

Hon. Mr. Lalonde
Hon. Mr. Reid
Mr. Pitfield
Mr. Coutts
Mr. Tellier
Mr. Massé
Mr. Carter
Mr. Gwyn
Mr. Hayes
Mr. Hurley
Miss Macdonald

SECRET

March 5th, 1979.

MEMORANDUM FOR THE PRIME MINISTER:

The program to achieve constitutional reform:
questions relating to the Quebec referendum

I. The program

In the course of our discussion on February 26th, you outlined modifications that you thought should be made in the plan and timetable I had sent you with my memorandum of February 19th. I have revised them along the lines you suggested - see the attached "Annex". The main changes from the February 19th version are:

"A. The elements of "the program"

This removes a "successor Bill" from the immediation post-election place it had originally and proposes that it should come either in 1980 or 1981 - after action on the Joint Address and "patriation" and after further federal-provincial meetings to get agreement on the Senate, the Supreme Court, etc.

The "basis of patriation" (No.3) would end up with a "last resort" amending procedure based on (but not identical with) Mr. Lang's proposal. This "last resort" would, I think, be more defensible than ending up with the "Toronto consensus", which bothered you. The plan here would combine unanimous consent (which preserves the full provincial role) with a referendum (which puts the final word with the people) if the provinces cannot agree or if all the provinces do agree on something and Parliament does not. Mr. Lang's formula would not have "worked both ways" - against Parliament as well as against a province. I think we would have

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March 5/79

great difficulty with any proposal that a province could be over-ridden by a referendum but Parliament could not.

Jim Hurley has suggested to me that an alternative to the "four steps" in the "basis of 'patriation'" would be to have three steps. (a) and (b) would remain as they are. (c) would be one or more referenda in which the people would be asked to vote on all formulae for amendment that emerged as possibilities from the discussions with the Premiers under (b). Any that did not get, say, 25% support in the first referendum would be dropped. In a second referendum, the formula with the least votes would be dropped. By the end of a second or a third referendum, there would be a clear decision in favour of some formula and the people would have selected it. This would be comparable to the referenda on the future of Newfoundland in 1948, which started with three proposals and ended up, after two referenda, with a clear decision for union with Canada.

Jim's idea is worth considering. The main problem about it would be the complication introduced by requiring, in the referendum or referenda, both an overall majority and a majority in each of the four regions (as the proposal in (c) suggests). I think the regional majority is fundamental and should not be dropped. Without it, the whole process would be open to serious attack in Quebec, the Atlantic provinces and even in the west. I do not see how one could combine a process of elimination in several referenda with a regional majority basis without grave risk of having no clear result in the end. I am, therefore, in favour of the "four steps" as proposed.

"B. A sequence and possible timetable"

This timetable reflects the change referred to above - action on the Joint Address as soon as possible after the election and

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postponement of the "successor Bill". The whole process is tightened up - from "E + 48 months" to "E + 42 months". A program to be accomplished over 3 to 3-1/2 years is undoubtedly better in presentational terms than one to be accomplished over 3-1/2 to 4 years.

The timetable is exceedingly tight in the six months after the election. If the result of the election is a minority situation, with the need to have a vote of confidence in Parliament, there would be 30 days or so before you could send out an invitation to the Premiers to a conference. I do not see how you could possibly do it if you were in a minority position and had not yet got a vote of confidence. It might be difficult to get all ten Premiers to a meeting in less than 4 to 6 weeks from the time you propose a conference - possibly more. These possible complications raise the question whether you might want to think of the very unusual step of writing to the Premiers after dissolution but before the election.

As I see it, there is no reason why you could not write during, say, two to four weeks after dissolution to say that you feel that the work on constitutional revision should be resumed just as soon as possible after the election. Because the matter is of such importance for the unity of the country in the present circumstances, you were taking the unusual step of communicating with them to say that, if you are returned to power by the electorate, you would hope to see the Third Constitutional Conference meet about a month after the election. You could suggest alternative dates around that time and see if agreement could be reached. Some of the Premiers might decline to commit themselves; some might attack the action as a political ploy, but it would at least emphasize your desire for early action and it would also make it possible to suggest some very tight dates for a meeting once the situation is clear after the election.

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If there is any further work you would like to have done on the program and possible timetable, please let me know.

II. Questions relating to the Quebec referendum

You raised some questions about certain parts of my memorandum of February 23rd on "sovereignty-association" and related matters:

(a) The "right of self-determination"

You were not sure that the UN doctrine about self-determination is "ambiguous" (as I had suggested) in its applicability to sovereign states. You thought it had been clarified so that it definitely is not applicable within such a state. I asked Jim Hurley to go into the matter. His memorandum to me of March 2nd, with attachments, is herewith. I have also examined an analysis of "Legal Aspects of Quebec's Claim for Independence" in "Must Canada Fail", published by the Institute of Intergovernmental Relations at Queen's University in June, 1977.

