LEGAL ASPECTS OF SECESSION

I. *Introduction*

Any discussion of the legality of Quebec's separation from Canada must, because of the nature of the topic, be almost purely academic and devoid of practical value. Should the people of Quebec decide they they wish to secede from from Confederation, the decision would be a political one and the action taken to affect that decision would be either political or military depending upon the extent of the opposition from the rest of Canada. All the legal arguments in the world could not prevent the Quebecois from carrying out a decision to secede.

The effect of legal arguments in reversing or preventing the carrying out of a political decision was amply displayed by the Rhodesian and American Civil War cases. In both circumstances the courts declared the revolutionary regimes illegal,[1] and in both cases these judicial pronouncements were almost totally ineffective. It is unlikely that a decision of any court in Canada could reverse the tide of separatism if the political decision had been made. In addition, it is unlikely that Canada and Quebec could even agree as to which court, if any, would be competent to decide on the legality of secession.

The only stage at which a legal argument, on such a case as secession, can play an effective role is at the stage before the political decision is finalized. The legal argument can affect the political decision to separate.

People are generally willing to give more support to a cause which is legal than one which is illegal. An argument which shows that secession of Quebec is legal could greatly enhance public support, especially in Quebec, for the separatist cause, while a contrary proof could seriously damage the cause. Since public support is essential in any move by Quebec to secede, the legality of secession can play a substantial role in the political decision-making process.

Both Quebec and the rest of Canada are presently at that stage in the political decision-making process where a discussion of the legality of secession can have its maximum effect. Separatism is being seriously considered as one of the alternatives open to Quebec for resolving its dissatisfaction with the present status it occupies in Canada.[2] Several separatist organizations have been formed in Quebec,

1. **Madzimbamuto v. Lardner**—Burk (Rhodesia).
2. See **Report of the Royal Commission of Inquiry on Constitutional Problems** (Tremblay Report) Quebec 1956 Vol. II.

public opinion is rapidly being polarized and an English-Canadian backlash seems to be shaping up. However, the Quebec government has not made its final decision upon what course it will follow, and the federal government has not yet decided how it would react to a Quebec decision to separate. Opinions can still be swayed and the ultimate decision is still in the making. It is at this stage that the time and efforts required to produce a paper on the legality of secession can be justified by the practical effect such a paper could have.

II. *Secession By Constitutional Amendement*

A. *Formal Amendement*

The purpose of this paper is to examine the various methods of seceding which would be open to the province of Quebec and to evaluate the legality of each of these methods.

The first and most obvious method by which Quebec could secede from Canada is through an amendment to the British North American Act. It was by this act that Quebec became part of Canada and by amending the act Quebec could be taken out. There is no doubt that if such an amendment could be made, the secession of Quebec would be legal, but the question is, would such an amendment be possible considering the present amending process?

An amendment of such magnitude as would be required to take Quebec out of Confederation is clearly not of the class of amendments which it is within the competence of the provincial legislature to make.

> "Although the Privy Council has confirmed the provinces in a wide range of powers, it has never said anything to support the right of the provinces to withdraw from Confederation."[3]

It is conceded that provincial legislators are competent to amend the B.N.A. Act in regard to sections of a purely local nature (such as section 70, 72, 83 and 84), but it is clear that a secession amendment would go beyond the area of purely provincial concern.

I would further submit that the power to amend the B.N.A. Act as substantially as would be required to take Quebec out of Confederation is beyond the legislative jurisdiction of the Federal Parliament. The 1871 amendment[4] gave to the Parliament of Canada the power to establish new provinces[5] but does not confer the power to

3. J. A. Corry and J. E. Hodgetts: **Democratic Government and Politics** (Toronto, 1959) p. 559.
4. **British North America Act** (1871) 34 - 35 Vict. c. 28 (U.K.)
5. **Ibid.**, section 2.

take provinces out of Confederation. Broad amendment powers were also conferred on the Federal Parliament by the 1949 Act[6] but it would appear that even these powers would not be wide enough to deal with secession of a province. The 1949 Act specifically excluded federal authority to deal with the Constitutional Act of 1791 or with sections 92, 93, 95, 133, 20 and 50 of the B.N.A. Act. I would submit that to allow Quebec to secede it would be necessary to repeal a large portion of the Act of 1791 and to amend section 93 and 133. In addition, a court would probably find that since the secession of a province was not contemplated by the 1949 Act, that the power to allow secession was not granted by it.[7]

It would seem therefore that the only formal method of attaining a secession amendment would be by address to the Imperial Parliament. A review of precedent makes it clear that such an address would have to be made jointly by the Parliament of Canada and Quebec and might even require the consent of the legislatures of the other provinces. It is doubtful that a unilateral address by the government of Quebec would convince the Imperial Parliament to take the required action. However an attempt by Quebec to do this would not be unprecedented.

