In the best Canadian tradition

BY KENNETH McROBERTS

Kenneth McRoberts is a professor of political science at York University.

On the face of it, the federal government's reference had to do with clarifying the law. Within its own terms, the reference sought to determine the status of a Quebec UDI (unilateral declaration of independence) under Canadian and international law.

A POLITICAL PHENOMENON ABOVE ALL

Nonetheless, over the months leading up to the Supreme Court's hearing on the reference, it became evident that much more was at stake than the specifics of the law. The reference had become a profoundly political phenomenon. It had become the central element in a public debate over the future of Canada — indeed whether Canada was to have a future.

When the reference was put forward, Canada had not yet recovered from the shock of the 1995 referendum result. In fact, it was because of that referendum that Ottawa felt the need to make the reference. For the very first time in Canadian history, the victory of sovereigntists in a Quebec referendum stood as a real possibility.

Outside Quebec, public debate had become consumed with how Canadians should respond to such a referendum result. For over three decades, most Canadian political and intellectual leaders had maintained that a democratically expressed desire of Quebeckers to secede should be recognized and good faith negotiations should be undertaken to produce an agreement over the terms of Quebec's departure. But this understanding had not been very well articulated or theorized. Typically, it was presented in purely pragmatic terms, as with L$3ter Pearson's statement: "If it comes to secession, and the decision is democratically taken, do we accept it or fight?" In any event, it was geared to an eventuality that was generally seen as highly hypothetical.

That all changed on October 30, 1995. In the deep shock and anger produced by the referendum result, the weakly articulated understandings of the past seemed to fade to the sidelines. It was as if Canadians were debating the question of Quebec secession for the first time. Indeed, many of them were.

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THE RULE OF LAW AND A "YES" VOTE

Clearly, some English-speaking Canadians saw the Supreme Court reference as a way of eliminating outright this suddenly real possibility of Quebec secession. By asserting "the rule of law" the court would show that Quebec could not leave, period. The question would be settled once and for all. In the face of such a court judgment, few Quebeckers would be ready to vote "Yes" in any future referendum. But if a majority of them did, the Canadian government would have the right to use whatever means were needed to preclude Quebec's departure. The surge of interest in analogies with the US civil war may have reflected a new bellicosity in the Canadian public.

Evidently, the majority of Canadians outside Quebec, both in the general public and in more specialized publics, continued to subscribe to the past undertaking to recognize a democratic vote for sovereignty and to enter into good faith negotiations. But this view seemed to have lost its pertinence. Federal leaders did reiterate it from time to time, but this never made the headlines.

By addressing UDI, and UDI alone, the reference served to focus public attention on the worst of scenarios and to deflect attention from the prospect of negotiating an agreement to Quebec's departure. For that matter, the federal government provided no coherent leadership at all on the question of negotiations. Moreover, some academic analyses insisted that negotiations were not really a viable option anyway. They were almost bound to fail given both the emotional climate in which they would be conducted and their own procedural and substantive complexities.

In short, within public debate Quebec sovereignty increasingly was reduced to a matter of the rule of law. For most English Canadians, there could be no question about that.

Among Quebec francophones, the newly real possibility of a future vote for sovereignty also had its impact. The stakes had become higher for them too. Out of this emerged a heightened sense that Quebeckers should be able to determine their futures. A positive vote should itself be sufficient for Quebec to become sovereign.

THE DEMOCRATIC LEGITIMACY OF A REFERENDUM

The Supreme Court reference seemed to fly in the face of this. By addressing the issue of law, and only the issue of law, the reference seemed to be deny-

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ing the democratic legitimacy of a referendum. The rule of law would negate the will of the Quebec people.

Thus, Quebec federalist leaders denounced the reference. Even the archbishop of Montreal was moved to proclaim that the people of Quebec have the right to decide their future, and the court has no business in the matter. By the same token, surveys showed that most francophones disapproved of Ottawa's initiation of the reference. Indeed, support for a "Yes" vote increased with the court's hearing of the reference. To the extent that the reference was motivated by a "plan B" desire to dampen support for sovereignty, as was undeniably the case, it apparently did not achieve its objective.

As long as the public debate over Quebec sovereignty was framed in terms of two mutually exclusive principles, the rule of law and the democratic legitimacy of a Quebec referendum, it could only result in an impasse, and an increasingly bitter one.

For whatever reason, the court seems to have recognized that the issues confronting it greatly exceeded the specific points of law raised in the reference. It saw that it had a constitutional responsibility in the fullest sense of the term and it acted accordingly. In the process, the court went far beyond providing the predictably negative answers to the specific questions contained in the reference.

AN EYE ON PUBLIC OPINION

In a decision that was clearly written with an eye to making it accessible to the general public, the court traced the historical development of fundamental principles of Canada's constitutional tradition and showed how they can, indeed must, be applied to the Quebec sovereignty question. In the process, it gave eloquent form to the weakly articulated notions that Canada's political elites had voiced in the past, and which had largely faded from sight in the trauma of post-referendum Canada.

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.

The genius of the court's decision is to transcend the impasse of the post-referendum debate by showing that no one principle can prevail, whether it be "the rule of law" or the "democracy" of a referendum. In fact, these two principles are joined by two others, federalism (which is given pride of place) and respect for minorities, to form a four-fold structure of principles that must be brought into balance. And "rule of law" shares title with its most important manifestation: constitutionalism.

Thus, through the application of this framework of principles, Quebec cannot declare sovereignty unilaterally but neither can the rest of Canada ignore the democratic legitimacy of a "Yes" vote. Both sides are constitutionally obligated to enter into good faith negotiations. Moreover, an illegal UDI by Quebec is still possible, and might well succeed, should the rest of Canada fail its constitutional obligation to negotiate.

As such, the decision has had a profoundly salutary effect on Canada's political and intellectual climate. As to be expected, both federalists and sovereigntists claimed vindication in the decision. Typically, these involved partial and selected readings of the decision. Yet, the fact remained that all Canadians, federalist and sovereigntist, were now debating within a common framework, and one that was rooted in Canada's constitutional tradition. Indeed, by giving such a central status to the principle of federalism, the court seemed to be distancing itself from the reasoning that it had followed in its two decisions about the 1982 patriation — a process which served, in a variety of ways, to produce the very crisis that had generated the UDI reference.

EVERYONE A WINNER?

Arguably, the court did not fully complete the task it had assumed for itself. For instance, it did not take a clear position on the procedures through which, upon an agreement, Quebec would be removed from the constitution. Here, there has been a real debate among legal scholars as to which amendment formula should apply. And what should happen if the amendment should fail? Could one or two provincial legislatures block implementation of an agreement over Quebec sovereignty? The very possibility of an orderly transition to Quebec sovereignty could hang on this point of law. The court's claim that it lacked "sufficiently clear facts" to make a ruling on this matter is not compelling. Perhaps the court simply wanted to avoid having to assert the need for provincial unanimity, given the dangers that would pose for any negotiated transition to sovereignty.

Similarly, the court's formulation of "a clear majority in response to a clear question" leaves much unanswered. If the court could not have been expected to spell out the terms of a question, it could at least have pronounced unambiguously on the 50 percent-plus-one is-

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 legislature, 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.

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.

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).

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 constitutionally 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.