It would appear that the position is not without some ambiguity, but that the presumption would be pretty strong against the application of the "right of self-determination" in a way that would result in "the partial or total disruption of the national unity and the territorial integrity of a country". (See the "Declaration" of December 12, 1960) That position is reinforced by Resolution 2625 (xxv) of October 14th, 1970, which says that the right is not to be construed as authorizing action "which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign or independent states". (See the memorandum by Fred Jordan of April 4th, 1977) The Helsinki Declaration of 1975, which Canada signed, refers to the right of "peoples" to self-determination and says that the signatories would respect the "right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the

United Nations and with relevant norms of international law, including those relating to territorial integrity of states". The summary of the authors in "Must Canada Fail" is:

"In general, international law suggests that in colonial situations self-determination usually prevails. Non-colonial situations are more ambiguous, but the presumption usually lies with the maintenance of integrity."

The Pepin-Robarts report suggests, probably rightly, that the most important question and, in the end, the final determinant, is not likely to be the legal position but more important realities of each situation. The position at international law could, however, become very important if the native peoples of Quebec in the northern part of the province and non-francophone people in other clearly identifiable areas contiguous to Canada voted strongly against separation, while an over-all majority in Quebec voted for it.

(b) The possible problem of dissident peoples in "contiguous" areas

If the above situation were to emerge, the position Mr. Lévesque has taken is that it would be irrelevant. He has said that Quebec would not recognize self-determination in areas within the province. I think, however, that Mr. Lévesque has not analyzed the potential problem very clearly.

If Quebec voted for independence in a clear and honest referendum, and if the northern one-third of the province voted against it in an equally clear fashion, the government of Quebec would presumably approach Ottawa to negotiate independence for Quebec. The Inuit, Indian and other people in the northern part of Quebec would almost certainly send delegations to Ottawa demanding that their part of Quebec remain part of Canada. They would argue that they are distinctive peoples, that

they have as much right to self-determination as the French-speaking people of southern Quebec; that their land was added to Quebec in 1912 by the federal government without consulting them and, finally, that the constitution of Canada imposes special and direct responsibility on the federal government to protect them and their rights. It would be virtually impossible for any government of Canada to accept the proposition that their wishes should be ignored.

If the federal government thought that the other provinces had to be consulted about a constitutional amendment to give independence to Quebec, they would almost certainly feel that the views of the northern Indians and Inuit could not be ignored. If, on the other hand, the government accepted the proposition and put it to Parliament in a Joint Address, either without consulting the provinces or over objections from some or all of them, it is hard to believe that Parliament would approve such a proposal. I do not for a moment believe that such an Address could pass.

The most likely scenario is that a federal government would accept a clear "self-determination" decision by Quebec but only on the basis that "self determination" were equally accorded to the peoples of northern Quebec. If Quebec refused to accept that basis and sought to appeal to the UN, or to some other forum, to get support for its "right to self-determination", it would be arguing that the right at international law applied to it, against the sovereign state of Canada, but that it did not apply to equally identifiable and "different" peoples against the non-sovereign state of Quebec. The improbability of being able to succeed with such a proposition is apparent. Quebec would appear to be in the role of arguing against the right of self-determination for precisely the kind of peoples for whom the UN and the "Third World" majority are most likely to feel the right was designed.

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In short, if one thinks the matter through, the position at international law could become important and it seems likely that it would operate in exactly the reverse direction to what Premier Lévesque appears to believe.

(c) The requirements for according independence

In our discussion on February 26th, you spoke of Mr. R.M. Fowler's letter to you in which he argues that a federal government could not negotiate for an economic association before sovereignty for Quebec has been established. The preparation of a reply to him (which will be sent to you shortly) has led to a closer look at what would be required for a constitutional amendment to accord independence to Quebec.

It is quite clear that the necessary constitutional amendment could not be effected by Parliament under Section 91(1). The only question is whether it would be constitutionally necessary for a federal government to consult the provinces before submitting a Joint Address to Parliament to seek an amendment by the British Parliament. The conclusion of the constitutional experts in "Must Canada Fail" is that consultation with the provinces would not be necessary in a strict, constitutional sense. They say, however, that "our conclusions about what the constitution requires are based on inferences not yet crystallized in law". They also say the "expectations" of the community might be different from what the strict requirements of the law would appear to be.

As a matter of strict law, it may be that the correct position is that an amendment to grant independence to Quebec (or to a part of present Quebec) could be on the basis of a Joint Address proposed by a federal government, after negotiation with Quebec about the terms, and without formal consultation or, possibly, any consultation with the provinces. However, we have seen in our experience with Bill C-60 that what "strict law" requires may not be the

determining factor if "the expectations of the community" are different. It is hard to believe that the three Maritime provinces would think that an amendment that cut off their over-land connection with the rest of Canada did not profoundly affect them as provinces. Newfoundland, with the latent problems of the Labrador boundary, the trans-Quebec movement of Labrador iron ore to tide-water and the long-term sale of hydro-electric power to Quebec, would feel even more affected as a province by independence for Quebec and the terms on which it would be granted. Ontario would have great worries about the use of the St. Lawrence Seaway, charges for its use and related matters. So would the Prairie provinces with their great movements of wheat to export. It is very hard to believe that they would not all feel that a constitutional amendment to give independence to Quebec would affect them so directly that the terms of the agreement or "treaty" on which independence was based would have to be discussed with and possibly approved by them.

