

# The issue of international recognition in the Supreme Court of Canada's Reference on Quebec Sovereignty

The Supreme Court's *Reference on Quebec Sovereignty* of August 20, 1998,<sup>1</sup> the "Solomonic judgment" as one recent observer has characterized it,<sup>2</sup> has been commented on in many of its aspects, and some of the juristic opinion has been concerned with its international underpinnings.<sup>3</sup> In my own piece on "globalizing sovereignty,"<sup>4</sup> I attempted to look into the international ramifications of the Supreme Court's opinion and to understand the linkage made by the court between the duty to negotiate and the international community.

I thought I would expand on this subject and explore in greater detail the issue of international recognition that the court relies upon in its judgment. International recognition is a very well-known concept of international law and has been the subject of a great deal of attention throughout the development of the law of nations.<sup>5</sup> It has been an evolving institution that has not lost its relevance with the proliferation of sovereign states and has been at the crossroads of international law and politics.

Although referred to at least seven times in the *Reference*, the question of international recognition of a sovereign Quebec is not pursued to any great extent by the Supreme Court of Canada. The court's statements on the topic reveal themselves, upon closer reading, to consist mainly of political prognostication and not of legal reasoning. This is so true in fact that one is led to ask: to what purpose was the matter raised by the court at all? I suggest this answer. The threat of non-recognition by the international community appears to be the only sanction the court adverts to in its circumspect discussion of the consequences of an illegal—that is, unconsti-

BY DANIEL TURP

Daniel Turp is Member of Parliament for Beauharnois-Salaberry, Critic of the Bloc Québécois for Foreign Affairs, and Professor at the Faculty of Law of the Université de Montréal (on leave)

**It is clear, then, that the court considers there to be an obligation on the so-called participants in Confederation to negotiate. But the foundation of this obligation is not at all clear.**

tutional—departure from Canada by Quebec. The purpose of the court's discussion of recognition seems to emphasize the court's contention that a unilateral declaration of independence by Quebec is against Canadian and international law.

The court first addresses the issue of international recognition in declaring that: To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of

the duty to undertake negotiations and pursue them according to constitutional principles may undermine the government's claim to legitimacy which is generally a precondition for recognition by the international community. ... Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process.<sup>6</sup>

This court's first allusion to recognition clearly links the recognition process with the duty to negotiate, the most "stunning element" of the Supreme Court *Reference*.<sup>7</sup> But the court refers not only to this newly created constitutional duty to negotiate, it also stresses the importance of legitimacy in the process of recognition. These notions colour the court's discussion of recognition, and need to be addressed before we deal with the issue of international recognition itself.

## THE DUTY TO NEGOTIATE AND THE CLAIM TO LEGITIMACY

After dismissing a challenge to its jurisdiction, the court begins its analysis of the questions put to it by a discussion of the nature of the Canadian constitution. Our constitution is both written and unwritten. Included in the unwritten part are principles that infuse and inform our constitutional arrangements.<sup>8</sup> Four of these principles are considered by the court in this opinion: federalism; democracy; constitutionalism; and the rule of law and the protection of minorities.

The obligation to negotiate is first mentioned in the court's discussion of

**International recognition, page 84**

the principle of democracy. The court declares that the *Constitution Act, 1982* gives expression to the democratic principle in conferring a right to initiate constitutional change on "each participant in Confederation."<sup>9</sup> This right involves "a corresponding duty on the participants in Confederation to engage in constitutional discussion in order to acknowledge and address democratic expressions of a desire for change in other provinces."<sup>10</sup> This corresponding duty also arises from the democratic principle.

Later in the *Reference*, the court declares that "[t]he secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation."<sup>11</sup> The duty to negotiate, which was described as arising from the right of provinces to initiate constitutional change under the *Constitution Act, 1982*, and the concomitant democratic principle that that Act embodies, is here said to arise differently. Here, the obligation to negotiate is said to arise from the simple legal fact that the breaking off of a province from Canada cannot be effected legally without amending the constitution.

The court finds a third source for the obligation to negotiate. "The clear repudiation by the people of Quebec of the existing constitutional order ... places an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations ..."<sup>12</sup>

Yet another source for the duty to negotiate is identified by the court in the *Reference*, where the "constitutional principles which gave rise to the duty to negotiate" are given as "federalism, democracy, constitutionalism and the rule of law, and the protection of minorities."<sup>13</sup> Here, the court declares that all four of the principles with which they are concerned in the *Reference* found an obligation to negotiate.

It is clear, then, that the court considers there to be an obligation on the so-called participants in Confederation to

**The court's discussion of legitimacy is fraught with difficulties. It does not define the term. But the thrust of the arguments suggests that by "legitimacy," the court means some sort of political or popular authority, rather than any sort of legal authority. This must be so, for Quebec's legal authority is perfect as is.**

---

negotiate. But the foundation of this obligation is not at all clear. The court cites at least four different foundations for the obligation, seeming not to notice that it is doing so. The reasoning leaves something to be desired.

