A Solomonic judgment?

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The Supreme Court gave the federal government the answer it was looking for when it held that even a successful referendum would not give Quebec the right to secede "unilaterally," either under the constitution of Canada or under international law. However, the court disappointed hardline federalists with its recognition that "a clear majority on a clear question" would "confer democratic legitimacy" on Quebec's secession initiative and oblige the rest of Canada to participate in negotiations that might lead to sovereignty.

Both sides immediately claimed victory and the word "Solomonic" was heard frequently in the days following the release of the judgment, meaning to suggest that it wisely gave something to both sides. However, the essence of Solomon's judgment in the *Mothers' Case* 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.

If the Supreme Court's judgment is to be considered Solomonic, it is because it, too, is full of pretence and trickery. The main pretence is that the court even answered the question it was asked. In fact, the court pulled a typical legal trick and posed itself a completely different question, transforming the key notion of "unilateral secession" from *secession without agreement*, even after negotiations (which is what Quebec was proposing in the sovereignty referendum) into *secession without negotiations*:

> [W]hat is claimed by a right to secede 'unilaterally' is the right to effectuate secession without prior negotiations with the other provinces and the federal government.

A PRETENCE OF OBJECTIVITY

A second pretence is that the Supreme Court decided anything at all, even about the question it asked itself. In what may well be a judicial first, the court was adamant that it would not enforce compliance with *any* aspect of its judgment. It would leave the question of whether "a clear majority on a clear question" had been achieved and whether the parties were complying with the duty to negotiate, to the parties themselves:

> [I]t will be for the political actors to determine what constitutes "a clear majority on a clear question." . . . [T]he courts . . . would have no supervisory role.

To appreciate how really extraordinary this is, imagine if at the end of a trial, the judge said, instead of "guilty" or "not guilty," that "*the guilty one is the one who clearly did it, but I leave it to the prosecutor and the accused to decide who that is.*"

However, despite the earnest attempts of PQ lawyers to put a good spin on the decision, there was a clear winner and it was not Quebec — which was clearly assigned the role of the false mother. The federal government got the one thing it really wanted: a way to delegitimate a democratically won referendum. And here the court delivered the goods in many ways: the effective subordination of international law to Canadian law, the idea of a "clear question," and, above all, the idea of "a clear majority." As even most sovereigntist Quebeckers have had to admit, this can only mean that an old-fashioned, plain and simple majority of "fifty percent plus one" — the majority that Quebec came within a whisker of achieving in October 1995 — would not be enough.

This response was highly predictable, because, in the modern world, going to constitutional court is the preferred way of denying people what they want and still calling it "democracy." That is why Trudeau imported the whole system into Canada: to "trump" democracy when it became inconvenient to the established order. The court's constitutional *raison d'être* depends on this preposterous redefinition of democracy as not being about majority rule, otherwise known as "one person, one vote."

A CONSOLATION PRIZE FOR QUEBEC

What the Supreme Court gave to Quebec as a consolation prize was essentially worthless: in place of the democratic right to independence after an affirmative vote by a majority of the population, Quebec got an unenforceable right to negotiations, with all the obstacles the rest of Canada could raise at negotiations underlined three times in red ink, and no promises about the outcome:

> While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached.

All this plus a blunt reminder that secession would require an amendment of the constitution, and no suggestion that Quebec could do that unilaterally: "Under the Constitution, secession requires that an amendment be negotiated."

So, if the government of Quebec is serious about independence, it is seriously mistaken in straying from its original strategy of boycotting the whole thing, relying on international law, and emphasizing the fact that the Canadian constitution was imposed on it and that the Supreme Court was appointed by the level of government that did the imposing. In fact, though Trudeau passed the first constitutional amendment

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.

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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.