

LANDMARK CASE

THE QUESTION OF QUEBEC SOVEREIGNTY: REFERENCE RE SECESSION OF QUEBEC



CURRICULUM LINKS:

Canadian and International Law,
Grade 12, University Preparation
(CLN4U)

Understanding Canadian Law,
Grade 11, University/College
Preparation (CLU3M)

ESTIMATED TIME:

1 - 2 periods

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REFERENCE RE SECESSION OF QUEBEC [1998] 2 S.C.R. 217

The province of Quebec has a unique negotiating role with the other provinces and with the federal government of Canada because it has been given special constitutional protection to preserve its distinct culture, history and language.

OJEN LANDMARK CASES

OJEN produces Landmark Case packages on important and controversial areas of Canadian Law. They are designed to provide a plain language summary of a legal case with related classroom activities that address the substantive legal issues and the sensitive or complicated areas of the case. There are currently over 25 complete Landmark Case packages, and more in development. Please visit the **Resources** section of the OJEN website, www.ojen.ca, to view and download Landmark Case packages.

Each OJEN Landmark Case package includes a plain language case summary of an important Canadian legal decision. A range of classroom activities follow the case summary and may include:

- Classroom discussion questions
- A glossary of key terms
- Student worksheets
- Cooperative learning activities
- Ideas for extension exercises

Landmark Cases are prepared by OJEN's justice and education sector volunteers, including law students, lawyers, judges and teachers. All OJEN resources are reviewed by both a lawyer and teacher and available at no cost in English and French. Grade 10 students review the materials and provide ideas and feedback on the readability of the resource.

OJEN aims to assist classroom teachers and enhance justice education opportunities for young people. If there is a case or topic that you would like to suggest as the next Landmark Case, please contact OJEN. We also welcome your feedback for improving and expanding our classroom resources. Examples of culminating activities, teaching strategies or modifications that are shared with OJEN may be added to the resource and distributed province-wide. Please forward comments, suggestions and ideas for new resources to info@ojen.ca.

REFERENCE RE SECESSION OF QUEBEC (1998)

BACKGROUND

In 1980, the provincial government of Quebec was led by the Parti Québécois (the “PQ”). Under the direction of the PQ, a referendum was held to determine whether a new political and economic union with the federal government of Canada should be negotiated in order to gain independence as a state. Essentially, the PQ sought permission to negotiate the separation of Quebec from Canada. The referendum failed to receive adequate support, as 60% of the voters desired to remain part of Canada.

SUPREME COURT ACT

53(1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning

- (a) The interpretation of the *Constitution Acts*;
- (d) The powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective government thereof, whether or not the particular power in question has been or is proposed to be exercised.

In 1982, the federal government amended the *Canadian Constitution* in order to gain full independence from Britain. This independence meant that permission from Britain would no longer be required to amend Canadian laws and *Constitutional* powers and privileges. Quebec was the only province to oppose these changes. Specifically, Quebec did not approve of the formula used to amend the *Constitution* nor did it support the adoption of the *Canadian Charter of Rights and Freedoms*. Two attempts were made – in 1990 (Meech Lake Accord) and 1992 (Charlottetown Accord) – to amend the *Constitution* to gain the support of Quebec; however, both efforts were unsuccessful. As a result, the Quebec government held that the *Canadian Constitution, 1982* was an illegitimate document, as it had not received Quebec’s formal approval.

In 1994, the PQ was re-elected to govern the province of Quebec. In 1995, the PQ held a second referendum to determine whether the residents of Quebec wanted to separate from Canada. A narrow majority of voters opposed secession (50.6% to 49.4%), and as a result, the advocates of separation vowed to hold another referendum. In response, the federal government submitted

three reference questions to the Supreme Court of Canada (“the SCC”), requesting an opinion regarding the legality of Quebec’s separation from Canada. The SCC granted fifteen parties intervener status, including the federal government, several provincial governments, and Aboriginal and other minority groups. These fifteen intervenors were given an opportunity to present their arguments before the SCC. Because the government of Quebec refused to participate, the Court appointed an *amicus curiae* (“friend of the court”) to represent the interests of Quebec.

