

Solomonic or Multronic?*

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The Supreme Court gave the federal government the answer it was looking for when it held that even a successful referendum would not give Quebec the right to secede "unilaterally," either under the Constitution of Canada or under international law.

However the Court disappointed hardline federalists with its recognition that "a clear majority on a clear question" would "confer democratic legitimacy" on Quebec's secession initiative and oblige the rest of Canada to participate in negotiations that might lead to sovereignty.

Both sides immediately claimed victory and the word "Solomonic" was heard frequently in the days following the release of the judgment, meaning to suggest that it wisely gave something to both sides. But that would be very bad Bible reading, because the essence of Solomon's judgment in the *Mothers' Case* was not that it gave something to both sides but that it pretended to, flushing out the wrongful claimant by trickery and ultimately handing total victory to her adversary.

If the Supreme Court's judgment is to be considered Solomonic, it is because it, too, is full of pretence and trickery. The main pretence is that the Court even answered the question it was asked. In fact, the Court pulled a typical legal trick and posed itself a completely different question, transforming the key notion of "unilateral secession" from *secession without agreement*, even after negotiations, (which is what Quebec was proposing in the sovereignty referendum) into *secession without negotiations*:

[W]hat is claimed by a right to secede "unilaterally" is the right to effectuate secession without prior negotiations with the other provinces and the federal government.

A second pretence is that the Supreme Court decided anything at all, even about the question it asked itself. In what may well be a judicial first, the Court was ada-

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mant that it would not enforce compliance with *any* aspect of its judgment. It would leave the question of whether "a clear majority on a clear question" had been achieved and whether the parties were complying with the duty to negotiate, to the parties themselves:

[I]t will be for the political actors to determine what constitutes "a clear majority on a clear question" ...

[T]he courts ... would have no supervisory role.

To appreciate how really extraordinary this is, imagine if, at the end of a

trial, the judge said, instead of "guilty" or "not guilty," that "*the guilty one is the one who clearly did it, but I leave it to the prosecutor and the accused to decide who that is. As for me, I'm outta here.*"

On the other hand, despite the earnest attempts of PQ lawyers to put a good spin on the decision, there was a clear winner and it was not Quebec—which was clearly assigned the role of the false mother. The federal government got the one thing it really wanted: a way to delegitimize a democratically won referendum. And here the Court delivered the goods in many ways: the effective subordination of international law to Canadian law, the idea of a "clear question," and, above all, the idea of "a clear majority." As even most sovereigntist Quebecers have had to admit, this can only mean that an old-fashioned, plain and simple majority of "fifty percent plus one"—the majority that Quebec came within a whisker of achieving in October 1995—would not be enough.

This response was highly predictable, because, in the modern world, going to constitutional court is the preferred way of denying people what they want and still calling it "democracy." That is why Trudeau imported the whole system into Canada: to "trump" democracy when it became inconvenient to the established order. The Court's constitutional *raison d'être* depends on this preposterous redefinition of democracy as not being about majority rule, otherwise known as "one person, one vote."

What the Supreme Court gave to Quebec as a consolation prize was essentially worthless: in place of the democratic right to independence after an affirmative vote by a majority of the population, Quebec got an unenforceable right to negotiations, with all the obstacles the rest of Canada could raise at negotiations underlined three times in red ink, and no promises about the outcome:

While the negotiators would have to contemplate the possibility of seces-

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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.

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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."²⁸ 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."²⁹

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.³⁰ 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.³¹

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

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