

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

Daniel Drache, of Robarts Centre for Canadian Studies at York University, and Patrick Monahan, of Osgoode Hall Law School, York University, are the editors-in-chief of *Canada Watch*.

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

In search of plan A, page 2

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

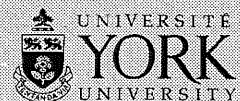
Peter W. Hogg is dean of the Osgoode Hall Law School of York University.

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-

The duty to negotiate, page 33

FEATURES

In search of plan A	
D. Drache and P.J. Monahan	1
The duty to negotiate P.W. Hogg	1
A balanced judgment? J.-Y. Morin	3
Globalizing sovereignty D. Turp	4
Quebec's sovereignty project and aboriginal rights P. Joffe	6
The next steps for Canadian federalists: Strategy and process S.H. Hartt	8
The Judiciary Committee of the Privy Council G. LaForest	10
In the best Canadian tradition K. McRoberts	11
The double and inextricable role of the Supreme Court of Canada A. Lajoie	14
Constitutionalism and nation J.D. Whyte	16
Unexpected consequences of constitutional first principles J. Woehrling	18
A Solomonic judgment? M. Mandel	20
A ruling in search of a nation J. Leclair	22
A court for all seasons G.F. Gibson	23
What can small provinces do? D. Greschner	24
A partnership proposal B. Cameron	25
Anglophone media and the court's opinion S. Clarkson	26
We were not invited A. Cairns	27
« L'arroseur arrosé » C. Emeri	38
Vers un droit international public canadien O. Corten	39
Réponse paradoxale pour une question absurde P. de Bruyker	40
La difficile « juridicisation » des questions politiques P. Avril	41
Le potentiel démocratique des référendums F. Hamon	42



sembly was empowered to proclaim Quebec as a sovereign state as soon as the negotiations for "a new economic and political partnership" were completed, or as soon as negotiations proved fruitless.

The terms of the proposed new economic and political partnership were set out in "the agreement signed on June 12, 1995" (which was an agreement between the leaders of Quebec's three separatist parties). These terms stipulated a partnership council, which would be a layer of government above the Parliament of Canada, in which Quebec and Canada would be equally represented, and in which the Quebec members would have a veto over Canadian policies on a wide range of matters including customs, mobility of persons, goods and services, monetary policy, and citizenship. Not a single person outside Quebec, let alone a government, would agree to any such arrangement. Therefore, it was certain that the negotiations would fail, and the National Assembly would unilaterally proclaim Quebec's independence.

THE 1995 REFERENDUM

The 1995 referendum proceeded on the assumption that a unilateral declaration of independence would be legally effective in removing Quebec, with its present boundaries, from Canada without the need for any amendment of the constitution of Canada and regardless of whether the terms of separation were agreed to by Canada. This extraordinary claim was not challenged by the federal government of Prime Minister Chrétien before or during the referendum campaign. The claim was challenged by a private citizen, Mr. Guy Bertrand, who obtained a declaration from the Quebec Superior Court that Quebec had no power to proclaim itself independent in disregard of the amending procedures of the constitution (*Bertrand v. Quebec* (1995), 127 DLR (4th) 408 (Que. SC)). However, the court refused to issue an injunction to prohibit

The stunningly new element that the Supreme Court of Canada added to the constitutional law of Canada in its opinion in the *Secession Reference* was the existence of the obligation to negotiate.

the holding of the referendum, and the referendum proceeded as scheduled, yielding the narrow "No" majority that has already been described.

The attorney general of Canada had refused to participate in the *Bertrand* proceedings, leaving to a private citizen the role of protecting the territorial integrity of the nation. Eventually, after nearly losing the referendum, and facing the prospect that another referendum on secession would eventually be held in Quebec, the federal government did come to appreciate the merit of securing a legal ruling on the validity of a unilateral declaration of independence. That appreciation led to the *Secession Reference*. The federal government directed a reference to the Supreme Court of Canada asking whether Quebec could secede unilaterally from Canada.

Three questions were put to the court. The first asked what was the position under the constitution of Canada, to which the court replied that unilateral secession was not permitted. The second question asked what was the position under international law, to which the court gave the same answer. The third question, which asked what was the position if the constitution of Canada and international law were in conflict, did not have to be answered.