The fact that there is some doubt as to the strict legal requirements may explain, in part, why the PQ government is so opposed to "patriation" of the constitution. If that is effected with any of the amending formulae that have been discussed - unanimous consent, Victoria formula, Toronto consensus, etc. - it is perfectly clear that an amendment to give independence to Quebec would come under the "general" formula. It would require the consent of all, or of 6, or of 7 of the provinces as the case may be. In short, as things now stand, there is some chance that independence could be negotiated between a federal government and the government of Quebec, and then made legal and final through action at Westminster, without the other provinces being formally involved. If the BNA Act is "patriated" with an amending formula (other than one that made specific provision for an amendment to give independence to a province) the possibility of constitutional action on the basis of bilateral federal-Quebec negotiation would be removed. As indicated above, I do not myself think that the

possibility really exists now - but the PQ government may think it does.

(d) The extent of negotiations prior to according independence

In my memorandum of February 28th, arising out of some comments by Mr. Reid, I drew a clear distinction between "independence", which would have to come first, and "economic association", which would have to be negotiated after independence between sovereign states. Mr. Hurley has pointed out to me that the negotiation of independence would involve agreement on a great many things - transportation, pipelines, transitional arrangements concerning industries and corporations, etc.- that would be closely related to some of the aspects of an economic association. He is undoubtedly right in this. I do not think, however, that it invalidates the basic point that the problems that necessarily relate to and arise out of independence are different from those that would be involved in a broader economic association. What it does mean is that the negotiations for independence might raise a lot of questions that would have to be settled but which would conceivably be subject to subsequent modification depending on whether an economic association were agreed to at a later date or not.

(e) Tactical considerations prior to the Quebec referendum

Thus far, the way the government of Quebec and the PQ as a party have presented and talked of the question for the referendum and the process leading to "sovereignty-association" have been confusing and misleading. How much of this is deliberate it is hard to say. The points that are either confused or else plainly wrong would include:

- (i) The idea that "sovereignty" is somehow different from complete independence;
- (ii) The proposition that "sovereignty" and "association" can be negotiated or secured as a single package;

- (iii) The proposition that, because of (ii), it will be possible to carry negotiations through to see all the terms of "sovereignty-association"; decide whether they are attractive or not; and, if not, then for Quebec simply to decide to carry on as a province;
- (iv) The idea that "sovereignty-association" is different from "separation" and that, if accomplished, it would not break up "Canada" as it now exists;
- (v) The proposition that there is a clear and undoubted right, morally and in international law, of "self-determination for Quebec";
- (vi) The idea that Quebec, alone and with no dispute, can impose a decision that it will not recognize any right to self-determination for any peoples within areas that are now part of Quebec;
- (vii) The impression that the Premiers of at least six provinces, who have said that in their judgment an economic association after independence is not a realistic possibility, are not serious and are simply bluffing.

All of these misconceptions are potentially extremely dangerous. If they go without effective challenge, they can lead to a referendum question and possibly to a referendum result that would be based on a completely wrong impression in the mind of the Quebec voter about the possible consequences of voting "yes". The immediate question is which of them should be challenged in the course of the federal election campaign and which should be left for discussion on a provincial basis in Quebec as the pre-referendum and referendum debates develop. It would seem to me that numbers (i) - (iv) above could all properly be challenged in the federal election. They all have

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ANNEX

Possible program and sequence on the constitution

A. The elements of the program

1. A third conference with the provinces - 1979

- To try to get agreement on the "first list" items
- To seek a substantial consensus on "patriation" forthwith
- To start work on the "second list"

2. Submission of a Joint Address - 1979

- To include all changes in the distribution of powers agreed on unanimously
- To include a Bill of Rights binding on the federal government and agreeing provinces, with provision for amendment only by the amending procedure
- To include a request for "patriation" of the constitution

3. The basis of "patriation"

The British legislation would provide the necessary legal basis for:

- (a) Amendment of the constitution with the unanimous consent of the provinces
- (b) Amendment by any other process that may be agreed upon with unanimous consent during two years from the proclamation of "patriation"
- (c) Amendment by any process that may be presented in a referendum held by the federal government and approved by the majority of the people of Canada and a majority of the people in each of four regions

of Canada under legislation to be introduced not less than two years from the proclamation of "patriation"

- (d) Failing approval of a new procedure for amendment under (b) or (c) within three years from the proclamation of "patriation", amendment of the constitution to continue to be on the basis of unanimous consent but with provision for an alternative procedure on the basis of a national referendum (as in (c)) in any case in which one of the elements for agreement is lacking (i.e. approval of Parliament or of one province)

4. Further constitutional conferences 1979 to 1982

- To proceed, along with work by the Continuing Committee of Ministers, to try to get agreement on
 - the "second list" of items
 - other items of change
 - an amending formula to replace "unanimous consent" in the two years following the proclamation of "patriation"

5. Submission of a "successor Bill" - 1980 or 1981

- To include any part of a Charter of Rights not fully covered by the Joint Address under No.2
- To include proposals on the Senate, if agreement has been reached with the provinces or failing such agreement if the Supreme Court decision has been favourable; on the Supreme Court and on any other elements of Bill C-60 as revised

6. Referendum on the amending formula, 1982

- If unanimous agreement on a formula has not been achieved during the constitutional conferences

7. 1982-1983 - further discussions with the provinces

B. A sequence and possible timetable

Starting from the date of the election (E) a possible, although very tight, sequence and timetable might be:

E + 1 month - Third constitutional conference.