The strongest legal case which has yet been made for state secession from a federal union was made by the State of Western Australia. In 1935 the government of Western Australia petitioned both houses of the Imperial Parliament, as well as the king, with a view to achieving a constitutional amendment which would allow the State of Western Australia to secede from the Australian Commonwealth. The petition had passed through both Houses of the State Legislature and was signed by the leaders of all political parties. In addition the petition was backed up by a referendum in which two-thirds of the state's voters had expressed a desire to separate. Despite all this support, a Select Committee of Lords and Commoners refused to hear the petition on the grounds that:

> ". . . it was not proper to be received since it prayed for legislative action which the Parliament of the United Kingdom would be incompetent to take except upon the definite request of the Commonwealth of Australia conveying the clearly expressed wish of the Australian people as a whole."[8]

Such a precedent would seem to destroy any chance Quebec may have had of seceding by way of constitutional amendment without the con-

6. **B.N.A. (No. 2) Act (1949) 13 Geo. VI C. 81 (U.K.).**
7. "The Commonwealth Parliament (of Australia) does not possess the power to enable a state to secede . . ." J. A. Maxwell "Petition to London by Provincial Governments" (1936) 14 Can. B. Rev. 783 at 738.
8. P. Gerin-Lajoie. **Constitutional Amendement in Canada** (Toronto, 1950) p. 144.

sent of the Canadian people. However, the Australian precedent can be distiguished on two grounds. First, the preamble of the Australian Constitution states that the colonies "have agreed to unite into one indissoluble Federal Commonwealth." The B.N.A. Act makes no reference to "indissoluble". Secondly, the Australian Constitution contains a comprehensive amending procedure though secession "could not be achieved through the process of constitutional amendment embodied in the Australian Constitution."[9]

Though the Australian case was probably the strongest, it was by no means the only attempt to extract, from the Imperial Parliament, constitutional amendments to allow for secession from a federal union.

> "Indeed, as early as 1868, this rule (set out by the Select Committee in the Australian case) was applied to the new Canadian Confederation when a petition from Nova Scotia, not supported by Ottawa, was rejected in London."[10]

The value of the Nova Scotia precedent is lessened somewhat by the fact that it was not supported by a referendum and that, in the end, the federal government acceded to Nova Scotia's demand for a bigger share of the federal tax dollar. In fact the Tremblay Report seems to treat the Nova Scotian attempt at secession as no more than a half-hearted threat by which to get more money.[11]

Three further unilateral petitions from Canadian provinces to London were rejected because of the absence of support from Ottawa,[12] but none of these dealt with secession and only one requested a constitutional amendment.[13]

Despite the fact that a petition from Quebec would probably try to distinguish itself from the above precedents on the basis of Quebec's special status within Confederation (discussed below), it is submitted that these precedents clearly establish two points. First, a unilateral petition by Quebec, seeking a Constitutional amendment to facilitate secession, would be ignored by the Imperial Parliament. Secondly, such a petition would be granted if concurred in by the Canadian Parliament "conveying the clearly expressed wish of the (Canadian) people as a whole".

Thus it is submitted that it is legally possible for Quebec to secede from Confederation by means of a formal constitutional amendment

9. **Ibid.**, p. 144.
10. **Ibid.**, p. 193.
11. **Tremblay Report** (op. cit.) Vol. I p. 51.
12. (a) 1874—B.C. re: building of trans-continental railway.
    (b) 1877—P.E.I. re: fishing rights.
    (c) 1908—B.C. re: federal subsidies.
13. 1908 petition asked for amendment of tax-sharing provisions.

if the Canadian people were willing to permit secession. However the possibility of such permission being granted is so remote that it is unnecessary to discuss the technicalities involved in this method of secession.[14]

