

The Judiciary Committee of the Privy Council

SOME HISTORY TO RECALL

We should remember that the prime minister of Canada comes from Quebec. The minister of finance, the presidents of the Treasury Board and of the Privy Council of the Queen for Canada, come from Quebec. The top advisers of the prime minister, as well as the clerk of the Privy Council, come from his own province.

The chief justice of the Supreme Court (and two other judges), the commander-in-chief of the Armed Forces, and the Canadian ambassador to the United States come from Quebec. Since the Quiet Revolution, Quebec has been remarkably well represented in Ottawa. What are Quebecers complaining about?

Interestingly, a similar approach can be found in the judgment rendered by the Supreme Court of Canada in August 1998, in the *Reference* case concerning the secession of Quebec. In its reply to the second question asked by the federal government, the court had to ascertain whether international law, and particularly the various documents giving life to the right of peoples to self-determination, could be interpreted as paving the way to a unilateral declaration of independence (UDI) by Quebec. In its judgment, the court argues that Quebec does not fall into the category of peoples that are colonized, subjugated, or manifestly dominated by an imperial power. In paragraph 132, the court concludes that the right of colonized peoples to detach themselves from an imperial power is thus not relevant in the present case. But in paragraph 135, the court moves on to discuss a trickier issue. What happens, beyond classical colonial subjugation, when the faculty of a people to exercise an internal right of self-determination within a political system is "totally thwarted" ("totalement contrecarrée" in French)?

BY GUY LAFOREST

Guy LaForest is the chair of the Département de science politique, Université Laval.

THE RIGHT OF SELF-DETERMINATION?

The court notes both that international law is not clear on the issue, and that it is pointless to find an appropriate answer in the case at hand. The court expedites the question by stating tersely that the Quebec situation is not close to such total thwarting. Why? The arguments provided in paragraphs 135 and 136 look like my favourite "overture" for an international audience on the Canada-Quebec question. It would be unreasonable to pretend that the people of Quebec do not have access to government. Quebecers occupy very important positions in the government of Canada (paragraph 136). The court claims to be on solid ground on the issue because its opinion is shared by the *amicus curiae*. This is, if I am not mistaken, the only time in the judgment that the brief of the *amicus curiae* is quoted at length. Moreover, the *amicus curiae* is the only reference provided by the Supreme Court to support its position. The court appears to find of the utmost importance the recognition by the *amicus curiae* that Quebec is not an oppressed people.

To make such an important point, the court would have been wise to use additional sources. It should be remembered that the *amicus curiae* was selected by the Supreme Court itself, in the absence of any official participation by the government of Quebec in the *Reference* case. Moreover, the argument in these paragraphs, supporting the thesis that Quebec's international right to self-determination is not totally thwarted, is not made by a neutral and international tribunal of arbitration. It is made by a Canadian national tribunal, as the Supreme

Court calls itself in the *Reference* case, whose members are all unilaterally appointed by the prime minister of Canada.

THE INSTITUTIONAL CONTEXT OF THE DECISION

One cannot understand the nature of an institution such as the Supreme Court without taking into consideration the imperial context that led to the birth of the Canadian federation in 1867. Our judicial system had a three-tiered hierarchy, with the Judiciary Committee of the Privy Council in London at the apex. The Judiciary Committee, as a court of last instance, disappeared for Canada in 1949. But the principle of an imperial hierarchy has been preserved. Any significant comparison with the constitutional tribunal of a modern federation (such as the German court in Karlsruhe) will reveal the fragile legitimacy of the Supreme Court as an impartial arbitrator of the conflicts between the central government and federated entities. I consider this weakness to be heightened when it comes to evaluating the extent of Quebec's internal right of self-determination. Responding to questions formulated by the federal government, the court examined in these paragraphs whether or not it would be appropriate to resort to a UDI as a consequence of the *total thwarting* of a people's internal right to self-determination. In *R. v. Oakes*, [1986] 1 SCR 103, the Supreme Court of Canada has judged that the notion of proportionality is essential when evaluating whether or not governmental actions are reasonable limits to rights in a free and democratic society. The implicit idea here, it seems to me, is that in some circumstances a UDI would be in an appropriate relationship of proportionality with the total quashing of one's internal right to self-determination.