REFERENCE QUESTIONS

Reference questions are a tool used by the government as a means of obtaining a legal opinion from the SCC on a specific issue, without having to first go through the lower level trial and appeal courts. The Court’s opinion serves as a guide to ensure that any law the government creates will comply with the law. However, s. 53 of the *Supreme Court Act* places limits on the types of questions the government may pose: only questions that are “important questions of law or fact” concerning certain topics may be submitted. In the *Reference re Secession of Quebec*, the applicable provisions of s. 53 were as follows:

DECISION

Question #1: Does the *Canadian Constitution* allow Quebec to unilaterally separate from Canada?

Unilateral secession would involve the separation of Quebec from Canada without any negotiation or consultation with the federal government and provinces. In a unanimous decision, the SCC ruled that a literal reading of the *Canadian Constitution* leads to the conclusion that unilateral secession would be unconstitutional, and thus not permitted. In arriving at this conclusion, the Court relied on four fundamental constitutional principles:

- **Democracy** seeks to promote participation in effective representative self-government, which respects and responds to all voices in a marketplace of ideas.
- **Constitutionalism and the Rule of Law** protects individuals from state action because (a) the Constitution guarantees fundamental rights to all Canadian citizens, and (b) the rule of law forces governments to act in accordance with the law.

- **Federalism** attempts to unify the nation by allowing the federal government to have authority over the common interests of its citizens, while acknowledging their differences.
- **Protection for Minorities** is a principle that guides other values and is unique to Canada because other democracies, such as the United States and Britain, promote assimilation.

The SCC reasoned that because of the complexity and importance of these values, no province can choose to unilaterally secede without addressing each principle and how their separation will affect each principle. Although the court held that Quebec cannot unilaterally separate from Canada, if a “clear” majority of Quebec residents vote in favour of secession in response to a “clear” referendum, Canada must negotiate the terms of separation with the government of Quebec.

Question #2: Does international law provide Quebec with the right to unilaterally separate from Canada?

The SCC held that international law does not permit Quebec to unilaterally separate. International laws such as the *Charter of the United Nations*, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights* recognize the right of a people to achieve self-determination or self-government, but only in certain circumstances; Quebec did not fall within any of these circumstances. Moreover, residents of Quebec are not oppressed, colonized people nor are they denied meaningful access to government to pursue their political, economic, social, or cultural development. Since World War II, the majority of Canadian Prime Ministers have been from Quebec and Quebec has been very well represented in the Cabinet, the civil service and the courts.

Question #3: Would domestic or international law take precedence in a conflict between the two?

Because the court found that Quebec could not unilaterally separate under either Canadian or international law, question three was irrelevant as there was no conflict between domestic and international law on the issue.

RESULT

The Court unanimously held that Quebec could not unilaterally separate from Canada because it would violate both the *Canadian Constitution* and international law. However, if a “clear” majority of Quebec residents voted in response to a “clear”

question, Canada would be obligated to negotiate the terms of separation in accordance with the principles of the democracy, constitutionalism and rule of law, federalism, and the protection of minorities.

DISCUSSION QUESTIONS

1. In what way does a reference question differ from other cases the SCC may hear?
2. What statute gives the SCC the power to answer a reference question? Are there any constraints on the types of question they can answer?
3. Which side won the 1995 referendum? What action did the advocates of separation propose to take after the results were released?
4. Because Quebec refused to appear before the Court to present their argument, the court appointed an *amicus curiae*, lawyer André Jolicoeur who supported Quebec's sovereignty. Do you agree with the Court's action? Do you think Quebec's views were fairly and accurately represented?
5. In your opinion, was Quebec's desire to separate an "important question of law or fact"? What are other examples that may be considered "important questions of law or fact"?
6. Describe how the SCC answered the three questions it was asked by the federal government.
7. What four constitutional principles did the SCC mention?
8. Do you agree with the Court that the words in the *Constitution* cannot be read literally without reference to certain underlying principles?
9. What are some of the reasons Quebec separatists might have for wanting to separate from Canada? What is your view?
10. Do you agree with the reference question power that allows the government to pose questions to the Supreme Court before creating laws? Should there be any limitations on this power? Assess the advantages and disadvantages.