B. *Informal Amendment*

Though formal constitutional amendment must be rejected as a practical method of achieving secession, it may be possible for Quebec to achieve the same result by informal methods. The most promising results in this regard would probably eminate from that of Constitutional Law involving inter-governmental delegation of powers. It was held in the Nova Scotia Delegation case[15] that:

> "Neither the Parliament of Canada nor the Legislature of any province can delegate one to the other (to be exercised by that other as a Parliament or Legislature as the case may be) any of the legislative authority respectively conferred on them by the B.N.A. Act and especially by s.s. 91 and 92 thereof."[16]

This case clearly prevents the "handing over (of) a plenary and primary legislative discretion".[17] Despite this strong stand against inter-governmental delegation at the primary legislative level, the Supreme Court has allowed delegation of power from one level of government to executive and administrative bodies of the other level of government.[18] In addition to this limited delegation power there seems to be a new concept developing in Canadian Constitutional Law. This new concept is exemplified by the "umbrella" treaty which the Federal Government signed with France in November of 1965. This treaty enables provincial governments (in this case Quebec) to make "agreements" with foreign countries under the umbrella of the federal blanket treaty.

By combining this limited delegation power with the "umbrella" concept it is submitted that Quebec could be given the status of an associate state without a formal constitutional amendment. This could be achieved if the Parliament of Canada would enact broad enabling acts dealing with each of the federal legislative powers under section 91 of the B.N.A. Act. Power to administrate these acts could then be delegated to the executive branch of the Quebec government. The

14. If amendment to the B.N.A. Act were sought, it would be necessary to discuss which sections need be amended, which repealed. It would also be necessary to decide whether a referendum need be held and if so how much of a majority would be required to "clearly express a decision". A problem would also be raised as to whether provincial legislatures had to comply and if so, how many and by what majority.

15. **Attorney-General of Nova Scotia et al v. Attorney-General of Canada et al** (1950) 4 D.L.R. 369 (Supreme Court of Canada).

16. **Ibid.**, p. 369 (Headnote).

17. W. R. Lederman: "Some Forms and Limitations of Co-operative Federalism" (1967) 45 Can. B. Rev. 409 at 421.

18. **Prince Edward Island Potato Marketing Board v. H. B. Willis Inc. and Attorney-General of Canada** (1952) 4 D.L.R. 146.

Quebec executive, using the broad federal acts as an umbrella could then make the regulations it desired. It is true that the power would rest in the executive of Quebec and there would be no legislative power in these areas, but since legislature can hold the executive responsible, the result would in effect be the same. Thus Quebec could achieve the status of an associate state: and since "there is no essential constitutional difference between the proposal for an Associate State and complete separation", Quebec could in effect, legally secede from Confederation by means of what amounts to an informal constitutional amendment.

Though this method seems to be far-fetched it appears to be legally possible and does have several practical advantages over an attempt to formally amend the B.N.A. Act. To institute this proposal would involve only two bodies—Federal Parliament and Quebec Government, it would require no referendum and the provisions of the umbrella acts could be justified politically as merely recognition of Quebec's special status in Confederation.[19] The probabilities of Quebec or the Canadian Parliament choosing such a course are, however, very remote. The separatists would be unwilling to wait out the time required for such a process and probably would reject even a formal tie with Canada. Also it is unlikely that any federal political party would sacrifice itself to satiate Quebec's hungers for independence. But the possibilities of this informal method of secession, as Mr. Morris points out, are not being disregarded:

> ". . . it is understandable that some federal representatives wonder soberly if calls for a provincial treaty power subject to no policy control from Ottawa are not in fact veiled calls . . . for total independence or for a loose form of associate state relationship that would effectively amount to the same thing."[20]

III. *Unilateral Declaration of Independence*

A. *Legality at International Law*

The final method of achieving independence, and the one Quebec would most likely choose if she decided to secede, is the unilateral declaration of independence. This method requires no dealings with parties outside Quebec, it requires no long drawn-out process of legal technicalities; in fact it requires little more than a declaration by those in power in Quebec that the Province of Quebec repudiates the B.N.A. Act and considers herself a fully independent and sovereign state.

19. This status is recognized in the B.N.A. Act by sections 71, 80, 133, 94, etc.
20. G. L. Morris. "The Treaty-Making Power: A Canadian Dilemma" (1967) 45 Can. B. Rev. 478 at 503.

The question of the legality of such a declaration involves many aspects of international and domestic law and practice.

