

Canada Watch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

SPECIAL DOUBLE ISSUE ON THE QUEBEC SECESSION REFERENCE

In search of plan A

When the Supreme Court of Canada handed down its historic judgment in the *Secession Reference* this past August, the nine justices achieved the impossible. Both Ottawa and Quebec claimed to find in the unanimous ruling support for their own preferred positions. Does this mean that we have turned the corner on the never-ending national unity saga, with the court having created the legal and political conditions for a consensual resolution of Quebec's claims? Possibly, but not quite.

The re-election of the Bouchard government on November 30 adds a new urgency to this matter. Premier Bouchard has stated that he will hold a third sovereignty referendum only in the event of "winning conditions." Yet the continued disarray in federalist ranks over how and whether to reform

BY DANIEL DRACHE
AND PATRICK J. MONAHAN

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the institutions of the federation suggest that Bouchard may well decide before too long that such winning conditions have emerged. And despite the much-repeated vow that Canada will be better prepared for the next referendum than it was during the near-debacle of the 1995 referendum campaign, the evidence of such preparation is far from apparent. Moreover, it recognized a duty to negotiate secession following a

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The duty to negotiate

To understand the *Secession Reference* (Supreme Court of Canada, 1998) we must go back to the referendum that was held in Quebec on October 30, 1995. In that referendum, the voters were asked:

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

BY PETER W. HOGG

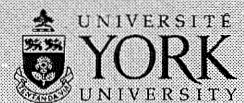
Peter W. Hogg is dean of the Osgoode Hall Law School of York University.

The referendum was defeated by the narrow margin of 50.6 percent to 49.4 percent. Had it been carried, "the bill respecting the future of Quebec" (which had been introduced into but not enacted by the National Assembly of Quebec) made clear that the National As-

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clear and unambiguous "Yes" vote. Thus the Supreme Court has foreclosed a federalist strategy premised on the threat of a "black hole" on the day after the referendum, while simultaneously reassuring borderline Quebec voters that the potential risks in voting "Yes" may well be tolerable.

A MORE IN-DEPTH ANALYSIS

With so much at stake, the court's decision and its impact on both Ottawa and Quebec's constitutional strategy requires a more in-depth analysis. It also raises equally fundamental questions about aboriginal rights in any secession of Quebec from Canada and the prominent role of the court in redefining Canada's constitutional rules of the game. The political ground is shifting and the court is at the centre of it.

To explore what may turn out to be the most important judgment in the Supreme Court's history, this past November *Canada Watch* gathered together at York University's Glendon campus 50 leading scholars, government policy makers, lawyers, and commentators from both sovereigntist and federalist perspectives. We can report that the vast majority of the participants at the Glendon meeting gave the court extremely high marks for producing a balanced and carefully nuanced judgment. Our participants were particularly impressed by the fact that the court denied total victory to both sides while at the same time allowing each to avoid the humiliation of a total defeat.

If the Supreme Court, in Stephen Clarkson's words, "pulled off a coup . . . showing that the constitution is not a strait-jacket," what is it about this judgment that has leading Quebec and English Canadian constitutionalists in broad agreement on the most disputatious of issues — namely, Canada's constitutional impasse?

AN UNFAMILIAR ROLE

The obvious answer is that the court provided leadership that had been wanting among Canada's political and intellectual elites. This is one of those

rare occasions when the court did something few would have predicted. It recognized that Ottawa and Quebec have a constitutional duty to negotiate secession based on a clear majority "Yes" on a clear question. Osgoode Hall Law School Dean Peter Hogg describes this duty to negotiate as the "stunningly new element that the Supreme Court of Canada added to the constitutional law of Canada in its opinion." But, as a matter of strict law, as Hogg explains, it is not easy to see where the obligation comes from since, in Hogg's view, "the vague principles of democracy and federalism . . . hardly seem sufficient to require a federal government to negotiate the dismemberment of the country that it was elected to protect."

John Whyte, deputy attorney general of Saskatchewan and a participating counsel in the reference, echoes Dean Hogg's assessment in this regard, observing that "the court pulled the duty to negotiate out of rarefied air." Still, while raising doubts about the legal pedigree of the duty to negotiate, Hogg was favourable enough in his assessment of its implications to state firmly that

Even without the court's ruling, the political reality is that the federal government would have to negotiate with Quebec after a majority of Quebec voters had clearly voted in favour of secession. It is safe to say that there would be little political support for a policy of attempted resistance to the wish of the Quebec voters. The court's decision simply converts political reality into a legal rule. Indeed, it is not entirely clear why it is a *legal* rule, since it appears to have no legal sanctions.

