

Globalizing sovereignty

BY DANIEL TURP

Daniel Turp is an MP for Beauharnois-Salaberry, the Bloc québécois critic for foreign affairs, and professor at the Faculty of Law of the Université de Montréal (on leave).

In its advisory opinion dated August 20, 1998 on Quebec sovereignty, the Supreme Court of Canada expressed views on several aspects of the process of Quebec's accession to sovereignty. From a political standpoint, the key element of this advisory opinion is that the court affirms that "a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognise" (at paragraph 150). But, from a legal standpoint, such a duty to recognize entails a right to "seek to achieve sovereignty" and would place "an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations" (at paragraph 88).

A SURPRISING NEW DEVELOPMENT

This obligation to negotiate, to which the Supreme Court gives a constitutional value, now has a prominent role in the process of accession to sovereignty. The existence of such an obligation 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 referendum campaigns by federalist leaders such as Pierre Elliott Trudeau or Mike Harris. Whereas the domestic use of the new legal argument provided to sovereigntists by the Supreme Court of Canada is obvious, its international use is also provided by the Supreme Court in the light of the linkages that the court itself makes between such an obligation and the international community. Hence, the court internationalizes the process of Quebec's accession to sovereignty in inviting other sovereign states to act not only as interested witnesses of the process of Quebec's accession to sovereignty, but also as involved parties in such a process.

The Supreme Court does not hesi-

tate to link the obligation to negotiate to the international context when it affirms "that the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane" (at paragraph 103). In so doing, the court acknowledges that the consequence of a "Yes" vote, inasmuch as it stems from a clear question and a clear majority, internationalizes a matter that in the past was seen as exclusively domestic.

What is new is that the Supreme Court does not simply recognize that other states might show, as they always have, an interest in attitudes of both Canada and Quebec governments in these matters, but it also considers that they can play a role in relation to an obligation to negotiate, which is a domestic constitutional obligation. Hence, the court appears to grant such states standing, which is more political than legal, and confers on them a key role.

THE ROLE OF THE INTERNATIONAL COMMUNITY

Such an internationalization occurs first during negotiations themselves. It implies that foreign governments can evaluate, albeit indirectly, whether Quebec and the rest of Canada are in compliance with the obligation to negotiate. This conduct "would be governed by the same constitutional principles, which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities" (at paragraph 90). Thus, foreign governments are invited by the Supreme Court of Canada to evaluate the way in which these constitutional principles are taken into account during the negotiations and how the interests of the federal govern-

ment, of Quebec and other provinces, of other participants, and of the rights of all Canadians inside and outside Quebec (at paragraph 92).

Those interests are also linked to the subjects of negotiation that the Supreme Court of Canada refers to in its opinion and that would "address a wide range of issues" (at paragraph 96). It seems, for the court, that among the issues to be discussed would be the "high level of integration in economic, political and social institutions across Canada," the "national economy and a national debt," "boundary issues," and "linguistic and cultural minorities, including aboriginal peoples" (ibid.). The Supreme Court thus implies that state members of the international community will indirectly evaluate all these aspects of the negotiation. But the court seems to confer an additional and even more critical role on the international community and its member states in suggesting that such states could become involved parties in the process of Quebec's accession to sovereignty.

NEGOTIATION AND RECOGNITION

If the Supreme Court of Canada does grant a role to other sovereign states in the phase of negotiations, it seems that they will also have a key role in the post-negotiation period. The court clearly links the violation of the obligation to negotiate with the issue of international recognition. In a statement of great significance, the court affirms (at paragraph 103):

Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognised than a Quebec which did not itself act according to constitutional principles in the negotiation process. 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.

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. ❖

A balanced judgment? continued from page 3

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 ven-

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?

tured 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.

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*. ❖