As far as international law is concerned:

> "There is no rule of international law forbidding revolutions within a state, and the United Nations Charter favours the 'self-determination of people'."[21]

It is upon this basis that many separatists justify the legality of secession. Marcel Chaput, leader of one of the separatist movements in Quebec, has based almost his whole legal case of separation upon the "self determination" section of the United Nations Charter. He states:

> ". . . Quebec secessionists believe that, having signed the United Nations Charter which proclaims, in its article 1, paragraph 2, 'the right of all peoples to self-determination' Ottawa, Washington and London will honour their signatures."[22]

Chaput then goes on:

> "French Canada is a nation in its own right and therefore it is obliged to be free of the rest of Canada, independent, sovereign – a separate state."[23]

Assuming for the moment that French Canada is a nation, and that this nation occupies territory which is co-extensive with Quebec (a proposition which will be discussed below), there is still some doubt whether Quebec has a right at international law to secede. It is pointed out by Professor L. C. Green in speaking of this right of self-determination:

> "This, however, is a political right. It is not a right under international law . . . ."[24]

Thus even if the residents of Quebec are a "peoples" within the definition of the United Nations Charter, it is doubtful that Quebec has a right to self-determination at international law. However, hough Quebec does not have a right to be independent, it does not follow that an attempt to gain independence would be illegal.[25] After all "a revolution is legal at international law . . . ."[26]

But international legal theory bears little resemblance to international legal practice and precedent, as can be seen by American actions in Cuba, Viet Nam, and the Dominican Republic as well as United Nations action against Katanga and Rhodesia. It should be

21. M. M. Witeman: **Digest of International Law**, Vol. 5 (Washington, 1965) p. 39.
22. Marcel Chaput: "The Secession of Quebec from Canada:" **Politics: Canada** B. Fox (ed.) (Toronto, 1962) p. 41 at p. 42.
23. P. Fox: "Separation and Quebec" **Politics: Canada** op. cit., p. 44 at p. 46.
24. Whitman, op. cit., p. 38.
25. It is submitted that one does not have a right to do all that is legal. Eg. though in Manitoba it is not illegal to invade anothers privacy, very few would claim that one has a right to do so.
26. Whitman, op. cit., Vol. 2 (Washington, 1963) p. 765.

noted that on November 12, 1965 the Security Council of the United Nations passed a resolution condemning "the unilateral declaration of independence made by the racist minority in Southern Rhodesia" and calling on all states "not to recognize the *illegal* racist regime".[27]

However, Quebec's case can easily be distinguished from the above mentioned precedents in that vital issues of international politics are not involved to the same extent.

Determining the legality or illegality at international law of a unilateral declaration of independence is of somewhat questionable value. The rules of international law cannot affect the domestic legal status of an action taken within one country. A domestic law cannot be validated or invalidated by rules of international law. But international law has been put forward as a justification for secession and no doubt arguments based on international law can affect the political decision-making process in Quebec and therefore some discussion in this area is required.

B. *Domestic Law*

The question now arises as to what would be the legal status of a unilateral declaration of independence judged by the standards of Canadian domestic law. It is in this context that the question of legality of secession is probably most relevant because it is the argument on this point which will probably be given the greatest weight by public opinion and therefore by the political decision-makers.

If a unilateral declaration of independence were made by Quebec following an armed insurrection, the legality of the declaration would probably be coloured by the acts of treason which made it possible. Section 46(1) of the Criminal Code of Canada makes it an offence to overthrow a government by force. A declaration by a treasonous regime would probably be found illegal by any court in the land. The Canadian precedent for such a situation is the Riel rebellions of 1869 and 1885.

Of Riel's actions in 1869, it is said:

> "No amount of special pleading, it seems to me, can *legalize* by these methods the exclusion of McDougall, the prospective governor of the territory, while yet a private citizen: the seizure and appropriation of his furniture: the opening of the mails: the seizure of Fort Garry: the opening of the safe: the seizure of arms, ammunition and provisions: the declaration of November 24 . . . that they were 'free and exempt from all allegiance' to the Hudson's Bay Company and that they had 'on the said 24th of November, 1869, above mentioned, established a Provisional Government and hold it to be the only lawful authority'."[28]