For Bloc québécois MP and law professor Daniel Turp, this duty to negotiate is a radical new development, for it "will allow sovereigntists to oppose any pre-emptive argument that the rest of Canada will not negotiate with Quebec following a 'Yes' vote in a Quebec referendum, such as those made during past

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us or silence any expression of our interests from the time plan B emerged. The Supreme Court, whose decision in the secession reference has often been criticized by our own public intellectuals since Quebec left Canada, was caught up in an inherited Canadian dilemma that was embodied in the questions asked of it. The federal government was not concerned with the possible future of New Canada when it formulated three questions focusing on the secession of Quebec. Admittedly, the court not only elaborated on the definition of the situation present in the questions it was asked, but, one might say, it constitutionalized that definition; it froze it and gave it such legitimacy that rival definitions of the priority question on our agenda — for example, what is the appropriate constitutional process for the creation of two new countries out of the shell of Old Canada? — appeared unconstitutional.

So, once momentum built up be-

hind the thesis that the big question on the Canadian agenda was how to deal with the secession of Quebec, our fate here in New Canada was an accident waiting to happen. Its likelihood was strengthened by the regrettable fact that ROC was headless, voiceless, and had no institutional existence. Unlike Czechoslovakia, Old Canada was not a two-unit federation — two halves that could bargain with each other. Even so, it was not absolutely inevitable that we were absent from the negotiations that attended our birth. The Supreme Court might have peered into the future, detected our pending existence, noted that we were not simply Old Canada writ small, and then tried to accommodate our concerns. That, however, was not to be. On the contrary, the Supreme Court decision firmly put us in the audience. Four years later that decision helped achieve the outcome the court sought should the Quebec electorate vote “Yes” — the constitu-

tional exit of Quebec. It also, however, contributed to another outcome the court neither sought nor appreciated — the creation of New Canada for which the Old Canada it privileged in negotiations was an imperfect proxy.

Our country has become a prison, paralyzed by partnership and other arrangements unwisely negotiated in our absence by what the Supreme Court called “Canada as a whole” in its much studied 1998 secession decision. That phrase meant that Quebec was represented on both sides of the negotiating table from which we were absent. This is the context for the present threatening secession movements in Atlantic Canada, British Columbia, and Alberta. If different, more realistic questions had been asked of the Supreme Court in the '90s, this memo might have been unnecessary.

Sincerely,
Preston Manning



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referendum campaigns by federalist leaders such as Pierre Elliot Trudeau or Mike Harris.”

Had the current court's vision of federalism been applied 15 years earlier in the *Quebec Veto* case, according to many of Quebec's constitutional experts, the federal government would never have been permitted to patriate the constitution from Britain over the objections of Quebec. As Jean Leclair puts it, “backtracking from the dubious reasoning it expressed in the *Quebec Veto Reference*, the court recognized the need to take into account Quebec's specificity in Confederation.” This time, in the *Quebec Secession Reference*, the court quite consciously avoided a narrowly legalistic approach and provided incentives for both sides to compromise in any future secessionist scenario. In so doing, according to York University political scientist Kenneth McRoberts, the court “transformed

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the terms of the public debate over Quebec sovereignty by cutting through the posturing and pretence and focusing all sides on the central questions at hand.”

In taking this unprecedented step, the justices were not disinterested actors but together formed a court that wanted to guarantee its own survival and integrity as Canada's primary legal institution. In refusing to keep Quebec in at any price, in Andréé Lajoie's analysis of the judg-

ment, the court saw its primary role as preservation of the Canadian state and preparation of the groundwork for an orderly exit of Quebec if it comes to that. From the outset, Quebec boycotted the entire proceedings but, ironically, in the end, the court gave Quebec more than it would have obtained had it appeared before the court. The advisory judgment conferred legitimacy on Quebec's right

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to *de facto* secession but upheld the legality of Ottawa's position that Quebec did not have the right to secede "unilaterally," either under the constitution of Canada or under international law.

Osgoode Hall Law School constitutional expert Michael Mandel, and the University of Montreal's Jacques-Yvan Morin, read the current judgment in a somewhat different light. Mandel argues that all Quebec received was at best "a consolation prize . . . [in place of] the democratic right to independence after an affirmative vote by a majority of the population." Morin takes the view that the court created a theoretical possibility of achieving secession, but then imposed so many obstacles as to make its achievement a practical impossibility.

THE DUTY TO NEGOTIATE: UNANSWERED QUESTIONS

Readers of this issue will also discover that the court's assertion of "the duty to negotiate" — the pivotal concept in its decision — is anything but clear and straightforward. Stanley Hartt, who served as chief of staff to former Prime Minister Brian Mulroney, makes the powerful point that in the event that negotiations were undertaken and failed to produce an agreement amid charges of bad faith, this could, in fact, lead directly to a unilateral declaration of independence by Quebec. If Quebec contested the legitimacy of Ottawa, nothing would prevent it from outright secession. The possibility of such an outcome, Hartt argues, would maximize uncertainty and unpredictability, a state of affairs that serves no one's interests. So good faith bargaining as defined by the court is too open-ended and imprecise when push comes to shove. Don't expect that the court has settled this issue in any definitive sense of the term.

