

# The double and inextricable role of the Supreme Court of Canada

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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.

The *Reference* decision has been unanimously well-received by all constitutional parties in Canada, where the national norm has been to disagree about everything. Three possibilities surrounding the decision and its reception come to mind. First, one group's interpretation could eventually be shown to be wrong because the court's opinion cannot be favourable to both federalists and sovereigntists. Second, people could be responding favourably because the court has shown more competence than expected. But most important is the third possibility: the court seems to have done me a personal favour in explicitly confirming my theory about its own behaviour. My theory holds that, like all judicial bodies, the court does not merely apply rules to facts, but constructs both as it gives meaning to law while supporting the state of which it is a part. This explains the choices it made in the *Reference re: Quebec Secession*.

What the court actually did was give each side a half victory. On the one hand, it granted Ottawa the two "nos" that it required to its questions, plus some vague requirements about a clear question and a clear majority. On the other hand, it awarded Quebec the legitimacy of the referendum process and an international recourse in case of obstruction by Canadian authorities.

## PRODUCING MEANING

As interpreter of the constitution, the court gives meaning not only to its open-ended language, but to its silences. Vague terms are not lacking in constitutional documents: "free and democratic society" or "aboriginal rights" are but two examples of terms that beg further definition.

What the court does is produce meaning and, just as any other inter-

preter of a text, this production is not entirely discretionary. It is bound first by the text itself. The legitimacy of any interpretation is also linked to fulfilling the expectations of both the legal community, who require legal coherence, and more generally the public, who seek equity in the case at hand. Unfortunately for the court, society is rarely unanimous, and judges must often choose between deciding in favour of the values of the majority and the values of one or more minorities.

This task is rendered even more complex by the second role of the court in constitutional matters: to maintain state support, as a central institution of the Canadian state. The court cannot survive outside this context. Bluntly put, the court is fond of applying the "living tree" metaphor to the constitution, but it cannot saw off the branch on which it is sitting! Its choices are limited not only by the anticipated effect of its decisions on the expectations of its "maîtres" but by the need of the state to preserve itself. Moreover, these conditions are more coercive than is usually acknowledged because both these roles of the court are linked. Indeed, unlike elected politicians who can use extra-judiciary discourse and direct political action, judges have no means other than their judgments to support the state. As such, the requirements of that support cannot but be reflected in their interpretations and orientation.

## THE CONTEXT

This, then, is the context in which the *Reference* must be read. No one expected the court to decide in favour of Quebec, least of all the Quebec government, which refused to intervene. And rightly so. Yet the judges could not have given Quebec more this time even if they had wanted to. However, courts rarely succeed in opposing the will of the legislature as shown by the Weimar Republic in the '20s, the New Deal in the United States in the '30s, and, more recently, the constitutional crisis in India. Yet, if my analysis is right, the court could not decide entirely in favour of Ottawa either, unless it was ready to provoke Quebecers into outright secession. It has consequently chosen "negative support" for Ottawa's position, which entails not giving the Canadian government all it was asking for but

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. ❖

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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,

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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. ❖