THE THREE QUESTIONS

The Supreme Court of Canada in the *Secession Reference* held that the secession from Canada of a province could not be undertaken in defiance of the terms of the constitution of Canada. The

principle of the rule of law or constitutionalism requires that a government, even one mandated by a popular majority in a referendum, still obey the rules of the constitution. A secession would be an amendment of the constitution of Canada, and would have to be accomplished in accordance with the constitution's amending procedures. The court was not asked to determine which of the amending procedures was the correct one, and it expressly refrained from doing so. However, the procedure would involve the participation of the federal government and the other provinces. It followed that Quebec's secession would need to be negotiated with the federal government and the other provinces, and could not be accomplished unilaterally.

This is straightforward constitutional law (although it had always been denied by the Parti québécois government of Premier Bouchard), but the court did not stop there. The court said (at paragraph 88) that a referendum in Quebec that yielded a "clear" majority on a "clear" question in favour of secession, while ineffective by itself to accomplish a secession, "would confer legitimacy on demands for secession" and "would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire." The court found this obligation to negotiate in the "unwritten" principles of the constitution, in particular, the fundamental principles of "democracy" and "federalism."

The duty to negotiate, page 34

The actual negotiations would have to proceed in accordance with these two principles, along with the equally fundamental principles of "constitutionalism and the rule of law, and the protection of minorities." The way in which these vague principles would govern negotiations was not made clear, but they seemed to add up, in the view of the court, to an obligation on each side to negotiate in good faith. The court acknowledged that the complications of a secession were such that "even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse," but the court reaffirmed that the constitution required an amendment, which required a negotiated agreement, and the court (at paragraph 97) refused to "speculate" about what would transpire if an agreement was not achieved.

"GOOD FAITH" NO EASY ANSWERS

What was to happen if one side refused to negotiate or did not do so in good faith? Or, to pose the question differently, how is the constitutional obligation to negotiate to be enforced? The court acknowledged (at paragraphs 97-102) that "where there are legal rights there are remedies," but went on to suggest that in these circumstances the only remedies might be "political." The court said that it "has no supervisory role over the political aspects of negotiations." These political aspects included the question of whether the referendum had yielded "a clear majority on a clear question" (which is the fact that gives rise to the obligation to negotiate) and the question of whether the different parties were negotiating in good faith (that is, adopting negotiating positions that were in accord with the underlying constitutional principles). What were the "political" sanctions for a failure to negotiate or to negotiate in good faith? The court did not say, except to note (at paragraph 103) that any such failure might have "important ramifications at

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.

the international level," undermining the defaulting government's legitimacy in the eyes of the international community.

The court did not close its eyes to the possibility that a *de facto* secession might take place without the required agreement or the required amendment. Such a secession would be unconstitutional. However, an unconstitutional secession could become successful if the seceding government achieved effective control of a territory and recognition by the international community. In that case, the constitutional law of Canada would eventually have to recognize the reality. This was the principle of effectiveness (the court coined the word "effectivity"). In that way, a unilateral secession might ultimately become the successful root of a new state. The principle of effectiveness was only briefly discussed by the court (at paragraphs 106-108 and 140-146), but it would, of course, become of great importance in the event of a failure of negotiations.

A STUNNING NEW ELEMENT

The stunningly new element that the Supreme Court of Canada added to the constitutional law of Canada in its opinion in the *Secession Reference* was the existence of the obligation to negotiate — an obligation on the part of all parties to the amending procedures to use their best efforts to negotiate an agreed-upon amendment in the event that the people of Quebec voted to secede by a clear majority on a clear question. As a matter of strict law, however, it is not easy to see where the obligation comes from.

The vague principles of democracy and federalism, which were relied upon by the court, hardly seem sufficient to require a federal government to negotiate the dismemberment of the country that it was elected to protect.

In the United States, the attempt by the southern states to secede in 1861 was opposed by the federal government and crushed by war. In Canada and Australia, more cautious attempts to secede by Nova Scotia in 1868 and by Western Australia in 1934 were successfully opposed by the federal government (Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997), 136). Although the secession of the southern United States was complicated by the slavery issue, there is no doubt that the secessionist movements in the Confederacy, Nova Scotia, and Western Australia enjoyed the support of a majority of the people in those regions. Yet this fact was not regarded as sufficient to justify federal cooperation or even acquiescence. If the Supreme Court's new rule had applied to these earlier precedents, presumably the Confederacy, Nova Scotia, and Western Australia would have become new nation states.