This would not allow time for a confidence vote in Parliament if needed for the establishment of the government. If the election produced a minority situation, a month would probably have to be added for Parliament to meet and vote confidence.

E + 6 weeks - Report to House of Commons; introduction of a Joint Address.

E + 2 months - Passage of Joint Address.

E + 5 months - Passage of "patriation" legislation by the British Parliament.

This will depend on the situation in Britain, where there will also be an election in 1979. That election, plus requirements of the timetable of the British Parliament, could cause problems.

E + 6 months - Proclamation in Canada of the "patriation" of the constitution and of any amendments to the distribution of powers included in it.

Fourth constitutional conference.

E + 6 - 12 months - Quebec referendum and conceivably a Quebec election. Everything else in the timetable would turn on the result of the referendum and, possibly, an election.

E + 12 months - Introduction of "successor bill" to include the Senate, Supreme Court and other elements of the Strayer bill.

E + 12 - 24
months -

Further constitutional conferences.
Amendments of the constitution on the basis of unanimous consent if any subjects receive that consent.

E + 30 months -

Expiry of the two year period for agreement with the provinces on an amending formula. If no agreement, introduction in the House of Commons of legislation for a referendum on a formula.

E + 32 months -

Passage of referendum legislation.

E + 35 months

Holding of the referendum.

This assumes that more time will be required than for a general election, which may or may not be a valid assumption.

If the referendum brings the required majority for an amending procedure, the process will be completed approximately three years after the election. The constitution could then be amended, using the new procedure, to bring into effect any changes that had achieved the necessary degree of consensus in the meetings of the constitutional conference - except for any that might have been implemented in the interim on the basis of "unanimous consent".

If the referendum did not bring the required majorities, there would be another six months for further discussions with the provinces to try to achieve unanimous consent on an amending procedure. Failing that -

E + 42 months -

The "unanimous consent and referendum" formula would come into effect.

The proposal would thus set an outer limit of three and a half years from the date of the election to achieve a formula other than unanimous consent for amendment of the constitution.

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Charter of the United Nations

March 2, 1979

We, the peoples of the United Nations

MEMORANDUM FOR MR. R.G. ROBERTSON

THE UNITED NATIONS CHARTER
AND "SELF-DETERMINATION"

The Parti québécois bases its claim to the right of self-determination on Chapter I, Article 1 of the United Nations' Charter, a copy of which is attached. Questions have arisen as to whether the right applies to any people in any situation or only to people in specific (clearly colonial) circumstances. However, the meaning of the Charter provisions respecting self-determination were clarified in 1960. The United Nations resolved that using the principle of self-determination to seek "the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations": Resolution 1514 (XV), Declaration on the granting of independence to colonial countries and peoples, December 14, 1960. A copy of the Resolution is attached.

Attached also please find a copy of the paper prepared in Justice on Self-Determination and International Status by Dr. Fitzgerald and a newspaper review of an article by Mr. David Matas of Winnipeg which was published by the McGill Law Journal in 1975.

James Ross Hurley
James Ross Hurley

Attachments

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APPENDIX

Charter of the United Nations

We the peoples of the United Nations determined

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

and for these ends

to practice tolerance and live together in peace with one another as good neighbors, and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

have resolved to combine our efforts to accomplish these aims.

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

CHAPTER I

Purposes and Principles

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the

peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

CHAPTER II

Membership

Article 3

The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.

should be admitted to membership in the United Nations,³¹

Having considered the application for membership of the Republic of Mali,³²

Decides to admit the Republic of Mali to membership in the United Nations.

876th plenary meeting,
28 September 1960.

1492 (XV). Admission of the Federation of Nigeria to membership in the United Nations

The General Assembly,

Having received the recommendation of the Security Council of 7 October 1960 that the Federation of Nigeria should be admitted to membership in the United Nations,³³

Having considered the application for membership of the Federation of Nigeria,³⁴

Decides to admit the Federation of Nigeria to membership in the United Nations.

893rd plenary meeting,
7 October 1960.

1495 (XV). Co-operation of Member States

The General Assembly,

Deeply concerned by the increase in world tensions,

Considering that the deterioration in international relations constitutes a grave risk to world peace and co-operation,

Conscious that both in the General Assembly and in the world at large it is necessary to arrest this trend in international relations and to contribute towards greater harmony among nations irrespective of the differences in their political and economic systems,

1. Urges that all countries, in accordance with the Charter of the United Nations, refrain from actions likely to aggravate international tensions;

2. Reaffirms the conviction that the strength of the United Nations rests on the co-operation of its Member States which should be forthcoming in full measure so that the Organization becomes a more effective instrument for the safeguarding of peace and for the promotion of the economic and social advancement of all peoples;

3. Urges further that immediate and constructive steps should be adopted in regard to the urgent problems concerning the peace of the world and the advancement of its peoples;

4. Appeals to all Member States to use their utmost endeavours to these ends.

907th plenary meeting,
17 October 1960.

1503 (XV). Report of the International Atomic Energy Agency

The General Assembly

Takes note of the report of the International Atomic

³¹ Ibid., document A/4514.

