Constitutionalism and nation

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In the final paragraphs of the portion of his factum dealing with the first question (Can Quebec effect unilateral secession from Canada under the constitution?), the attorney general of Saskatchewan speculated on the political conditions and processes that would likely trigger the passing of a requisite number of resolutions for amending the constitution. In these paragraphs, he listed a clear expression of support for independence in Quebec expressed through a referendum; some expression of the national will to negotiate with Quebec; and, finally, negotiated terms of separation touching on such things as assets, debt, borders, rights of minority communities, citizenship, monetary matters, pensions, rights of office holders, and so forth.

A DEFINITE MAYBE

This section of the factum is explicitly disconnected from the argument on the content of the constitutional order. It did not appear in the factum in order to establish any sense of an answer to the question about what our constitutional rule for secession is but, rather, to show that constitutional rules operate in political contexts and that their normative effect is determined by their relevance to those contexts. Saskatchewan was, in short, reassuring the court that those rules could well bear on political developments around a secession initiative. The factum also recognized that those rules could be irrelevant to those developments. The Saskatchewan factum was meant to be a partial answer to the many voices saying that the constitutional reference was a mistake because the practices of national birth and national dissolution were not amenable to legal norms. It said, in short, "Maybe yes, maybe no, but we are not free to prejudge the weight of law on politics."

The factum proceeded from a certain assumption about law and legitimacy — that we cannot always count on the legitimacy of high stakes national politics being measured in terms of whether it sustains the integrity of what has gone before. It is clear that our American constitutional heros (by whom, of course, I mean Bob Cover and Bruce Ackerman) see the constitutional order as establishing a national narrative that is, at the same time, enabling of social and legal transformation and suppressive of, or outflanking, revolution; generative of new normative communities, and constantly expressive of fidelity to original commitments and structures. The Canadian sense of constitutionalism, as represented in the factum, is less embracive of political order and accepts the strange fact that, even in a nation governed by constitutionalism, politics does not necessarily engage law.

The court's own, more modest, factoring process — its attempt to bridge constitutional principle with politics — is not particularly convincing. The court pulled the duty to negotiate out of rarefied air.

There is another way to put this. If we do have an organic sense of our nation, our constitution is not a powerful site of that organic understanding. The transformative effect of nation-creating on the identity of its parts, and on all of its people, is not thought to be captured in the constitution or through constitutional law. It is not in constitutionalism that the intellectual basis for our nationalism is expressed. It is not in the constitution, or in its application, that national virtues are enumerated and tied to basic structures and arrangements. For Canada, the organic nation is an expression of commerce or transportation or, for example, in the discovery of Marius Barbeau (of the National Museum) of Emily Carr and his connecting her to a developing indigenous artistic sensibility. (Readers of John Ralston Saul will recognize this example of organic nationalism from *Reflections of a Siamese Twin.*)

AN ORGANIC SENSE OF NATION?

The factum, then, although in other parts supportive of an organic understanding of nation, adopts a view of constitutional order that is modest, limited, and contingent — contingent on ideas of political legitimacy and political identity that likely have their origins elsewhere and whose vitality is renewed not through practices of honouring our constitution but through other, barely seen and understood, processes that flow, perhaps, from the PMO, or from various centres of influence on Front Street West.

From one perspective, the Supreme Court of Canada in the *Secession Reference* would have none of this modesty. Consider paragraph 69. This paragraph concludes the court's reflections on the constitutional principle of democracy. The court states:

> The *Constitution Act, 1982* gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in

Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces.

The court in these two sentences leaves behind the careful delineation of law and political legitimacy that has marked Canadian constitutionalism. This is not to say that this shift is unfortunate or mistaken. The political role of constitutionalism, especially since it has been a narrow role, is not fixed. As David Schneiderman has pointed out, our constitutionalism was, for a long time, focused on maintaining structures conducive to energetic economic development, albeit, perhaps, as an adjunct to national development. It could well be time to adopt a larger state project for constitutionalism — the project of measuring political legitimacy.

WHAT IS DIFFERENT

What has changed for the court is the political unrealism of the view that such strong propositions can be factored into our constitutional law. The court's own, more modest, factoring process — its attempt to bridge constitutional principle with politics — is not particularly convincing. The court pulled the duty to negotiate out of rarefied air. There is nothing in the democratic principle that gives it a trumping effect over other more fundamental constitutional ideas. In fact, the court embraces an extremely simple or direct form of democratic expression over the multilayered understandings of democracy that are actually required to coordinate the democratic principle with constitutionalism.

Furthermore, the court's lack of legal rigour is also found in its unconvincing and inconsistently expressed claim of the blanket non-justiciability of all issues with respect to the essential legal requirements in the process leading to secession — legal requirements that will bind the parties to a secession arrangement but, evidently, that are not subject to adjudication or enforcement by the courts. The court's connection of constitutional principle to the politics of extreme choices, and its disconnection of constitutional principle from the rule of law's chief instrumentalities, reveals a remarkable shift toward constitutionalism as a passive marker of political legitimacy. The court believes that its role is to reveal constraints on the politics of dissolving a nation through certain moral demarcations.

The court placed the Canadian nation somewhere between a compact of states and Lincoln's view of the nation as a "perpetual union."