Another equally contentious issue left in abeyance by the court's decision is who has a right to participate in the negotiations as envisaged by the Supreme Court. According to the Université de Montréal's José Woehrling, the

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court's judgment supports the view that the negotiations on secession must be conducted bilaterally, between Quebec and the rest of Canada, rather than multilaterally, between Quebec, on the one side, and each province and the federal government. Mark one for Quebec.

But the University of Saskatchewan's Donna Greschner comes to precisely the opposite conclusion: not only has the court required the involvement of the other provinces, but she suggests that provincial *legislatures* are likely to play a direct role in the process. Given their status as parties, they will have the right to initiate constitutional amendments directly in any negotiations should Quebec decide to secede.

The court's judgment also took a major step in recognizing the rights of Canada's First Nations to be at the negotiating table. For Quebec lawyer Paul Joffe, the court went very far in recognizing that aboriginal peoples living in Quebec are "political actors" who have a right to participate in secession negotiations. Joffe also interprets the court's judgment as establishing that boundary issues are a legitimate matter for negotiations and that the international law principle of *uti possidetis juris* could not be relied upon by Quebec to conserve the province's current boundaries.

NO KNOCK-OUT BLOW

If Ottawa went to the court with three narrow questions, expecting a legal knock-out, it didn't get it. The court did not give three simple answers to three deceptively simple queries. In a way that

no one could have predicted, the Supreme Court took a very different tack in "internationalizing" the process leading to potential Quebec secession. As Daniel Turp observes, the court envisages the international community as being directly involved in the secession process, in the sense that other states will (according to the court) monitor the negotiation proceedings to ensure that the domestic Canadian parties are meeting their constitutional obligations. Turp highlights the court's statement in paragraph 103 of its judgment to the effect that other states would be more likely to recognize an independent Quebec if it had declared sovereignty in the face of bad faith conduct by Canada.

It is not at all clear, however, how or whether other states would make such a judgment. Indeed, in the court's answer to question two, dealing with secession in the context of international law, the court notes that "international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of states" (paragraph 122). In fact, just seven paragraphs after having predicted that international states would be more inclined to recognize an independent Quebec in the event that Canada refused to negotiate secession in good faith, the court expresses the seemingly contradictory view that it is "wary of entertaining speculation about the possible future conduct of sovereign states on the international level." The court explains that it will not

engage in such speculation because "the Reference questions are directed only to the *legal* framework within which the political actors discharge their various mandates" (paragraph 110).

INTERNATIONAL PERSPECTIVES

Numerous commentators have suggested that the Supreme Court's judgment is likely to be widely read elsewhere and to establish an important international precedent on secession. That prediction seems to be confirmed by the papers contributed by three French jurists (Hamon, Emeri, and Avril) and two Belgian legal scholars (de Bruyker and Corten). Professor Francis Hamon of Faculté Jean Monnet, Université de Paris XI, suggests that the Supreme Court's decision constitutes an important precedent that could, in the future, be invoked to support other separatist demands in other countries. Hamon describes the Supreme Court as "daring" in confirming that a referendum can give rise to a constitutional obligation to negotiate, but he also describes the court as being cautious in describing the way in which this principle would be applied. Hamon also regrets that the court did not provide greater clarification of certain key points, such as what would constitute a clear majority or a clear question.

Professor Claude Emeri of the University of Paris praises the court's decision as a wise one. He also suggests that it backfired on the federal government, which had hoped to delegitimize the referendum as a method of achieving secession. Professor Emeri says the court has provided a remarkable lesson in constitutional and political theory, which brings honour to the members of the court. As for Professor Pierre Avril of the Université de Paris II et Institut d'études politiques de Paris, he likens the court's intervention to that of an arbitrator between the political actors, an intervention that may well take the heat out of a political controversy. However, he cautions that there are risks in the court assuming this role, particularly the possibility that the court will be tempted to take

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an activist stance, and to impose as a legal requirement the political solutions that the judges deem opportune.

Professor Olivier Corten of the University of Brussels is critical of the court's treatment of international law on secession, arguing that the court attempted to transpose the domestic norms of Canada into binding rules of international law. He argues that international law is neutral with regard to secession, with the only relevant question being whether the secession is successful as a matter of fact. Professor de Bruyker of the University of Brussels is also critical of the court for imposing a requirement of a "clear majority" in a referendum before secession negotiations can be triggered. He describes this as a political assessment that has been transformed into a legal rule, and one that is not likely to produce a legal solution to a process that is, at bottom, revolutionary in nature.