³² Ibid., document A/4512.

³³ Ibid., document A/4533.

³⁴ Ibid., document A/4527.

³⁵ Annual report of the Board of Governors to the General Conference, 1 July 1959-30 June 1960, Vienna, July 1960 (A/4531 and Corr.1 and Add.1).

Energy Agency to the General Assembly for the year 1959-1960.³⁵

943rd plenary meeting,
12 December 1960.

1513 (XV). Report of the Security Council

The General Assembly

Takes note of the report of the Security Council to the General Assembly covering the period from 16 July 1959 to 15 July 1960.³⁶

943rd plenary meeting,
12 December 1960.

1514 (XV). Declaration on the granting of independence to colonial countries and peoples

The General Assembly,

Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom,

Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence,

Aware of the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace,

Considering the important role of the United Nations in assisting the movement for independence in Trust and Non-Self-Governing Territories,

Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations,

Convinced that the continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace,

Affirming that peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law,

Believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,

Welcoming the emergence in recent years of a large number of dependent territories into freedom and independence, and recognizing the increasingly powerful trends towards freedom in such territories which have not yet attained independence,

³⁶ Official Records of the General Assembly, Fifteenth Session, Supplement No. 2 (A/4494).

that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory,

and solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations;

And to this end

Declares that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without

any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

947th plenary meeting,
14 December 1960.

1592 (XV). The situation in the Republic of the Congo

The General Assembly,

Having considered the item entitled "The situation in the Republic of the Congo",

Noting that the previous resolutions of the Security Council and the General Assembly on this subject are still in effect,

Decides to keep this item on the agenda of its resumed fifteenth session.

958th plenary meeting,
20 December 1960.

* * *

Note

Appointment of the Peace Observation Commission (item 18)

At its 960th plenary meeting on 20 December 1960, the General Assembly decided to reappoint, for the calendar years 1961 and 1962, the present members of the Peace Observation Commission. The Commission is therefore composed as follows: CHINA, CZECHOSLOVAKIA, FRANCE, HONDURAS, INDIA, IRAQ, ISRAEL, NEW ZEALAND, PAKISTAN, SWEDEN, UNION OF SOVIET SOCIALIST REPUBLICS, UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, UNITED STATES OF AMERICA and URUGUAY.



Department
of Justice

Ministère
de la Justice

MEMORANDUM / NOTE DE SERVICE

CONFIDENTIAL

April 4, 1977

TO/A: CONSTITUTIONAL REVISION COMMITTEE
FROM/DE: F.J.E. JORDAN
SUBJECT/OBJET: SELF-DETERMINATION AND INTERNATIONAL STATUS

F3-13(25)

Comments/Remarques

Attached is a short memorandum by Dr. Fitzgerald on the international law aspects of acquiring independence and international recognition as a state. While this subject is not one falling within the ambit of this Committee's review process, it might be useful for the Committee to consider it with a view to advising as to what further study should be pursued on the subject with a view to being prepared for the "debate" on the issue.

. In particular, would it be useful to

- (1) examine the ability to secede from the Confederation under the constitutional provisions,
- (2) examine the extent to which Quebec meets the criteria for statehood,
- (3) examine other cases where secession has been sought and succeeded or failed,
- (4) examine the discussions which have occurred in the United Nations on recognition, admission to membership, refusal of admission,
- (5) etc?

F.J.E.J.

Att.

I. Introduction

1. Presented herewith for the Constitutional Review Committee are certain points which relate to the acquisition of State sovereignty by a people who wish to secede from an already existing State as well as to the recognition of the seceding entity as a State.

II. The Principle of Equal Rights and Self-Determination of Peoples*

2. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Resolution 2625(XXV)), dated October 24, 1970, includes, under the heading "The principle of equal rights and self-determination of peoples" (which words are borrowed from Article 1(2) of the Charter), inter alia, the following paragraphs:

"By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

...

"The establishment of a sovereign and independent State, the free association and integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

...

"Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign or independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

*See Annex hereto

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3. Taking as a starting point the 1970 Declaration, Jacques Brossard, in his book, l'accession à la souveraineté et le cas du Québec, examines the question of the self-determination of the Quebec people in great detail and seeks to point out that there is nothing, in international law, which would prevent Quebec from becoming a separate State particularly in the view of the unique character of the case of Quebec. There is no scope here for discussing arguments which, in Brossard's book cover several hundred pages, although it is well to be aware of those arguments which are presented in a forceful manner. Rather, it may be useful to indicate under succeeding headings some of the tests which an entity must meet if it is to be considered a State for the purposes of international law and if it is to obtain recognition as a State.

III. Definition of a State

4. The traditional "definition" of a "State" was adopted in the 1933 Montevideo Convention on the Rights and Duties of States (165 L.N.T.S. 19), thus:

"The State as a person of international law should possess the following qualifications:

- (a) a permanent population;
- (b) a defined territory;
- (c) government; and
- (d) capacity to enter into relations with other States."