ACTIVITY 1

The SCC decision states that although Quebec cannot secede unilaterally, if there is a “clear” majority vote in favour of secession, the rest of Canada has an obligation to negotiate the terms of secession with the government of Quebec. This prompted the government of Canada to enact the *Clarity Act*. The full text is available here: <http://laws.justice.gc.ca/eng/C-31.8/page-1.html>

The *Clarity Act* (“the Act”) addresses two issues:

(a) The requirement of a “clear” referendum question

Although the Act provides a guideline as to what does not constitute a “clear” question, it does not specifically identify what wording is required for a “clear” question.

1. In your opinion, are the 1980 or 1995 referendum questions “clear” questions? If not, what are the characteristics of a “clear” question?

1980 – “The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad — in other words, sovereignty — and at the same time to maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will only be implemented with popular approval through another referendum; on these terms, do you give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?”

1995 – Do you agree that Québec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?

2. Do you think the requirement that the referendum question be “clear” is too subjective? Explain.

(b) The requirement of a “clear” majority

The Act also requires a “clear” majority to vote in favour of secession. The Act provides that:

(2) In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account

- (a) the size of the majority of valid votes cast in favour of the secessionist option;*
- (b) the percentage of eligible voters voting in the referendum; and*
- (c) any other matters or circumstances it considers to be relevant.*

3. In your opinion, what is a “clear” majority? Should Parliament have specified a specific percentage?

ACTIVITY 2

Following the release of the SCC decision, both the federal government and government of Quebec were pleased with the outcome.

Quebec Premier Lucien Bouchard was satisfied because (a) the court stated that the question of Quebec’s status was a political question, not a legal one, and (b) the SCC clearly specified that in the event of a successful referendum regarding secession, the government of Canada and the other provinces would have to negotiate with Quebec.

Prime Minister Jean Chrétien was also pleased with the decision because (a) the SCC noted that Quebec could not declare independence unilaterally, and (b) any obligation Canada had to negotiate with Quebec was conditional upon receiving “clear” majority support to a “clear” question.

1. Do you agree with the assessment of the case by these politicians? In your opinion, was there a victor?
2. Write a brief reflection of your opinion on this case.

ACTIVITY 3

Your class wants to separate from your school in order to become a separate, independent school. What rules and regulations would you look to for guidance? What factors would you have to consider (e.g. power and privileges, rights, resources, etc.)? What reasoning could you take away from *Reference re Secession of Quebec* and apply to this hypothetical situation?

1. In small groups (4-5 students), brainstorm the advantages and disadvantages of your class separating from your school. Analyze it from both perspectives.
2. Hold a class debate where one side is advocating for the separation and the other is opposing it.

ACTIVITY 4

The SCC in *Reference re: Secession of Quebec* expressed concern for the First Nations and Métis people, and in particular, the effect the decision would have on Aboriginal Peoples whose status and rights are governed by the *Constitution Act, 1867* and the *Indian Act, 1876*. Since the beginning of Colonial expansion into Canada, First Nations, Métis, and Inuit peoples have fought for their own governance; however, their attempts to establish self-government have been denied many times.

1. What are the similarities and differences between Quebec residents advocating for separation and Aboriginal people advocating for self-government?
2. Brainstorm and discuss reasons why Aboriginal people have been denied the ability to self-govern.
3. Do you think that the constitutional principle of “protection of minorities” was meant to be inclusive or exclusive of Aboriginal people, both in 1867 and today?