What can one say about this calculation of the role for constitutional law? One might say it lacks conviction. It is based on the twin beliefs that our constitution contains a complex moral vision of rights and entitlements and respect for individuals, communities, branches, and jurisdictions, and that those moral visions provide a constitutional chart for appropriate legal behaviour. The judgment is not, however, based on the idea that the court's sense of constitutional meaning will be defended by the nation as the nation's sense of constitutional meaning. From an American perspective, this is an unthinkable concession to the political branches' understanding of constitutional meaning. It shows that our court is willing to subscribe to a less mature idea of Canadian constitutional democracy than was embedded in our political culture before the Charter of Rights.

CONSTITUTIONALISM AND THE NATION

The decision demonstrates not only a particular conception of constitutionalism but also of nation. The paradox in these two elements of the decision is that normally belief in a rich substantive national constitutionalism — one, for instance, that contains elaborate ideas about political communities and cultural communities and their inter-relationship — would go hand in hand with a strong sense of nation — of a national identity and national integrity. Of course, it may not be an accurate inference from the court's holding that there is a constitutional duty to negotiate about national dissolution that there is a thin view of the Canadian nation. In fact, the court in referring to the words of George Étienne Cartier has deepened and historicized the conception of the Canadian federation to present it as generative of a new political entity, all of whose members could have a claim to participate in fundamental reformation. The court quotes Cartier's view that "[w]hen we are united we shall form a political nationality independent of the national origin or the religion of any individual." Cartier, while insisting on the confederation promise of the non-assimilability of the founding nations of Canada, went on to say:

> In our own federation, we will have Catholics and Protestants, English, French, Irish and Scots and everyone, through his efforts and successes, will add to the prosperity and glory of the new confederation. We are of different races, not so that we can wage war on one another, but in order to work together for our well-being.

The court did not take from this passage, however, the moral notion of nationhood and there can be no turning back. Rather, the court chose to focus primarily on the accommodation of diversity. But it did end its reflection on Cartier with the diluted Cartier-like sentiment that Canada is "a unified and independent political state in which different peoples could resolve their disagreements and work together toward common goals and a common interest."

The result of the *Reference*, however, clearly avoids the strong version

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against Quebec's will, it was the Supreme Court of Canada that said it was constitutionally acceptable to do so.

A QUESTION OF BIAS?

But if the court is biased, why not hand the federal government total victory? Why give Quebec any concessions, even these puny rhetorical ones? The answer is that the court is biased in favour of federalism and not any particular government wearing the federalist mantle, much less that particular government's strategy.

The court reads the polls. It knows that the sovereigntists have been weakened, and it knows that nothing strengthens weak sovereigntists like fresh insults from Canadian institutions. Better to show a little rhetorical generosity. This, after all, was the strategy of the Meech Lake accord, and here it is worth mentioning that, unlike the court that torpedoed Meech with its ruling on the signs law in 1988 (a "Trudeau" court in which all the judges were appointed by Meech's most implacable foe), this court is still dominated by judges appointed by Meech architect Brian Mulroney (6/9 — a "clear majority" if ever there was one). But Meech was no gift to the cause of Quebec sovereigntism; it was meant to be the kiss of death. This judgment is of no more value to Quebec than the "distinct society" clause, and for the same reason: its interpretation lies entirely in the hands of an institution that will always put federalist interests first. These judges will turn on a dime if the political need arises. They've done it before, and in Quebec, too, with much less jurisprudential leeway than they have given themselves in this case.

The word "Solomonic" was heard frequently in the days following the release of the judgment. But . . . the essence of Solomon's judgment . . . was not that it gave something to both sides but that it pretended to, flushing out the wrongful claimant by trickery and ultimately handing total victory to her adversary.

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of the organic state whose integrity can be compromised only in truly exceptional circumstances. The court placed the Canadian nation somewhere between a compact of states and Lincoln's view of the nation as a "perpetual union." (For example, Lincoln stated, "I hold, that in contemplation of *universal* law, and of the constitution, the union of these states is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments," or "The principle [of secession] is one of disintegration, and upon which no government can possibly endure." Finally, in the Gettysburg address, Lincoln's admission of how paltry his dedication of the memorial space was compared with the consecration of nation by men who fought and died is, perhaps, designed to recognize the ultimate form of national organicism — a nation built on people giving up their lives for the sustaining of the new entity. This, for Lincoln, is a transformative creation from which there can be no unravelling.)

Canada's highest court, however, did not venture so far. It chose a middle course to capture the idea of nation in Canada. It recognized a constitutional barrier to unilateral secession *and* a constitutional requirement on the nation as a whole to conduct negotiations with a single province seeking to effect secession from the nation. This is not an idea of nation that stirs loyalty anywhere. Is it, however, the right idea of the Canadian nation?

NATIONAL INTEGRITY AND NATIONALISM

At the level of national romanticism, some argue that a nation that is not forged through the ultimate transformation represented by the movement from personal death to birth of a nation is not likely to have an organic sense of itself. However, endless numbers of Canadian nationalists have seen the pattern of sacrifices, sharing and cross-fertilization in Canada as being constitutive of a nation whose integrity has pre-eminent value.

The court's view may, however, represent the modern conception of nation as an arrangement of market convenience, whose role has been seriously diminished. It is futile to cling to national integrity when the national role for the modern state is so attenuated.

Whatever the court's deep thinking was behind its invention of the duty to negotiate, it has generated a view of the state as susceptible to fundamental changes in order better to reflect the needs, interests, and identities of its component parts. Perhaps this is the sane way for all nations to see themselves. It may be the view that forestalls bloodshed. It does not, however, stand as a note of confidence in the viability of pluralistic states and, in that way, the vision of nation implicit in the judgment may not be the least bit modern.