O'Connell, in International Law, Vol. I (1970), p. 285, indicates that... "the extent of population and territory seems to be of less significance in United Nations practice than degree of autonomy and stability of government, though not infrequently autonomy is correlative with size as in the cases of Monaco, San Marino and Liechtenstein." "Also," states O'Connell, "the capacity to enter into treaties is not limited to fully sovereign states and changes in the social and political structures of territories will increasingly require the extension of this capacity to abnormal entities."

5. Here, it is of interest, for purposes of the Canadian debate, to note that Brossard, pages 108-109, gives the following résumé of the conditions which must be fulfilled by a people for the purposes of having the right to opt for independence as a State:

1° Il doit d'abord, bien entendu, constituer un « peuple » au sens de la Charte des Nations unies et remplir les conditions requises afin de pouvoir exercer le droit à l'autodétermination ou droit de libre disposition des peuples [p. 64-70, 83-89].

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2° En plus de posséder une « organisation politique » ou un « embryon de pouvoir politique », ce peuple doit posséder une certaine *dimension politique*. Celle-ci dépend de certains faits mais elle dépend aussi, dans une large mesure, de l'appréciation de la société internationale.

3° Ce peuple doit être *regroupé territorialement* de façon à ce que le territoire de son État puisse être clairement délimité.

4° Ce peuple doit pouvoir *former un État viable*. Cette viabilité dépend notamment de sa population et de ses ressources économiques, mais elle peut dépendre aussi, dans une large mesure, de l'appui politique ou économique de la société internationale ou de certains autres États ou groupes d'États.

5° En ce qui concerne les Nations unies, ce peuple doit s'engager en outre à respecter, en tant qu'État, les principes de la Charte et du droit international.

Les « conditions » qui précèdent s'appliquent à tous les cas d'accession à l'indépendance et sont cumulatives. Les « conditions » additionnelles suivantes s'appliquent plus particulièrement aux cas de sécession et sont alternatives :

6° Le peuple en question doit avoir le *consentement* de l'État dont il désire se détacher.

7° *A défaut*, il doit avoir des *motifs suffisants* de le faire : ce sera notamment le cas si l'État qui l'englobe ne lui reconnaît pas l'égalité de droits ou le traite de façon discriminatoire, ou s'il lui refuse le droit de s'autodéterminer sur le plan interne.

8° Il pourra toutefois se séparer de l'État qui l'englobe si telle est *la volonté* clairement exprimée et nettement majoritaire de sa population *et* s'il appert de façon suffisamment évidente que ce peuple ne peut plus vivre ou ne désire plus vivre ni coexister avec l'autre peuple ou les autres peuples qui sont compris dans l'État qui l'englobe.

A ces « conditions » plus ou moins juridiques (et de plus en plus politiques), il faut ajouter une constatation sur laquelle nous allons revenir dans un instant : quel que soit son droit et quels que soient ses motifs de désirer l'indépendance, le peuple qui se proclame indépendant et *réussit* à s'affirmer comme tel peut faire légitimer sa position.

It will be noted that Brossard's conditions are more numerous than those set out in the Montevideo Declaration because he is concerned not only with the mere definition of a State (and his conditions contain the Montevideo elements), but also with certain additional alternative conditions which pertain to cases of secession. Again, it is not proposed to comment on Brossard's conditions, since, at this stage the chief concern is merely to indicate points that will have to be considered in discussing the case of the possible secession of Quebec.

IV. Establishment of a New State

6. Without being exhaustive of the possibilities, it may be indicated that a new State may be established through the regrouping of existing States, the annexation of peoples to existing States, and the detachment of a State from an existing unit. The last method could include such forms as secession, the breaking of a union or

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partition of a State, separation from a unitary State or detachment from a colonial metropolitan unit. Dismemberment of a State would lead to the disappearance of the State dismembered. The case of Quebec would, it appears, be one of secession from a federation; and it is Brossard's thesis that Quebec's case is so unique that its secession from the Canadian federation is justified.

V. Recognition-Distinctions to be Drawn

7. A discussion of recognition involves the drawing of certain distinctions. Firstly, recognition is a political action whereby the recognizing State indicates a willingness to acknowledge the factual situation of the existence of a State and to bring about certain legal consequences of that acknowledgement. Secondly, acknowledgement is not recognition if it is limited to noting the factual situation.

8. O'Connell points out (I, 128) that:

"In order to distinguish an acknowledgement of facts which has consequences in international law from one which has not it is useful to distinguish three processes, cognition, cognisance and recognition. The taking notice of the facts may be described as cognition. Until the facts are noted and until indeed they are facts, there is no proper cognition, without which there can be no proper recognition. Cognisance is the act of some body other than the executive taking note of the facts and allowing consequences to follow therefrom. This is what a judge does when he draws legal conclusions from the existence of an unrecognized as well as from a recognized State or government. Recognition is the act of the Executive taking note of the fact and indicating a willingness to allow all the legal consequences of that noting to operate..."

9. It is also important to bear in mind the legal significance of recognition. According to one view, it has a "constitutive" effect in that only and exclusively through recognition does a State become an international person and a subject of international law. However, according to one noted authority, "The better view is that the granting of recognition to a new state is not a "constitutive" but a "declaratory" act; it does not bring into existence a State which did not exist before." (See Brierly, J.L., The Law of Nations (6th ed., Waldock 1963), 138-139). In this view, a State may exist without being recognized.