Nor is it clear whether the obligation to negotiate applies in the case of any proposal for constitutional change by any province, or whether it is limited to a proposal to leave by one of the provinces. The reasoning in paragraphs 69 and 90 suggests that the obligation arises upon any constitutional proposal by any province. But the reasoning in paragraphs 84 and 88 suggests that negotiation is only necessary in the case of a claim for sovereignty by a province,

and the court's discussion of the legitimacy to initiate a constitutional amendment that the government of Quebec would enjoy following a Yes vote<sup>14</sup> supports the view that the duty to negotiate is a narrow one and specific to the Quebec case.

The obligation to negotiate, whatever its legal foundation in the court's view, is deemed to affect Quebec's recognition internationally, which would also be the case for Quebec's claim of legitimacy.

The issue of legitimacy is brought by the court when it commences its discussion on referendums. Referendums have no legal effect per se in British parliamentary systems. The court states that "the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme."<sup>15</sup> Hence the sovereigntist's longstanding argument that, strictly speaking, the government of Quebec need not wait until it has won a referendum in order to initiate negotiations for Quebec's sovereignty. Nevertheless, the court acknowledges that "a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate" and considers that "[t]he democratic principle ... would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada."<sup>16</sup>

The effect of a successful referendum—subject to the court's mention of a "clear majority" and a "clear question," would be to "confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means."<sup>17</sup>

The court's discussion of legitimacy is fraught with difficulties. It does not define the term. But the thrust of the arguments suggests that by "legitimacy," the court means some sort of political or popular authority, rather than any sort of legal authority. This must be so, for Quebec's legal authority is perfect as is. As their

court argues, the *Constitution Act, 1982* confers on Quebec, as a participant in Confederation, the "right" to initiate constitutional change with or without the "legitimacy" of a positive referendum result, which in any event is an instrument of "no direct role or legal effect in our constitutional scheme."<sup>18</sup> So it would seem that the legitimacy to which the court refers is not needed either. Nor does the court say that the Quebec government requires such legitimacy. It simply observes that the Quebec government would gain this legitimacy as a result of a successful referendum.

The court affirms, on the other hand, that "refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole."<sup>19</sup> The statement applies to all parties, not just to Quebec. But in Quebec's case, it is difficult to understand how the manner in which it might negotiate the constitutional amendments necessary to effect its departure from Canada could possibly jeopardize the legitimacy of its assertion of its rights. At least in the case of its right to initiate constitutional change, that right is complete and unassailable simply by virtue of Quebec's status as a province of Canada (or "participant in Confederation"); a successful referendum may increase its political legitimacy in some abstract way, but it adds nothing to Quebec's already perfect legal powers.

Likewise in the case of the other parties to the negotiations, the federal government and the other provinces, their rights to be a party to the negotiations and approve or disapprove proposed constitutional amendments must also be founded on the unassailable ground of the *Constitution Act, 1982*. In their case, as in the case of Quebec, "legitimacy" seems to be a political consideration foreign and extrinsic to their legal rights and powers. Yet, legitimacy, as well as the duty to negotiate, are not foreign to matters related to international recognition, to which I will now turn in dealing with

**But in Quebec's case,  
it is difficult to  
understand how the  
manner in which it  
might negotiate the  
constitutional  
amendments  
necessary to effect its  
departure from  
Canada could  
possibly jeopardize  
the legitimacy of its  
assertion of its rights.**

---

the court's various statements on the subject of recognition itself.

**INTERNATIONAL RECOGNITION  
AND QUEBEC SOVEREIGNTY**

The court claims that a failure by any party to observe its constitutional obligation to negotiate "in accordance with the principles" may "undermine a government's claim to legitimacy which is generally a precondition for recognition by the international community." We have seen that the legitimacy of which the court speaks must be a political legitimacy rather than a legal one. If that is so, there may be some truth in the claim that negotiating in bad faith, for example, might damage Quebec's political bid for international recognition. For "[i]n more cases than not the decision whether or not to recognise will depend more upon political considerations than exclusively legal factors."<sup>20</sup> Notice, however, that this statement is a political opinion of the court rather than a statement of either Canadian or international law.