27. Quoted from J. Hopkins: "International Law—Southern Rhodesia—United Nations—Security Council" (1965) Camb. L. J.

28. C. Martin: "Confederation and the West" (1927) C.H.A. Report 20 at 26.

As for the 1885 rebellion, Riel was convicted of treason for his part in it and hanged.[29]

Opinion upon the decision in Riel's case is far from unanimous. However, Riel was convicted, and it is submitted that the legality of his November 24, 1869 declaration has been impinged by the prior treasonous acts. Would the result be different if the declaration were made by a government which had attained office legally and only used force to back up their declaration? Would such a government owe the allegiance to Canada? It is submitted that the use of force after a declaration of independence is irrelevant to the question of the legality of the declaration, for in such a case the declaration is not coloured by prior treasonous acts. The relevant question again comes back to what is the legal status of the declaration itself.

To answer this basic question I will assume the situation which I would submit would be the one most likely to occur if Quebec decided to separate. I will assume that an act has been passed through the legally constituted Provincial Legislature of Quebec repudiating the B.N.A. Act and declaring Quebec to be an independent state. Is this act valid?

It is submitted that the passing of the act is not in itself a treasonous act under the Criminal Code[30] or under common law.[31]

The act would probably not receive Royal assent, and even if it did, the act would almost certainly be disallowed by the Federal Government and/or would be held *ultra vires* by the courts. Again, however, I would submit that these technicalities are irrelevant because they depend upon the B.N.A. Act for their velidity and it is the B.N.A. Act that Quebec is repudiating. If Quebec has a legal right to repudiate the B.N.A. Act, no one would doubt that it is the legally constituted government of Quebec which could legally exercise that right. Does such a right to repudiate exist?

On this point neither the Western Australian nor the Nova Scotia cases are valid precedents in that both apply to attempts to withdraw from a federation by means of a constitutional amendment whereas here the attempt is to repudiate the constitution itself.

There are two precedents in the Common Law world which make a direct decision upon the right of a legally constituted government

29. **R. v. Riel** (1885) 2 M.R. 321 Affirmed by (1884-85) L.R. 10 App. cas. 675.
30. **Criminal Code of Canada**, S.C. 1953-54 C. 51 section 46.
31. For discussion on this point see A. Wharam: "Treason in Rhodesia" (1967) Camb. L.J. 189.

to unilaterally repudiate a constitution, and both decide that the right does not exist in law. The first of these resulted from the American Civil War where a Texas court[32] held that repudiation of the U.S. Constitution was illegal and "the government of Texas was held to be unlawful during the Civil War".[33] The second and by far the strongest decision on the matter of the legality of a unilateral declaration of independence originated as a result of the declaration by Rhodesia. In the case of *Madzimbamuto v. Lardner—Burke and Another: Baron v. Ayre and Others*[34] the Rhodesion High Court held that the unilateral declaration of independence was illegal as was the resulting constitution set up by the regime of Ian Smith.

The Rhodesian decision would be of great persuasive value to a Canadian court in deciding the legality of a unilateral declaration of independence by the Province of Quebec. Rhodesia was a member of the British Commonwealth and the Rhodesian court based its decision on a system of constitutional law similar to that which would be applied by a Canadian (or Quebec) court. The constitution which the Smith government purported to repudiate was an act of the Imperial Parliament as is the B.N.A. Act. Also, as the Smith regime was undoubtedly the legally constituted government when it made the declaration, the case seems to be on all fours with the situation I have assumed would result if Quebec decided to secede from Confederation. Unless a distiguishing factor can be found I would submit that the Rhodesian case is valid precedent for a decision that Quebec has no legal right to repudiate the B.N.A. Act and declare itself to be an independent state.

C. *The Compact Theory of Confederation*

At different stages in Canadian history several writers have put forward a theory of constitutional construction which, if applied to the B.N.A. Act, would distinguish Quebec's case from that of Rhodesia and possibly give Quebec a legal right to repudiate the B.N.A. Act and secede from Canada. This theory is known as the "compact" theory of Confederation and it takes several forms.

The first form in which this theory was advanced claimed that:

> "Confederation is a compact, made originally by four provinces, but adhered to by all the nine provinces who have entered it . . . ."[35]

32. **Texas v. White, supra.**
33. R. W. M. Dias: The U.D.S. Case: "The Grundnorm in Travail" (1967) Camb. L.J. 5 at 7.
34. Judgment No. GD/CIV/23/66 and discussed by R. W. R. Dias **op. cit.**
35. Sir Wilfred Laurier: January 28, 1907 in the House of Commons: quoted from Gerin-Lajoie **op. cit.**, 292.