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would be that of the self-determination of peoples. Prominent separatists have already advanced it to justify Quebec's right to secede. But it is a weak reed to lean upon in international law.

In practice, the UN has so far been hostile to the secession of parts of member states. The UN worked successfully to end the secession of Katanga from the Congo, and the secretary-general rejected the right of Biafra to secede from Nigeria.

The law gives no standing to the Parti Quebecois' chosen method of expressing self-determination.

"A referendum cannot validate a separation that would otherwise be illegal," says Matas.

"If Quebec can legally separate, that separation must be effected by legislation by the National Assembly. It cannot be effected by referendum."

New Scotia tried to get out of Confederation in 1868, and 31,000 out of 48,000 electors signed a petition in favor of separation. But the federal government was opposed, and Britain did not legislate secession.

But do the legalities matter that much after all, compared to the popular will and political resolution of the two sides?

Not to Walter Tarnopolsky, professor of constitutional law at Osgoode Hall law school.

"A revolution that succeeds legitimizes itself," he says. "If it fails, the rebels acted illegally."

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VI.

The Nature of Recognition

10. As already indicated, recognition is a political action on the part of the recognizing State. It follows that no State has an entitlement to be recognized. (O'Connell, I, 132) Whether States have granted recognition or withheld it has always been a matter of politics and not of law.

VII.

Conditions for Recognition

11. As O'Connell points out (I, p. 132) recognition is subsequent and consequential, and hence is conditional upon the entity being internally organized in such a way as to be competent to perform an international act. Premature recognition, that is of a community not so organized (and this could be pertinent in the case of Quebec), is an abuse of procedure which constitutes and illicit intervention in the affairs of the mother country from which the community is in the process of breaking away. "However, says O'Connell, "provided the community is organized in the manner prescribed by international law the parent's consent is not a pre-condition of its statehood - for the parent may well be the last to admit hard facts - and therefore the act of recognition is not dependent upon it." (O'Connell, I, 132)

12. Little useful purpose would be served in this note in examining the question of the recognition of change of government since the case under consideration is that of the coming into existence of a new State and the recognition of that State.

VIII.

Modes of Recognition

13. "Recognition is an act of the executive deliberately performed with the intention of bringing about the accepted consequences of the act. Unless there is deliberation there is no recognition. Hence it is possible for a government to have almost normal intercourse with another government and yet not recognize it, allowing only the consequences of its intercourse and excluding the other consequences which would flow from recognition." (O'Connell, I, 153) Implied recognition may be ascertained by construction of the relevant acts of the government alleged to have accorded recognition, and, in this regard, the following are some of the items to be given appropriate weight: (a) the reception of diplomatic representatives and (b) the entry into treaty relationships with unrecognized governments. But co-membership, even of the United Nations, does not involve recognition. (O'Connell, I, 153-158) These are all points that would have to be considered in the case of a seceding province because outside pressure could be brought to bear on Canada indirectly if certain States exchanged diplomatic representatives with the province, entered into treaty relationships with it and voted for its recognition as a member of an international organization.

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Conclusions

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14. The foregoing constitutes an extremely brief presentation of points for consideration in a field which is almost more political than legal. Yet it is through the application of the practice subsumed under these various points that international recognition of states takes place bilaterally or in the multilateral form of international organizations.

15. The Constitutional Review Committee may wish to bear in mind the foregoing material (which represents the briefest description of complex aspects of international law and practice) when considering the question of the secession of a province and a people located therein and the possibility of international recognition of the seceding entity.

Annex

Le texte du discours inaugural prononcé par le premier ministre René Levesque, le 8 mars 1977, à l'ouverture de la 31^e législature du Québec.

Extrait

"... Toute le monde respectera sûrement ce droit indiscutable que possède le peuple québécois de s'auto-déterminer, et l'exercise qu'il sera appelé à faire de ce droit..."

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Secession is legally possible

By ^{BA} ROBERT NIELSEN
Star staff writer

Can Quebec legally separate from Canada in the way that the Parti Quebecois proposes?

That once-academic question came into live Canadian politics this week. An article answering it in careful detail, written for the McGill Law Journal last year by Winnipeg lawyer David Matas, has suddenly become a hot item in Canadian law libraries.

In brief the answer is: Yes, in certain circumstances Quebec or any other province could legally secede — although that might be very difficult if the federal government opposed the secession.

If Ottawa and Quebec agreed on secession, there wouldn't be much to it, even though Canada's present constitution, the British North America Act, doesn't allow a province to separate either unilaterally or in concert with Ottawa.

In that case it would be necessary for the Canadian Parliament and Quebec to ask the British Parliament to legislate the separation by an amendment to the BNA Act.

Matas thinks such a joint request would be granted even if all the other provinces opposed Quebec's secession. Legally, other provinces wouldn't have a leg to stand on because the amendment wouldn't affect their constitutions or the constitutional division of powers between them and the federal government.

What Quebec couldn't do legally

under the BNA Act would be to secede simply by amending its own constitution. To separate in this way it would have to change or eliminate the office of the lieutenant-governor, and it couldn't do that without poaching on the federal constitution.

