A balanced judgment?

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The gist of the court's answer appears to be the following: in theory, sovereignty is for Quebec a legitimate goal to pursue and the *right* to secede cannot democratically be denied; in practice, however, the federal power is entitled to raise obstacles and difficulties that are important and numerous enough so as to negate any attempt to achieve sovereignty and to throw off track any negotiation on the issue. How did the court arrive at this conclusion?

THEORETICAL CORRECTNESS: HALF THE STORY

If it is true that the principles underlying the Canadian constitution — democracy, federalism, the rule of law, and respect for minorities — make it imperative for the federal government and the English-speaking majority in Canada to recognize the legitimacy of a democratically supported movement in favour of the secession of Quebec, then certain federal politicians and self-appointed spokesmen will have to modify their behaviour.

Indeed, if the will to secede is a "right," provided it is pursued by democratic means, the appeal to the Canadian Air Forces by a McGill academic to bomb the Hydro-Quebec installations in case of secession appears to be somewhat exaggerated if not outright illegitimate. In fact, the court's reasoning undermines the federal "plan B" and it is not surprising that the Quebec government should have been pleased with this unexpected pat on the back.

Similarly, the "obligation" to negotiate when and if the people of Quebec choose sovereignty (or some other type of constitutional reform) is in stark contrast to the unilateral attitudes of the federal government in its dealings with Quebec since it decided to put an end to Privy Council appeals in 1949 and to Westminster's control over the constitution in 1981. As a matter of fact, these attitudes largely account for the progress — gradual but steady — of the idea of independence in Quebec. Has the Supreme Court become belatedly aware of this situation?

For their part, the Parti québécois leaders have always known and said that they would negotiate. Indeed, at every referendum they have put forward a number of elements of negotiation, including a common market, free circulation of persons, goods, and capital, and the protection of minority rights. It is only when confronted with a dogmatic affirmation by federal politicians that they would under no circumstances negotiate that Premier Parizeau evoked the possibility of a unilateral declaration at the expiry of a one-year delay.

The court went even further. It warned that, in the absence of negotiations, the possibility of a unilateral decision to secede *de facto* remained open. Such a move on the part of Quebec would be unconstitutional, but its success would depend on the recognition of the new sovereign state by the international community, which no doubt would take into account any refusal to negotiate. And the court went so far as to recognize that obstruction might create a "right" to secede, although it did not rule on whether such a norm is firmly established in international law.

So far, those who support Quebec's independence have every reason to be pleased with the court's answers. But the nine judges failed to carry their theoretical considerations through to their practical consequences and left enough questions open to allow Ottawa as much leeway as it needs to negate Quebec's right to self-determination.

DENYING QUEBEC'S CLAIM IN PRACTICE

The Supreme Court is wary lest it appear to usurp the role of politicians. Yet, it ventures deeply enough into the political arena to raise insoluble questions concerning the actual working of referendums.

Nobody will contest the idea that a referendum must allow the people to express their will without ambiguity. Unfortunately, the court, instead of pursuing its principles and political considerations to their logical conclusion, is content with the vague language of politicians. What indeed can be considered a "clear" question by a federal politician other than one that will ensure the failure of any attempt to obtain independence?

"Sovereignty" has a clear meaning in international law, but Mr. Chrétien insists on "separation" because of its negative connotation. Similarly, any mention in the referendum question of an economic association between Canada and Quebec or any arrangement of the common market type should be banished from Ottawa's viewpoint, as it might appear reasonable to Quebec voters.

The expression "clear majority" used by the court also opens the door to endless bickering. United Nations practice has always observed the norm of 50 percent of votes plus one in such matters, and indeed this has been considered reasonable in the Canadian context until it was very nearly attained in 1995. Now, thanks to the court's lack of "clearness," the only clear majority that will satisfy federal politicians is one that will be out of reach for Quebec.