The court does consider, however, the possibility of Quebec's *de facto* se-

cession.<sup>21</sup> It declares that "under the Constitution there is no right to pursue secession unilaterally," yet "this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession." It continues: "[t]he ultimate success of such a secession would be dependent on effective control of a territory and recognition by the international community."<sup>22</sup>

It is, however, unclear what the court means by a "successful secession." If it is speaking of the law (as perhaps it ought to be), it is mistaken to say that an effective Quebec accession to sovereignty depends upon recognition by the international community: "Recognition is not strictly a condition for statehood in international law" and "[s]tates do not in practice regard unrecognised States as exempt from international law."<sup>23</sup> The court does finally acknowledge that recognition is not a condition for statehood, when it declares that "recognition by other states is not, at least as a matter of theory, necessary to achieve statehood."<sup>24</sup> So the court's statement that the success of Quebec secession depends in part on international recognition is a political statement, not a legal one. Such dictas of the court in the nature of a political prediction are an informed guess about a hypothetical situation. They do not declare the law.

There is one instance, however, of the court addressing the question of recognition from a more legal perspective. The court notes that "[t]he process of recognition, once considered to be an exercise of pure sovereign discretion, has come to be associated with legal norms."<sup>25</sup> It cites, but does not quote from, the *European Community Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*.<sup>26</sup> It notes that foreign states, in determining whether or not to recognize a seceding state, may take into account "the legality of the secession according to the law of the state from which the territorial unit purports to have seceded."<sup>27</sup>

The court adds that, "an emergent state that has disregarded legitimate  
**International recognition, page 97**

## Solomonic or Multronic? continued from page 86

sion, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached.

All this plus a blunt reminder that secession would require an amendment of the constitution, and no suggestion that Quebec could do that unilaterally: "Under the Constitution, secession requires that an amendment be negotiated."

So, if the government of Quebec is serious about independence, it is seriously mistaken in straying from its original strategy of boycotting the whole thing, relying on international law, and emphasizing the fact that the Canadian constitution was imposed on it and that the Supreme Court—every last judge on it—was appointed by the level of government that did the imposing. In fact, though Trudeau passed the first constitutional amendment against Quebec's will, it was the Supreme Court of Canada that said it was constitutionally okay to do so.

But if the Court is biased, why not hand the federal government total victory? Why give Quebec any concessions, even these puny rhetorical ones? The answer is that the Court is biased in favour of federalism and not any particular government wearing the federalist mantle, much less that particular government's strategy.

The Court reads the polls. It knows that the sovereigntists have been weakened, and it knows that nothing strengthens weak sovereigntists like fresh insults from Canadian institutions. Better to show a little rhetorical generosity. This, after all, was the strategy of the Meech Lake Accord, and here it might just be worth mentioning that, unlike the court that torpedoed Meech with its ruling on the signs law in 1988 (a "Trudeau" court in which all the judges were appointed by Meech's most implacable foe), this court is still dominated by judges appointed by Meech architect Brian Mulroney (6-9—a "clear

majority" if ever there was one). But Meech was no gift to the cause of Quebec sovereignty; it was meant to be the kiss of death. This judgment is of no more value to Quebec sovereigntists than the "distinct society" clause, and for the same reason: its interpretation lies entirely in the hands of an institution that will always put federalist interests first. These judges will turn on a dime if the political need arises. They've done it before, and in Quebec, too, with much less jurisprudential leeway than they have given themselves in this case. They're only (slightly) elevated lawyers, after all, and you've heard the one about the lawyer haven't you? ❖

---

\* Although this paper was published in an earlier issue of *Canada Watch*, certain portions were inadvertently edited. The editors have, therefore, agreed to republish the article in its original, unedited form.

## International recognition continued from page 85

obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition, at least with respect to the timing of that recognition."<sup>28</sup> That last sentence is simply an inelegant way of admitting that an ungentlemanly break from Canada by Quebec would probably do no more than delay Quebec's inevitable recognition by third states. Interestingly enough, the question of recognition by Canada itself is never addressed in the *Reference*. This is a curious omission given that "if the former sovereign recognizes as a State a local unit exercising *de facto* control over certain territory, then that entity is, at least *prima facie*, a State."<sup>29</sup>

Given that the court's discussion of recognition consists mainly of political, rather than legal, considerations, we may wonder why the court chose to

consider the question of international recognition at all. The three questions put to the court could have been answered, it would seem, without broaching the topic. The reason lies most probably in the court's admission that, absent negotiations, Quebec may opt to break from Canada anyway.

