity, has the authority under the Constitution of Canada to initiate and approve amendments. Bill C-110 purports to impose legal obstacles to the manner in which some members of the House (those belonging to Cabinet) and the institution as a whole (inasmuch as members of the Cabinet have a key role in its operation) exercise that authority. It may therefore be unconstitutional.

The foregoing analysis has suggested a number of means whereby the federal government can express or insist on its views concerning the ground rules for secession. Regardless of which specific means are actually chosen with respect to various issues, the basic principles that federal government intends to pursue could be included in its Proposal for Change, or released concurrently.

## VI. PUBLIC CONSENT TO THE PROPOSAL FOR CHANGE

THE RELEASE OF THE PROPOSAL FOR CHANGE, along with deliberate but expeditious federal efforts to implement it through administrative and legislative practice, should be sufficient to persuade many "yes" voters in Quebec that they have been heard and respected. Canadians are weary of referendums. But the federal government should keep in reserve the option of holding a national referendum on the Proposal for Change.

Suppose that the Proposal for Change is issued on 1 January 1997. By then, the provincial government of Quebec will finally have had to take sharp austerity measures to deal with the provincial debt crisis. If the BQ or PQ denounce the Proposal for Change (as they inevitably will) the federal government can do some polling, and consider the possibility of putting the Proposal to a national referendum.

If the federal government does hold out the offer of a national referendum, and the BQ and PQ resist the challenge, they may well be discredited. If a referendum is held, the federal government might take a gamble, and take the Proposal directly to the people of Quebec. A positive vote would be the end of separatist threats for a very long time.

I would emphasize again that the referendum possibility is only an option to be held in reserve. The basic plan for the Proposal for Change would be to make it a solemn political declaration of the federal government, supported by resolutions of the House of Common and Senate.<sup>3</sup>

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<sup>3</sup> For a more detailed statement of my philosophy of constitutional reform, please see *Opting In: Improving the 1992 Federal Constitution Proposal* (Hull, Que: Voyageur Publishing, 1992). For more recent views on the economic and social union respectively, see "Assessing the Agreement on International Trade: the Case for a 'More Perfect Union' " in *State of the Federation* (Kingston: Queen's University Press, 1995) 189; and "A New Federal Role in Building the Social Safety Net for Disabled Persons" (1994) 22 Man. L.J. 395.