This would mean minority rule and the court should have known that few situations are more likely to thwart the fine democratic principles on which it has based its decision. Indeed, the margin of interpretation left to the federal government is such as to undermine the whole democratic process in Canada.

SOME LOOSE ENDS

What will happen if, in spite of these obstacles, Quebec decides in favour of

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and the perceived legitimacy of such action, would be important considerations in the recognition process.

The court's emphasis on recognition is further evidenced by statements that again link the conduct of parties to negotiations. The court asserts that "[t]he ultimate success of [the] secession would be dependent on effective control of a territory and recognition by the international community" (paragraph 106), and further adds (at paragraph 155):

> The ultimate success of [the] secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.

THE LEGAL FRAMEWORK AND PROCESS

The court thus shows a great deal of interest in the role of recognition and appears to suggest that the legal framework and process it has created to deal with Quebec's claim to sovereignty within the Canadian context will be highly relevant. From such a standpoint, the court states that "one of the legal norms which may be recognised by states in granting or withholding recognition of emergent states is the legitimacy of the process by which the *de facto* secession is, or was, being pursued" (at paragraph 144). It hastens to add that "the process of recognition, once considered to be an exercise of pure sovereign discretion, has come to be associated with legal norms" (ibid.) and quotes the *European Community Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union* to support such a position.

These statements of the Supreme Court of Canada clearly reveal that the court sees other state members as involved parties in the process of Quebec's accession to sovereignty. The involvement of third parties is obviously not seen as a violation of Canada's independence and the court does not condemn in advance any recognition of Quebec sovereignty as "premature." Quite on the contrary, it appears to accept the idea that foreign governments could recognize Quebec if Canada did show intransigence during the negotiations and did not abide by its obligation to negotiate in good faith with Quebec.

On August 21, the importance of these views expressed by the Supreme Court of Canada was noted by the premier of Quebec, Mr. Lucien Bouchard, who stated that the court was "sending a clear signal to the international community by saying that, after a 'Yes' vote, if Canada and the other provinces were intransigent towards Quebec in the process of negotiations, Quebec's recognition would be easier to obtain." He also added, using language reminiscent of the electoral campaign, that court was giving Quebec "one of the additional conditions to successful negotiations."

In the light of the numerous statements of the court with regard to the key role that states could play in the process of Quebec's accession to sovereignty, the sovereigntists have reiterated that they are committed to fulfill their obligation to negotiate with the rest of Canada. They intend to negotiate in good faith all matters related to Quebec's accession to sovereignty and, furthermore, to conclude a treaty of partnership in order to maintain the existing economic and monetary union. This commitment is made principally to Canada, but is also addressed to all those states that are considered by the Supreme Court of Canada as interested witnesses and, possibly, involved parties in Quebec's process to become a sovereign country.

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one form or another of sovereignty and, so to speak, wins the steeple-chase? Here again, the court's answers are not "clear" and it was at the very request of the federal government that it did not indicate which one of the constitutional amending procedures should be applied to the secession of a province. This is essentially a "legal" question but was left open for what appear to be purely political reasons. Few points in its reasoning suggest as clearly that the court is still dependent on the federal government — indeed, on the prime minister himself — for its appointments.

In accordance with its own precedents, the court could have abstained from answering questions of a political nature. Instead, the judges have ventured on this perilous ground enough to embroil matters but not sufficiently to provide clear direction for the two majorities that will have to adjust their relations under difficult circumstances.

What indeed can be considered a "clear" question by a federal politician other than one that will ensure the failure of any attempt to obtain independence?

The Supreme Court, with an eye on international law and opinion, has legitimized the *objectives* pursued by a substantial part of the Quebec people, but has failed to set out the *means* by which the principles upon which it has based its arguments can be carried out peaceably and with the greatest chances of mutual success.

Can one speak of a "balanced" judgment? For Quebec, there is the satisfaction of being right in the field of principles; for Ottawa, a victory in the decisive elements that are the instruments of *realpolitik*.