And yet — here's where things start to get complicated as the law stretches itself to cover the realities of a disorderly world — a unilateral secession by Quebec without an amendment to the BNA Act would not necessarily be illegal.

There are other founts of legality than the BNA Act which could be drawn upon by Canadians ambitious to turn a province into an independent country.

Of these, one of the most important is effective control of the territory it claims a right to govern.

"If Quebec unilaterally declared itself separate from Canada and the Quebec government was in complete control of the territory of Quebec, and it appeared certain to remain in control, then the separatist regime would be the legal regime even without any amendment of the BNA Act."

If, however the federal government continued to claim its right to legislate for Quebec in matters assigned to Ottawa by the constitution, and if it took steps to regain control of Quebec that might possibly succeed, then a separatist regime would

possible

not meet the "effective control" test of legality.

That was the line taken by Britain when Ian Smith unilaterally declared Rhodesia's independence of colonial ties in 1965.

The separatists' prospects of controlling Quebec would obviously be improved if Canada did not oppose secession by force. If secession were forcibly opposed, control might depend on the loyalty of Canadian Armed Forces stationed in Quebec.

Another principle that could validate a unilaterally seceding regime is drawn from the law of England. It is that the "sovereign in possession" is entitled to the allegiance of its subjects.

This means that people in Quebec would, at least temporarily, have a duty to obey a separatist regime for purposes of carrying on the administration of government.

Disloyalty to the seceding regime would be a crime not only in its own eyes, but also in the eyes of the federal government, and would, Matas says, be treated as such if the federal government regained control of the province.

The Canadian Criminal Code reinforces this principle. A Quebec citizen who carried obedience to a separatist regime to the point of resisting the return of the federal power would not be guilty of treason.

Perhaps the most impressive principle Quebec could invoke, in terms of Canadian public opinion,

THE REFERENDA held in Scotland and Wales last week should be studied in Quebec — the lessons are significant. In Scotland, the referendum settled absolutely nothing, a warning of exactly what's most likely to happen in Quebec.

Wales did say no, decisively, and Scotland said — was it yes or no or maybe? to Prime Minister James Callaghan's proposal to set up regional governments. In Wales, the 243,048 voters who accepted the proposal were buried by the 956,330 voters who said no. The answer was final only in Wales, where the secessionist movement had never been very strong anyway.

But in Scotland? There, where the nationalist movement seemed so strong a few years ago, the yes vote in favor of devolution was a bare majority of the votes cast: 51.6 per cent. But these yes votes represented less than a third — 32.9 per cent — of those who had the right to vote. The turnout was only about 64 per cent of the Scottish electorate. So how are the results to be read? Was it a victory, though a narrow one, for devolution, since a majority of votes cast were in favor? Or was devolution defeated, since less than a third of the electorate came out for it?

Such questions could become very important after Quebec holds its referendum, because an ambiguous outcome here is a strong pos-

William Johnson in Quebec

Plenty to learn from U.K. vote

sibility. The stake in the Quebec referendum is much higher, passions could be much stronger and the dangers of ambiguity greater for civil peace and the state of the economy.

In Britain, the Government had eliminated in advance some of the ambiguities. The bill required that at least 40 per cent of the eligible electorate as well as a majority of the votes cast be in favor of devolution for the referendum to carry. Now it is clear that it was a wise provision. Those who abstained from voting clearly showed no enthusiasm for regional government. Before making a change that was a sharp breach with the past it was reasonable to require a fairly

broad support for that change.

Now, what about Quebec? Here the change proposed by the PQ will be far greater than regional government, something Quebec already has. How will the result of Quebec's referendum be interpreted? Will those who don't vote be taken into account? What level of support in the total electorate, and what percentage in favor among those who actually vote, will be considered a mandate for sovereignty-association?

These are all questions without answer in Quebec. The Government chose to maintain the greatest possible indefiniteness. It announced its intentions in a white paper on "consulting the people,"



way as the ballots which are cast. If in Quebec the outcome should be the same as Scotland's, would the Quebec Government consider had won a mandate?

Will a majority yes or a majority no be given equal weight? That is will the Government consider either a majority yes or a majority no as a final answer to its question? Or will only a yes be considered final, whereas a no is merely considered the prelude to another referendum a few years later? The Government has never clearly put forward its stand on these questions, certainly not in the white paper on the referendum. Its general attitude suggests that it will consider a yes vote as definitive, no vote as temporary. It has never committed itself to accept the verdict of the electorate as final.

The strategy of the Quebec Government is entirely directed toward winning a majority yes vote from a population which is in majority against sovereignty-association. That requires trickery of a high order, and the whole approach of the Government follows logically from the way it defines its objective. That means keeping the population in the dark as long as possible as to the question to be asked; it means fighting the referendum campaign on anything but the main issue, it means leaving undefined how the results are to be interpreted.

without any specific reference to the referendum on Quebec's future. Instead, the Government proposed the rules of referendum-in-general.

So the bill was passed without Quebecers or anyone else knowing what question on Quebec's future will be put to the people. Now, more than two years after the Parti Quebecois came to power, the people still don't know what question will be asked.

Nor does anyone know how the answers given in the ballots will be interpreted. Will abstentions be taken into account as a withholding of a mandate, or will they be considered as evenly divided between yes and no, or dividing in the same