Unexpected consequences of constitutional first principles

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It has now been clearly established by the court that a unilateral declaration of independence (UDI), such as contemplated in the bill introduced by the Parizeau government before the 1995 referendum, and referred to in the referendum question, would be unconstitutional. Should another separatist government embark on the same strategy, the Supreme Court ruling will make it easier for the federal government, or indeed any citizen, to challenge its validity or even to ask for a court order prohibiting a new referendum.

However, the court's decision also contains a number of elements that were assuredly not desired by the federal government and will almost inevitably assist the cause of the Quebec sovereigntists.

A QUEBEC-FAVOURING DECISION

First, the court proclaims the "democratic legitimacy" of a secession initiative approved by a clear majority vote in Quebec on a clear question. In the past, there have been affirmations from certain quarters in the rest of Canada that the mere attempt to separate Quebec from Canada was illegitimate and even illegal. Such arguments have now been put to rest. It is true that the highest federal authorities have sometimes recognized that it would be difficult, on a political level, to refuse any negotiations with Quebec after a positive referendum on secession. Yet the court goes much further by stating that, in such a case, there would exist for the rest of Canada a constitutional and legal obligation to negotiate. This is very important, because politicians in the other provinces have occasionally proclaimed that they would refuse to negotiate with a secessionist Quebec altogether. Now that it is clear that a victorious referendum will trigger negotiations, a certain number of "soft nationalists" in Quebec will be less hesitant to vote "Yes" in the future.

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The second favourable element for the sovereigntists is that the court seems to give little importance to the constitutional amending formula in the event of a secession. During the hearings of the reference before the Supreme Court, counsel for the federal government put considerable weight on the argument that the secession of a province could be conducted only through the amending formula. This would mean that Quebec has to obtain the separate approval of the legislative assemblies of the nine other provinces as well as of both houses of Parliament (the court says nothing about the applicable amending formula, but for the great majority of constitutional lawyers, secession would require the unanimity procedure). In addition, if the Charlottetown referendum is to be considered as a political precedent, Quebec's accession to independence would also have to be approved in a popular referendum by a global majority of Canadian voters as well as by a majority in each of the five "regions." By insisting on compliance with such a cumbersome procedure, the federal government was able to claim that it abstractly recognized the right of Quebeckers to decide their own constitutional future while, at the same time, denying such a right on a practical and political level. The court brings this scheme to ruin by establishing a sequence of events that leaves only a secondary role for the amending formula. Should Quebeckers approve secession, there would be a negotiation on the precise conditions. If the negotiations fail, there would be of course no need to use the amending formula. If, on the other hand, negotiations succeed, recourse to the amending formula would still be required, but it is difficult to see how a province or the federal government could then refuse its formal approval, and thus negate the political agreement arrived at. However, should this happen, the court recognizes that Quebec could then try the UDI route and that such a course would be subject to evaluation by the international community — each foreign state having to take a position based on its judgment of the conduct, during negotiations, by Quebec on the one hand, and the rest of Canada on the other (paragraph 103).

A KEY CLARIFICATION

Finally, the court makes it clear that eventual negotiations on secession must be conducted bilaterally, between Quebec and the rest of Canada, and not

multilaterally, between Quebec on the one side, and each province and the federal government on the other:

> The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be (paragraph 93).

The court enjoins Canada to speak with one voice during the negotiations with Quebec. This is crucial because one way of indirectly refusing to negotiate secession, present in the writings of some ROC academics, is to claim that the rest of Canada could not possibly agree on a common position vis-à-vis Quebec, thus any attempted negotiations would be doomed to fail.

In the text of the reference, the court stresses many times that the obligation of the rest of Canada to negotiate will be triggered only by "a clear majority vote in Quebec on a clear question in favour of secession." However, the court leaves it to the political actors to determine what these notions mean. The question in a future referendum should be agreed to by all political parties present in the Quebec Legislative Assembly. In a situation where the Parti québécois formed the government, the official opposition would be the Liberal Party of Quebec, a political party strongly opposed to secession. Nobody could thus claim that the question was unclear or ambiguous. Such a solution avoids the inextricable problems that would exist if the federal government demanded to participate in the formulation of the question.

Requiring a special majority (more than 50 percent plus one) for secession would, however, depart from precedents since all past Canadian referendums, as well as the two referendums necessary to bring Newfoundland into Confederation, have been held on the basis of the simple-majority rule. Any attempt to impose a higher threshold would run into insuperable difficulties as the choice of any number larger than 50 percent would appear to be entirely arbitrary.

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The best way to make sure that the will of a majority of Quebeckers has been clearly expressed is to hold a second referendum once the results of negotiations between Quebec and the rest of Canada on the terms of secession are known. Voters will then be able to evaluate the true consequences of secession on matters like Canadian citizenship, the Canadian dollar, the proportion of the public debt of Canada to be assumed by Quebec, the economic or political ties maintained with Canada, as well as the territorial integrity of Quebec. This time, voters will be very aware of all the difficulties and disruptions that may be caused by secession, as it must be assumed that ROC representatives will have stressed them amply during the period of negotiations. Therefore, if the second referendum is also positive, the will of Quebec voters will have to be considered as sufficiently clear.

A FINAL REMARKABLE ASPECT

For legal scholars, the most remarkable aspect of the ruling is how the court answered all the questions without ever referring to the actual specific provisions of the constitution. This case admirably illustrates the considerable margin of freedom a supreme or constitutional court can exercise in applying the constitution. The whole judgment is based strictly on four general principles that are present today in every democratic, liberal, and federal constitutional system in the world. These are: the democratic principle, which gives Quebeckers the right to decide their own political future and grounds the obligation of the rest of Canada to negotiate a secession approved by a clear majority on a clear question; the federal principle, which forms the basis of the obligation of Quebec to negotiate with its federation partners the rupture of a union existing more than 131 years; the protection of minorities, which asks for respect of minority rights in the conduct as well as in the outcome of negotiations; and, finally, the rule of law and the principle of constitutionalism, which demand that secession of a province be achieved within the existing constitutional framework.

Ironically, if the court had decided the patriation reference in 1981 and the Quebec veto reference in 1982 by applying the same four principles, it never could have arrived at the answers actually given in these two cases. The federal principle would not have allowed it to pronounce the legality of a major constitutional reform to which only two provinces had consented at that time, and the protection of minorities would have prevented it from ruling that the nine English-speaking provinces and the federal authorities, controlled by an English-speaking majority, could impose the same kind of constitutional change on the only province where francophones form the majority. The 1982 patriation did not respect the rights of the most important minority in Canada, the francophones, 90 percent of whom are living in Quebec.