The Judiciary Committee, page 15

rather telling it "how far it can go." Indeed, the government must have known, at least unconsciously, the rules of the game, and was probably expecting this call to order. So it is true that the court and the state write constitutional law together.

Not unexpectedly, the court divided the pie in two, as it did in the *Patriation Reference*, awarding legality to Ottawa and legitimacy to Quebec, but with such obvious pitfalls that its concessions to the minority would not endanger seriously the vital interests of the majority.

There are no innovations in the means the court has chosen to neutralize its concessions. Using the same kinds of devices so useful in other cases, where, constrained by the rigidity of the

constitution or the resistance of conservative legislatures, the court has affirmed a set of progressive principles only to limit their short-term application.

Examples of this kind of thinking are provided by recent decisions on the rights of gays and lesbians and of aboriginal peoples. In the first instance, the court has included sexual orientation as a prohibited ground of discrimination in the Charter and human rights codes of reluctant provinces. But, strangely enough, it never produced a finding of actual discrimination in any of these cases. In the second example, it has furthered the cause of aboriginal peoples, most notably in *Delgamuukw*, by validating oral evidence relating to Indian title. But in the same breath, it has lim-

ited economic use of such lands to those that are compatible with their original usage.

CONCLUSION

In sum, the court seems to have had two objectives in mind: above all to preserve and strengthen the Canadian state and, at the same time, to maintain its own legitimacy within that state. The almost unanimously favourable reception of its *Reference*, both by Ottawa and Quebec, shows that it has succeeded in this regard. The judges have pleased (almost) everybody and yet have refused to oversee the process that they have prescribed. As for the court's first objective, the survival of the Canadian state, the jury is still out. ❖

The Judiciary Committee continued from page 10

The conclusion in the *Reference* case is that this question was not relevant with regard to Quebec. The Supreme Court is not the ultimate authority on the matter. And, a different question would have been more appropriate: Is Quebec's internal right of self-determination significantly or substantially thwarted in the Canadian political system?

The attempt to provide a coherent and positive answer to this question is the core issue. Quebec, and all the provinces for that matter, are placed at the mercy of Ottawa in a number of key institutions and legal instruments: the judicial system, Senate, reservation and disallowance, as well as its spending powers, and the imposition of national norms in the absence of appropriate institutions of collaborative coordination with the provinces. The constitutional reform of 1981-82 and the process preceding it have strongly curtailed Quebec's internal right of self-determination.

FOUR NORMATIVE PRINCIPLES

In the *Reference* case, the Supreme Court identifies four normative principles of Canada's constitutional and political order: federalism, democracy,

A different question would have been more appropriate: Is Quebec's internal right of self-determination significantly or substantially thwarted in the Canadian political system?

constitutionalism and the rule of law, and, finally, respect for the rights of minorities. The reform of 1982 failed to respect all of these principles as they existed in our political culture and institutions at the time. In other words, as an actor in the struggles of 1981-82, the Supreme Court of Canada supported with all its authority a constitutional coup d'état. Out of this chapter of our history has emerged the tremendous empowerment of all judges, but mostly the members of the Supreme Court. A price had to be paid for this, and it is the significantly decreased legitimacy of the institution in Quebec.

If indeed Quebec's internal right to

self-determination has been significantly or substantially thwarted in 20th-century Canada, then the sovereignty-partnership proposal of 1995, open to negotiations in good faith based on the principle of reciprocal concessions, was a proportional response. What institution would be an impartial assessor of the validity of such claims and arguments? It is hard to believe that the Supreme Court, in its current form, would qualify for such a task. I count myself among those in Quebec who would not be satisfied by the pronouncements of a court that is, for all intents and purposes, Canada's new Judiciary Committee of the Privy Council. ❖