This view that confederation is an inter-provincial compact received wide support during the 1930's from "most writers, politicians and even the Judicial Committee of the Privy Council."[36] This latter body, on two occasions announced support for this theory and showed a willingness to apply it in construing the terms of the B.N.A. Act.[37]

Since the 1930's this idea of an inter-provincial compact has been severely attacked as being unfounded in history and law. It is pointed out that the B.N.A. Act, is an Act of the Imperial Parliament and though it was based on the Quebec Resolution, substantial changes were made. In addition it is pointed out that since the provinces were created by the B.N.A. Act they could not have been parties to any contract which brought them into existence. Prior to the B.N.A. Act the provinces were merely colonies and as colonies had no capacity to enter a binding contract of union due to the fact that:

> "The Crown did not authorize the delegates at the Quebec Conference to conclude a binding agreement among themselves."[38]

Speaking from a strictly legal point of view, it is submitted that the critics are probably correct and Confederation is not a legal contract entered into by the various provinces. However, it would be open to a court, basing itself on the two Privy Council decisions as well as the various statements by several leading politicians through the years,[39] to find that Confederation is a contract between the several Canadian provinces.

The second form in which the "compact" theory was advanced stated:

> "Confederation was a compact, not between the several provinces but between the two races, English and French, which agreed to associate together in the Dominion of Canada on terms of mutual tolerance and respect."[40]

This version has been widely propounded during the past two decades. It was accepted by the Tremblay Report,[41] and to some extent by F. R. Scott of the B. and B. Commission[42] as well as a large segment of Quebec including a majority of the separatists. However the idea

36. Gerin-Lajoie op. cit., at p. 206.
37. (a) In re The Regulation and Control of Aeronautics in Canada [1932] A.C. 54 at 70. (b) Attorney-General for Canada v. Attorney-General for Ontario [1937] A.C. 326 at 351.
38. N. McL. Rogers: "The Compact Theory of Confederation" 9 Can. B. Rev. 395.
39. See: Gerin-Lajoie, op. cit., at pp. 292-297.
40. Corry and Hodgetts, op. cit., at p. 582.
41. Tremblay Report, op. cit., at pp. 143, 146-147.
42. F. R. Scott, in an address at Charlottetown on June 11, 1964 and reprinted in The Future of Canadian Federalism: P. A. Crepeau and C. B. Macpherson (ed's) (Toronto, 1965) p. 181 at 183.

that Confederation is a two-nation compact has been rejected by such eminent scholars as Donald Creighton[43] and Eugene Forsey.[44]

It is submitted that it would be difficult for a court of law to find that Confederation is a legally binding contract between two founding races of Canada. The only delegation at the Quebec Conference of 1864 which could claim to represent the French was the delegation from Lower Canada and at that time Lower Canada was merely one-half of the united Canada which was created by the Act of Union of 1840. Therefore it is hard to see how Lower Canada could have a legal capacity to contract. Similarly, today, who could enforce the contractual rights of French Canada? Though Rene Levesque claims that Quebec is the national state of the French-Canadian nation,[45] it must be noted that, there are nearly one million French-Canadians who do not live in Quebec.

> "However, if we speak in moral rather than strict legal terms, there is ground for saying that Confederation was a compact . . . ."[46]

The compact theory has taken several other forms, some involving the Imperial Parliament as a party, some involving claiming that the compact was between Protestants and Roman Catholics, and some combining aspects of all of these. Each of these several forms lacks one or more of the essentials of a binding legal contract.

Had the compact theory had a sounder legal base, it would have been necessary to go on and decide whether or not there has been a breach serious enough to entitle Quebec to repudiate the compact. In considering that question, factors such as the schools question in New Brunswick and Manitoba; the small percentage of French-Canadians receiving federal appointments; and the amount of bilingualism outside Quebec would have weighed heavily in favour of Quebec's case.

However, it is submitted that the compact theory has no legal basis and therefore must be rejected. With rejection of the compact theory, a unilateral declaration of independence by Quebec would be undistinguishable from the Rhodesian precedent. It is therefore further submitted that the act declaring Quebec's independence, which I have assumed had been passed through the Quebec Legislature, would probably be found to be illegal. Thus the final method by which Quebec could secede from Confederation is probably unlawful.

