

A ruling in search of a nation

THE REJECTION OF THE ATTORNEY GENERAL'S POSITIVIST APPROACH

First and foremost in its judgment in the *Secession Reference*, the Supreme Court of Canada rejected the attorney general's positivist approach to the constitution that requires the court to follow strictly the letter of the law.

Justice requires more than blind adherence to established legal rule. It requires the recognition that law fulfills other purposes than reinforcing the state's authority and that such purposes are often historically contingent. Seen in this way, law must be conceived as a system of rules whose object is to facilitate human relations. If it fails in this task, it will cease to be obeyed and eventually lack legitimacy.

In its judgment, the Supreme Court embraced a concept of law that recognized that the constitution also encompasses underlying principles that "inform and sustain the constitutional text" (paragraph 49), including federalism, democracy, constitutionalism and the rule of law, and respect for minority rights (*ibid.*). None of these principles is absolute to the exclusion of the others (paragraph 93). In fact, these principles are said to function in symbiosis (paragraph 49). The rule of law, constitutionalism, and the democratic principle are thus closely intertwined (paragraph 67).

The court also recognized the need to take into account Quebec's specificity in Confederation (paragraph 59):

The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and in-

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deed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867.

Suddenly, history appeared relevant, in contrast to 1982, when it was felt that it was "not . . . necessary to look further in these matters." Backtracking from the dubious reasoning it expressed in the *Quebec Veto Reference*, the court recognized the need to take into account Quebec's specificity in Confederation. In other words, in the eyes of the court, the federal principle is not an ethereal

concept universally applicable in all federations; it is historically contextualized.

THE IMPACT OF THE COURT'S NEW CONSTITUTIONAL VISION ON THE FATE OF CANADA

What could be the impact of this more historically informed vision of our constitutional order? Will it have any?

First, it comes years too late. The reasoning adopted in the *Secession Reference* could and should have been adopted in the *Quebec Veto Reference*. Quebec's specificity in Confederation would then have been considered an essential element of a proper understanding of the federal principle in Canada. As a consequence, the court could have concluded that patriation without Quebec's consent contravened the law of the constitution and that Ottawa failed to respect the underlying federal principle that sustains our constitution.

Second, the impact of the court's ruling might be insignificant because it did not provide any means for a provincial federalist government in Quebec to ensure the recognition of their demands. Outside an obligation to negotiate in good faith, the ruling provides no answer on this issue. Faced with an impasse, such a government would be condemned to eternal negotiations.

Unfortunately, the secession-obsessed members of the federal Cabinet do not share the court's new vision. No one in Ottawa wishes to take the result of the 1995 referendum for what it is: an undeniable dissatisfaction with the present state of the federation. In truth, no political party appears interested in understanding the reasons that lie behind the ambivalence of the Quebec electorate. But the federal Cabinet, sooner or later, will have to recognize that a quarter of Quebecers who voted "No" in the 1995 referendum, the sovereigntist "Nos" as they are called, prefer that Quebec remain in Canada, but only on the condition of a renewal of federal-

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ism, which would include a true recognition of Quebec's difference.

In the federal government's eyes, the only solution to the Quebec issue lies in the election of Jean Charest. This hope demonstrates an unbelievable inability to understand the seriousness and complexity of the situation. Not all Quebecers agree with the demands of the PQ government in terms of political autonomy, but the great majority wish that the federal government and the ROC would finally understand that the Que-

bec issue is not an ephemeral one confined to language. Quebec is a multicultural society where 85.3 percent of all French-speaking Canadians reside; a society living its public life in French, just as much as English Canada is a multicultural society living its public life in English. Nonetheless, Quebecers want Ottawa to understand and explain to the rest of Canada that such a difference does entail political consequences that would not threaten the existence of our nation, but that would actually enhance it.

The blindness of the federal government remains bewildering to a federalist such as myself. Although I do not share the desire of the separatists, I can see that the divide between the respective collective memories of Quebec and the rest of Canada grows consistently wider as time passes. I fear that the inability of the federal government to grasp the extent of the problem, let alone be an advocate of a new understanding, will accelerate the disintegration of this country. ❖

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This declaration would be accompanied by the announcement of major new initiatives in these areas of jurisdiction to mark the commencement of the post-deficit era and the dawn of the new millennium.

2. An offer to any province to opt out of federal programs with compensation in the area of social programs, post-secondary education, and labour market policy on two conditions:
 - a. the government receives a mandate from the electorate of the province in the form of a majority referendum vote to opt out; and
 - b. members of Parliament from a province that has opted out will not vote on measures that directly relate to these areas of jurisdiction. (This condition would have to be contained in the referendum).

THE CHALLENGE TO PROVINCIAL GOVERNMENTS

Such a scenario is possible within the framework of existing federal arrangements and is even consistent with the notion of "provincial equality." However, at the same time, it requires any provincial government demanding the provincialization of federal responsibilities to demonstrate that it has a popular mandate for its claims. It also prevents the electorate of an opted-out province from having a say over federal programs affecting citizens of the non-opted-out provinces.

**To win support outside Quebec,
a partnership proposal would need
to link recognition of the national rights
of Quebecers and aboriginal peoples
to the protection and expansion of the
social and democratic rights of
Canadians in English-speaking Canada.**

My expectation is that the likely outcome of such a proposal would be that only the electorate of Quebec would vote by a majority of 50 percent plus one to opt out of federal programs. Even here, though, the combination of a federal commitment to expand social rights and the reduction in representation in the federal Parliament would give Quebecers an interesting choice. If they did vote to opt out, then the federal Parliament would represent English-speaking Canada with respect to federal involvement in the areas of social programs, post-secondary education, and labour market policy. This form of asymmetry might be transitional to the development of other institutional arrangements reflecting an explicit partnership between Quebecers and Canadians in English-speaking Canada.

It is possible that Canadians in provinces other than Quebec would vote to opt out of federal programs with compensation, thereby losing representation with respect to these matters in the federal Parliament. This would be undesirable but much preferable to the current situation where provinces are reaching a hodge-podge of different arrangements with the federal government through administrative agreements of which the average Canadian has no knowledge. Canadians in English-speaking Canada would at least have been given the chance to debate and choose democratically the institutional arrangements under which they wish to live instead of having the decisions made for them by unaccountable elites working through irresponsible institutions of executive federalism. ❖