

The next steps for Canadian federalists: Strategy and process

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The Supreme Court of Canada's recent judgment on the reference concerning the secession of Quebec from Canada makes a fundamental argument against unilateral secession by invoking the deep, extensive, and complex ties established since Confederation among Quebec and its partner provinces. At paragraph 42, the court refers to the attempt by Nova Scotia's Premier Joseph Howe in 1868 to persuade the Imperial Parliament to undo the new constitutional arrangements. The colonial secretary, citing "vast obligations, political and commercial . . . already . . . contracted on the faith of a measure . . . so solemnly adopted . . . [and] so many extensive consequences already in operation," refused to endorse this early secession.

HISTORY MATTERS

The same reasoning is applied, *a fortiori*, to the current constitutional dilemma. The court, at paragraph 92, spells out the requirement that Quebec respect the rights of others. They point out that there exists "[after] 131 years of Confederation . . . a high level of integration in economic, political and social institutions across Canada" (paragraph 96).

This presumed institutional reliance by Canadians living outside Quebec who are not voters in the referendum on Quebec's sovereignty project emphasizes the view that Confederation was a contract, not an imperialist form of government imposed on the conquered Quebecois minority as often presented in sovereigntist mythology.

The degree of legal and economic integration among Quebec and its partners increases the difficulty of dismembering these profound links while attempting to avoid chaotic outcomes.

The integration of Canada's economy is not merely the result of s. 121 of the *Constitution Act, 1867*, mandating tariff-

free trade in manufactured goods originating in the various provinces, but is also the product of the division of legislative responsibility under ss. 91 and 92, with the result that many of the most fundamental economic matters fall under the control of the central government: interprovincial and international trade and commerce, the monetary and banking systems, bankruptcy and insolvency, interprovincial transportation (rail and air including, by extension, broadcasting and telecommunications), shipping and navigation, works for the general advantage of Canada (grain elevators), and matters determined to have been conferred on the federal government (for example, atomic energy and national energy policy).

CANADA'S REGULATORY STRUCTURE

This division of responsibilities, giving such important subject matters to the federal level, creates a national regulatory structure for these matters and, thus, markets operating on a national scale, all of which would need to be reconstituted by new institutional arrangements after secession. Doing so on a basis that would ensure a smooth transition has never been adequately addressed by sovereigntist theory, other than to say that it would be in Canada's best interest to do whatever is necessary to avoid institutional chaos.

Also ignored are the unheralded links between us as partners represented by the multiplicity of interprovincial legal arrangements as well as reciprocal legislation that ensures standing before the courts for the collection of trade receivables, measures for the taking of security,

and procedures for compelling the attendance of witnesses and for the enforcement of judgments between provinces. For the wheels of commerce to continue to turn, the basic assumptions of business people — order, the rule of law, predictable institutional arrangements — must continue in force. The complexity that this adds to the deconstruction of existing laws and regulations, and their replacement by newly negotiated structures, has always been ignored or underestimated by sovereigntists who claim that everything that binds us together now could be replaced in relatively short order by equivalent, negotiated partnership arrangements.

A deadline of one year for negotiations has been included in previous Quebec legislation regarding the accession to sovereignty, with unilateral secession held out as an option in the event of failure of negotiations. One consequence of the Supreme Court decision is that one-sided time limits, outrageously inadequate in the face of the complexity of the issues to be resolved, will not be seen as legitimate.

The contribution of the Supreme Court has been to stress that, although Quebecers alone will be asked to vote in the referendum that may ultimately decide to sever these economic and institutional arrangements, it does not follow that self-determination means that Quebec voters are the only ones with something to say about how institutions are dismantled and wealth destroyed.

FUTURE OF CANADA

If the rest of us will have our say on the future of our country, not in voting on Quebec's proposal for secession, but in the disposition of its request for a constitutional amendment, the Supreme Court has also sounded a significant warning: it will not be sufficient for Canada to respond to Quebec with an

"over my dead body" attitude. The duty of Canada will be to negotiate in good faith the constitutional amendment proposed by Quebec (paragraph 69).

At paragraph 97, the justices state that "it is foreseeable that . . . negotiations . . . could reach an impasse." In the face of failed negotiations, Quebec could appeal to the international community for recognition (paragraph 103).

This raises the futility of continuing to rely on the tough love of "plan B" to deter the sovereigntist project. Merely increasing the complexity and difficulty of achieving a negotiated settlement does not obviate the chaotic consequences of failure; indeed, it may well increase them, because in the event that negotiations fail amidst charges of bad faith on both sides, a unilateral declaration of independence will have contested legitimacy, which maximizes the chances of a chaotic outcome. The only thing that could avert the penalty that all Canadians would pay for uncertainty and unpredictability is constitutional reconciliation in order to avoid an exercise in secession.

THE DANGER OF CHAOS

In 1995, the C.D. Howe Institute published a series of papers on likely outcomes of a post-"Yes" negotiation on secession (the referendum papers). On all fronts — the economic cost of unilateralism, the unavailability of the Canadian currency to Quebec's new government, stunted trade relations, lost citizenship, and the burden of a full share of the public debt — the outlook for Quebec was bleak indeed. It is noteworthy that this series was premised not on seeking terms for secession that would punish Quebec for daring to divide our country, but on Canada's likely negotiating position based solely on its self-interest.

Robert Young's work, *The Secession of Quebec and the Future of Canada*, argued that, in a negotiation designed to quickly end uncertainty and minimize economic damage, an agreement would be rapidly arrived at because rational motivation would lead to this result. I fundamentally disagree and see the negotiations as acrimonious, slow,

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and unable to settle the intractable issues of borders, First Nation rights, minority protection, asset division, currency, debt, citizenship, and trade relations before the damage inflicted by uncertainty has actually occurred.