THE CONTINUING LEGACY OF 1982

André Joli-Coeur, the *amicus curiae* appointed by the Supreme Court to present arguments favouring Quebec's right of unilateral secession, conceded in his argument before the court that Quebecers are not an oppressed people. Joli-Coeur noted the presence of senior Quebecers in the highest echelons of the Canadian state, including the office of the prime minister as well as the Su-

preme Court itself. Nevertheless, Laval political scientist Guy LaForest maintains that the court was remiss in failing to consider whether Quebec's internal right to self-determination is *significantly* thwarted (as opposed to being totally denied) in the Canadian political system. LaForest challenges the legitimacy of a constitution that was imposed on Quebec in 1982 and that Quebec still refuses to sign. "Quebec, and all the provinces for that matter, are placed at the mercy of Ottawa," including "the judicial system, Senate, reservation and disallowance as well as its spending powers." Challenging the right of a Canadian national institution to define the terms upon which Quebec's right to self-determination could be exercised, Professor LaForest went so far as to label the Supreme Court the "new Judiciary Committee of the Privy Council," an institution, in his view, that cannot act impartially in assessing Quebec's claims to sovereignty.

For provincial rights advocates, the court's judgment muddied the constitutional waters in another fundamental way. It did not clarify what a clear question was, what a clear majority should be, or what constituted "good faith" bargaining if the country was on the verge of dividing in two. The fictitious "Manning memo" from "former Prime Minister Preston Manning" (but written by Alan

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Cairns) issued on March 15, 2010 complains that the court's judgment focused exclusively on the interests of the province of Quebec in the secession process. Thus the court must accept principal responsibility for failing to give voice to the interests of "New Canada" in the process whereby the latter was created.

PLAN A: TWO PROTOTYPICAL IDEAS

If Canadians are to move beyond the present impasse, the crucial challenge remains reconciling the competing nationalisms of Quebecers, aboriginal peoples, and Canadian federalists across the country within a single-nation state. In the opinions of virtually all our participants, the court's judgment signalled the renewed importance of plan A — efforts aimed at renewing the federation — as opposed to plan B — preparations for secession. But it has never been easy to find a plan A that fits all. Shifting gears will, therefore, also require a fundamental shift in political strategy for all national political actors.

While the justices do not provide either a road map or a clearly articulated set of new constitutional principles for plan A, they do in fact create the political space needed for its preparation. In the days ahead, Canadians will have to consider new kinds of institutional arrangements for sharing power, renewing federalism, and identifying the first principles of union. From opposite ends of the political spectrum there are at least two prototypical schemes on offer.

For the Fraser Institute's Gordon Gibson, one vision of plan A is the rapid devolution of authority away from the federal government in favour of the provinces, local government, and the private sector. Gibson argues that decentralization based largely on market principles is consistent with the experience of countries around the world under the influence of technology and globalization. Gibson favours "amending the arrangements of federalism in such a way that the main goals of the sovereigntists

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could be achieved *within* the union." The Gibson approach is consistent with the social union proposals put forward by the premiers at their Saskatoon meeting in August 1998, in which new federal social programs would be subject to a provincial right to opt out.

In contrast, York University political scientist Barbara Cameron presents a very different vision of reconfederation based on the social market. If she is right that Canadians outside of Quebec do not favour further limits to federal authority — such as provincial control over the federal spending power — then we should take seriously her basic contention that there is a different plan A in the offing.

Her starting premise is that Canadians want a social union with a strong federal government, which will set national standards and redistribute resources between the rich and the poorer provinces. To meet this need, Cameron proposes that the federal government affirm its constitutional authority to exercise its spending power in areas of exclusive provincial jurisdiction, "accompanied by the announcement of major new initiatives to these areas of jurisdiction to mark the commencement of the post-deficit era and the dawn of the new millennium." Cameron also recognizes the right of a province to opt out of federal programs with full compensation, but only if the province

holds a referendum and on the condition that the federal MPs from an opted-out province not vote on measures directly relating to the matters in question.

AN UNCERTAIN FUTURE

Although the court was not expected to solve all of our problems, it has created a measure of common ground in the debate over the country's future. It is in this space where debate and dialogue can occur between sovereigntists and federalists, which is, in the end, no mean accomplishment.

The unexpected closeness of the Quebec election has put the issue of a sovereignty referendum on the political back burner for now. Yet, in our judgment it will not be possible for Mr. Bouchard to avoid a referendum during the current mandate. The "winning conditions" formula, then, should be seen primarily as his chosen strategy, allowing him maximum flexibility to choose the date and circumstances of the referendum. This cannot bode well for Canada. Despite polls that indicate that most Quebecers would prefer to put off another referendum indefinitely and that a narrow majority would vote "No" if the 1995 question were posed again, English Canada is just not ready. It still does not have a plan A to renew federalism and without this foundation stone on the table, almost everything else is in doubt. ❖