There is no historical basis for the proposition that a referendum in the province that desires to secede should impose an obligation of cooperation on the other parties to the amending procedures. However, this is now the law of Canada. Is that a bad thing? 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.

Moreover, by crafting a decision that was pronounced acceptable by the government of Quebec, the court seems to have caused a public renunciation of the theory, so frequently and dogmatically asserted by the premier of Quebec before the decision, that no constitutional law could stand in the way of the wish of a majority of Quebecers. It is not

easy to see how Quebec could repeat the 1995 assertion of a right of unilateral secession from Canada. Given the potential for chaos and disorder in a secession that has not been accomplished in compliance with the law, the court has conferred a benefit on the nation by causing the leaders of the Parti québécois to rule out that course of action. ❖

A court for all seasons continued from page 23

statements in the history of the Quebec Liberal Party. The *Pepin-Robarts Report* was ahead of its time in this regard as well. Most proposals from English Canada, such as those of the *Group of 22* have been more modest, though my *Thirty Million Musketeers* sets out a more ambitious agenda. The European Union concept of *subsidiarity* is a common touchstone.

The usual concerns about plan A, once the dialogue gets beyond annoyance at Quebec for forcing us to think about such things, are the "slippery slope" or "critical mass" arguments. "With significant devolution," goes the concern, "will there be enough left at the centre to continue a robust entity called Canada?"

GETTING ON WITH IT

So, in operational terms, what to do? In reverse order, the plan A activity in the federal legislature will be restricted to the official opposition, which is currently the Reform Party. Should the so-called united alternative come into being with significant non-Reform support and adopt Reform policies on this file, it would be an important message to and option for the Canadian people. However, in the short term, the federal government still relies on plan B, and need not call an election for three and a half years.

The provinces are showing interesting activity in developing a new vision of the federation, above all in the social union area. Equally fascinating, the Quebec government of Lucien Bouchard has become an active player in

this game, risking (in a sense) proving that the federation can work. Can any student of federalism fail to have noted that, while Mr. Bouchard talks of sovereignty and a new referendum, he also talks of an amendment to the existing constitution of Canada re: opting out? Mixed messages indeed.

Through the smoke, one thing is very clear. The provinces are working together in a way that is absolutely unprecedented in the history of this country. They remain tentative and even fearful about developing their own vision of the federation — their own plan A — but they are moving inexorably in that direction.

The missing ingredient in all of this is the leadership of ideas that should be coming from the remaining prime mover, the academic community. It is always easier for politicians to watch reactions to the ideas of others, rather than take the risk of advancing their own. With some honourable exceptions, that sort of leadership on a plan A has been lacking.

CONCLUSION

The court has cut away the foundations of plan B, and with the Parti québécois victory in the Quebec election at the end of November, there is an urgent need for a plan A. Even had the Quebec Liberal Party won, we would have quickly come to understand that they too would have settled for nothing less.

But to look at things in a constructive way, Quebec is only the engine on this journey, not the driver. Are we up

to the imagination, the flexibility, the successful adaptation required to preserve this country? In its ruling, the Supreme Court explicitly left all such questions — rightly — as political issues. That is the court's real challenge to the rest of us. ❖

- 1 "Plan B" has become the shorthand for the stonewall, scorched earth, "You can't do it" stance, which argues that the separation of Quebec would be politically, economically, and legally very unwise, and virtually impossible to achieve. "Plan A" (or "plan C" in some formulations) addresses a different agenda — namely, "What acceptable amendments to the Canadian federal structure, if any, would reduce sovereigntist support and secure the union?"
- 2 The ability to effect a UDI is an essential ingredient in the sovereigntist strategy, in response to a plan B stonewall. If there is no "or else," there will be no bargaining in such a situation. For a secessionist, bargaining without a UDI option would be like a trade unionist bargaining without a strike option.
- 3 Stated by the court to be federalism, democracy, the rule of law, and respect for minorities.
- 4 Powers to prohibit provincial restraint of interprovincial trade are a common theme, for example.