Perhaps more important, while there is broad agreement on the list of the large, divisive issues that would need to be negotiated, there does not exist as yet any comprehensive academic study of the components of the economic union that would need to be laboriously stitched back together by constructive cooperation between two sovereign states. Issues such as the credit allocation system (replacing the *Bankruptcy Act*); treaties for the avoidance of double taxation; full faith and credit for the enforcement of judgments emanating from Quebec or a province of Canada; free movement of capital, goods, services, and labour within the former Canadian economic space; mobility rights and immigration; portability of social benefits; and other matters would all take time to replace.

Although the model of Europe (which took 50-plus years to evolve a common external tariff, an internal common market, common agricultural, labour, and social policies, collective external policies on fisheries and other matters, and a common currency) is certainly not applicable, what can be concluded from the European experience is that cooperative efforts at building common or shared institutions work best when they are evolved from mutual in-

terest and not imposed by artificial time limits. Five to ten years seems to be a reasonable time-frame to restructure the severed economic union.

THE NEED FOR DIALOGUE AND PLAN A

Like it or not, the sovereigntist project necessarily involves massive institutional discontinuity and no one has produced a study that would establish an inventory of the laws and regulations which would need re-enactment (or replacement by treaty) in order to rebuild the former, discarded system. Before we leap to the conclusion that, with goodwill, Canada could be reshaped in a time-frame consistent with political expectations, we should know more about this.

The point is that by far the most useful response to the Supreme Court's determination that a sovereigntist request for a constitutional amendment contemplating secession (based on a clear mandate obtained by asking a clear question) would be legitimate, and that Canada's obligation would then be to consider this demand and respond to it along constitutional principles, is to develop satisfactory plan A solutions that avoid this extremely risky exercise. Quebec's aspirations for recognition of its specificity and for institutional (including constitutional) support for this are understandable and justified. The problem will be for Canada to have a dialogue on what form a plan A solution should take in or-

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sue. The court's characterization of a "clear majority" as "a qualitative evaluation" is not very helpful.

By the same token, despite the claims of some, the court's allusions to a Canadian tradition of "enhanced majorities" (paragraph 77) do not bear on the question of a referendum on Quebec sovereignty. The notion of "enhanced majorities" is presented as part of the Canadian understanding of democracy, but the evidence that is offered deals not with the procedures in vote-taking among citizens or the members of a leg-

islature, but the number of provincial legislatures needed to ratify a constitutional amendment. In other words, it bears upon the principle of federalism rather than democracy. The fact remains that within any given jurisdiction simple majority always has been the main operative principle of democracy in Canada. It might be argued that a provincial referendum on secession is so consequential and unprecedented as to require a higher threshold than 50 percent plus one. Yet it is difficult to make this argument in terms of past Canadian

practice. In short, it would require a different methodology than the court's.

Still, through the carefully constructed and balanced positions it did take, the court has transformed the terms of public debate over Quebec sovereignty, cutting through the posturing and pretence and focusing all sides on the central questions at hand. By restoring to its proper place the best of Canada's political tradition, the court provided a leadership that had been wanting among political and intellectual elites alike. ❀

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protection of minorities, apply to more than secession negotiations (paragraphs 93-95). These principles "animate the whole of our Constitution" (paragraphs 148 and 32), including the "amendment process" (paragraph 92). This suggests that the express provisions to amend the constitution of Canada are qualified by unwritten principles and are not absolute.

In an extreme situation such as secession, underlying constitutional principles could serve to limit the powers of federal and provincial legislatures. Should legislatures violate the principle of democracy in relation to aboriginal peoples, the courts could rule that the amendment procedures used to allow Quebec secession were "not in accordance with the authority contained in the Constitution of Canada" (*Constitution Act, 1982*, s. 52(3)).

As the above 10 points illustrate, the question of legitimacy of Quebec secession is inextricably tied to the respect accorded to the rights, legitimacies, and aspirations of aboriginal peoples, among others. Non-aboriginal governments and legislatures in Canada do not have the discretion to determine the future of aboriginal peoples. This is fortified by the fact that the Canadian system of government has been "transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy" (paragraph 72).

The Quebec government could not rely on constitutional guarantees for its present provincial boundaries to prevent division of the province in the event of secession.

NEW RULES OF THE GAME

The status and rights of aboriginal peoples are fundamental elements in Canada's constitution. Protection of these rights "reflects an important underlying constitutional value" (paragraph 82). Should a successful referendum in Quebec lead to secession negotiations in the future, the court's judgment has strengthened the position of aboriginal peoples in Quebec to make their own collective choices, participate directly in negotiations, and assert their basic rights. As the court stipulates in the *Secession Reference*, any future negotiations on Quebec secession must be "principled" (paragraphs 104, 106, and 149).

In particular, the right of aboriginal peoples to self-determination militates against their forcible inclusion in any future seceding Quebec. With regard to the James Bay and Northern Quebec Agreement, the right to self-determination of the Cree and Inuit reinforces the fact that any alteration of their constitu-

tionally protected treaty rights requires their free and informed consent.

While clearly there are no guarantees, the Quebec government may ultimately be able to negotiate an independent Quebec state. However, consistent with principles of fairness, democracy, and respect for human rights, this would not necessarily include the vast northern and other traditional aboriginal territories currently in Quebec. ❀

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der to make it attractive to all parts of the country, including Quebec.

Working on plan A is invariably going to be easier and more rewarding than facing the (likely) consequences of a failed secession negotiation, bogged down in its own complexity in the face of unrealistic expectations that it could be settled quickly. ❀