The *amicus curiae* submitted that, with or without a right under international law to secede unilaterally, international law will ultimately recognize effective political realities.<sup>30</sup> This argument is referred to as the principle of effectivity. It amounts, to some extent, to a denial of the court's jurisdiction over that matter. It may even imply a denial of the rule of law. The response of the court is forceful:

If the principle of "effectivity" is no more than that "successful revolution begets its own legality" ... it necessarily means that legality follows and

does not precede the successful revolution. *Ex hypothesi* the successful revolution took place outside the constitutional framework of the predecessor state, otherwise it would not be characterized as "a revolution." It may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to legal consequences; but this does not support the more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under the colour of a legal right.<sup>31</sup>

The court also notes that while our law does in some cases allow a person to

**International recognition, page 98**

# International recognition continued from page 97

profit from her own wrong (for instance, in the case of adverse possession of land under common law), to allow the profit is not to make the profitable act any less wrong. As the court puts it, "It is ... quite another matter to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place."<sup>32</sup>

Thus, the court's response to the effectivity argument is to assert that effective or otherwise, the act of unilateral secession remains illegal because it is unconstitutional. And yet, nowhere in the *Reference* does the court suggest that in the event of such an illegal secession, it would be Canada's responsibility or prerogative to prevent the illegal act and to reassert the rule of law. Nowhere is the possibility of military measures—or any measure, for that matter—mentioned. The only sanction to which the court alludes in the event of an unconstitutional break from Canada could be the possible withholding of recognition of Quebec by the international community. Yet, the international community could also sanction Canada if it has not negotiated with Quebec in good faith, and such a sanction could be the granting of international recognition to Quebec.

The question of the international recognition of a sovereign Quebec was obviously taken up by the Supreme Court of Canada because it realized that the issue of Quebec sovereignty could not be looked at within only domestic parameters. A close examination of the court's reliance on recognition reveals that it is referred to from a political standpoint rather than from a legal viewpoint. Such a course of action is surprising, but shows how intertwined the issues of international law and politics have become.

The views of the Supreme Court of Canada comfort the idea that recognition could play a key role in the process whereby Quebec could achieve international sovereignty. Sovereignists have long been aware of this fact and have carefully studied the issue.<sup>33</sup> But, they also have been active in explaining to

state members of the international community, through various means,<sup>34</sup> that they would solicit international recognition when Quebeckers decide to become a country after negotiating, as they have always advocated, not only the terms of secession, but also a novel form of partnership with Canada.<sup>35</sup> And that process, with the additional guidance of the Supreme Court of Canada, is bound to continue. ❁

1 [1998] 2 S.C.R. 217, paras. 103, 106, 110, 142, 143, 144, and 155 (the *Reference*). In para. 152, the court also seems to refer to recognition when it uses the expression "acceptance of the result by the international community."

2 M. Mandel, "Solomonic or Multronic?" elsewhere in this issue. See also K. McRoberts, "In the best Canadian Tradition" (January-February, 1999), 7 *Canada Watch* 11.

3 O. Corten, "Vers un droit international canadien," *id.*, at 39.

4 *Id.*, at 4.

5 On recognition, see generally J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine* (Paris: Pedone, 1975) and the recent update published by the same author in "La reconnaissance internationale: déclin et renouveau" (1993), 33 *Annuaire français de droit international* 7.

6 *Reference*, para. 103.

7 See on this duty P. Hogg, "The Duty to Negotiate" (January-February 1999), 7 *Canada Watch* 1. See also A.C. Cairns, "The Quebec Secession Reference: the Constitutional Obligation to Negotiate," vol. 10, no. 1, *Constitutional Forum* 6.

8 *Reference*, para. 32.

9 *Reference*, para. 69.

10 *Ibid.*

11 *Id.*, para. 84.

12 *Id.*, para. 88.

13 *Id.*, para. 90.

14 *Id.*, para. 87.

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*

18 *Id.*, para. 69.

19 *Id.*, para. 95.

20 See M.N. Shaw, *International Law*, 3rd ed., at 242.

21 *Reference*, para. 106.

22 *Ibid.* See also *Reference*, para. 155.

23 See J. Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 1981), 74.

24 *Reference*, para. 142.

25 *Reference*, para. 143.

26 (1992), 31 *International Legal Materials* 1485, at 1487.

27 *Reference*, para. 143.

28 *Ibid.*

29 See Crawford, *supra* note 23, at 249. See also the remarks to the same effect in a Canadian context by P.J. Monahan, "When Cooler Heads Shall Prevail: Assessing the Costs and Consequences of Quebec Separation" (January, 1995), *C.D. Howe Institute Commentary*, no. 65, at 12.

30 *Reference*, para. 110.

31 *Reference*, para. 144.

32 *Reference*, para. 146.

33 For a summary of the positions of the sovereigntist movement, see D. Turp, *Avant-projet de loi sur la souveraineté* (Cowansville: Éditions Yvon Blais, 1995), at 6-9 and the bibliography, at 11-12.

34 See Bloc Québécois, *The Road to Nationhood*, Parliamentary wing of the Bloc Québécois, Information Branch, 1998 (available on the Bloc Québécois's Web site at [www.blocquebecois.parl.gc.ca](http://www.blocquebecois.parl.gc.ca)).

35 See the recently released document on partnership: Bloc Québécois, *Dans l'intérêt de tout le monde*, Chantier de réflexion sur le partenariat, 17-18 avril 1999, at 25.