43. Address given in Winnipeg last year.
44. E. Forsey: "French Canada in Our Second Century". (1967) 32 Sask. L. Rev. 729.
45. Rene Levesque: "Rene Levesque Speaks of Quebec National State of the French-Canadians." **Quebec States Her Case.** F. Scott and M. Oliver (ed's) (Toronto, 1864) p. 132.
46. Corry and Hodgetts, **op. cit.**, at p. 582.

Before going on, one further point must be made with reference to the compact theory of Confederation. Although I have submitted that the theory has no legal validity, the same opinion does not persist in Quebec and it is pointed out that:

> "Que les publicistes et les juristes canadiens-anglais la trouvent acceptable ou non, elle peristera comme l'un des elements les plus tenaces de la definition que le Canadien francais donne le l'histoire de son Canada."[48]

Mason Wade sums up what he found to be the attitude of French Canada toward the B.N.A. Act as follows:

> "To the French, it is a pact or treaty between French and English, which guarantees to each group an equal right to its own faith, language, laws and customs."[49]
>
> "He (the French-Canadian) feels that he has kept his part of the 'treaty' (of 1867) and even gone beyond its letter in tolerance to the English minority of Quebec; while the other provinces have flagrantly violated both the letter and the spirit of the pact by their actions in such instances as the New Brunswick, Manitoba, North-west and Ontario School question, and the federal government, by failing to support bilingualism inside and outside Quebec, and by not giving a proportionate share of federal appointments to French-Canadians, has likewise broken faith."[50]

If Wade's findings are correct and if the French-Canadian feels, as Belcourt does, that "Linguistic right is a fundamental right,"[51] the separatists will have little trouble convincing the people of Quebec that they have a legal right to repudiate the B.N.A. Act. In such a case the legal argument itself becomes a divisive factor between the French-Canadian who can see secession as legal and the English-Canadian who finds it illegal.

IV. *Conclusion*

Thus it can be seen that there are three possible courses open to Quebec if the decision is made to secede. She can attempt to obtain a formal constitutional amendment from the Imperial Parliament, she can attempt to persuade Ottawa to invoke the informal method of amendment and hope that the courts don't block the process, or she can unilaterally declare her independence. Of these three courses, two seem to be legal but would be virtually impossible to obtain within the foreseeable future. The third is illegal but has the virtue of possibility.

If secession was decided upon, no doubt the third course would be chosen and the government and constitution of the independent state

48. See: Jean-C Falardeau, "Les Canadiens francois et leu ideologie". **Canadian Dualism** Mason Wade (ed.) (Toronto, 1960) p. 25.
49. M. Wade: **The French-Canadian Outlook** (Toronto, 1964) p. 42.
50. **Ibid.**, p. 43.
51. N. A. Belcourt: "The Status of the French Language in Canada." (1924) 2 Can. B. Rev. 170 at 171.

of Quebec would be illegal. However it has been held, in *The State v. Dosso and Another*[52] that the illegality can be cured by the continuing effectiveness of the revolutionary regime. The principle in this case is an application of Kelsen's theory of the grundnorm which states that:

> "A successful revolution can displace that (former) constitution if the new order begins to be efficacious because individuals 'behave in conformity with it'."[53]

This proposition was rejected by the Rhodesian court in the *Madzimbamuto* case but it is suggested that the reason for rejection is that the court is not yet ready to conclude hat the Smith regime has established stable *de facto* control.[54]

Thus, it is submitted, even if the third course were chosen, the secessionist regime in Quebec could be subsequently legalized (though the original act of secession would not be legal) by the establishment of stable *de facto* government. Whether or not this stability could be achieved would depend largely upon Canada's reaction to secession. With Canadian co-operation a stable secessionist regime could be established, but then, if the rest of Canada were willing to co-operate a secessionist regime need never occur.

R. A. MAYER*

52. (1958) 2 Pakistan S.C.R. 180.
53. J. M. Eekelaar, "Splitting the Grundnorm" (1967) 30 Mod. L. Rev., 156 at 161.
54. Britain is still trying to exercise control as was seen by the March 2, 1968 action of Queen Elizabeth II. Exercising the royal perogative the Queen purported to commute to life imprisonment two death sentences handed down by Rhodesian court.

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