A court for all seasons

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WHAT THE COURT SAID TO FEDERALISTS

The court said some things that were new, and some that were reminders. Both are important. The two *new* elements of greatest importance are as follows:

1. The sovereignty project is a legitimate quest.
2. If certain tests for popular support are achieved, the rest of Canada has an obligation to negotiate on the matter of sovereignty in good faith.

The two important *reminders* are as follows:

1. The provinces are an integral part of all constitutional processes, including those that could lead to Quebec sovereignty.
2. Any province can begin a process of constitutional change.

On the surface, these things are nothing more than common sense, at least in the context of the Canadian political tradition.

However, they represent a serious blow to the main thrust of the historic federal government position, particularly as represented by Liberal governments since 1968. Ottawa has both directly and indirectly taken the position that it will not in any way cooperate in the division of Canada (though it might in some circumstances have to accede to the *force majeure* of an overwhelming vote) and that the very quest for sovereignty is morally illegitimate and shameful.

The great advantage of such a position for the federal Liberals has been that if one dismisses the idea out of hand, there is no need to further discuss the possible causes and cures of the underlying discontent that gives rise to the secessionist impulse. Such a discussion inevitably leads to questioning the very heart of our federal structure — questioning it is better to avoid if one believes that the distribution of political power in Canada is as good as it could possibly be, short of perhaps a bit more central power here and there.

The quest for sovereignty is *not* illegitimate. Stonewalling is *not* an acceptable tactic.

PLAN B AND PLAN A

Accordingly, the central government strategy has been to focus on "plan B."[1] This approach is simple to understand, apparently patriotic in its motives, and has the virtue of requiring no thought about significant change. It has been very popular in English Canada.

Unfortunately for the proponents of this approach — who in a delicious irony were responsible for the Supreme Court reference in the first place — the court delivered a great deal more than it was asked to.

It did indeed say that a unilateral declaration of independence (UDI)[2] would be illegal. But then the court gave back what it took away and more, thereby undermining the main foundations of plan B. The quest for sovereignty is *not* illegitimate. Stonewalling is *not* an acceptable tactic. The court even hinted at the end of its statement that if Canada refused to engage in good-faith bargaining, a UDI (while still illegal) might be successful.

So now what are federalists to do? The focus on plan B has been the strategy of the federal Liberals as well as pleasing to the public. But there has been a significant and growing body of federalist thought that would devote far more attention to "plan A." The search for a reconfigured Canada would retain the essential elements of the country,[3] while amending the arrangements of federalism in such a way that the main goals of the sovereigntists could be achieved *within* the union.

The two most publicized moves in this direction have involved provincial governments other than Quebec, and the official opposition in Ottawa. The first provincial move was very tentative, as evidenced by the Calgary declaration. Nevertheless, it was highly significant as the first provincial acceptance of responsibility for the shape of Canadian federalism.

The official opposition has been more direct, specific, and bold in their draft *New Canada Act*, which paints a picture of a markedly more decentralized country.

No such interest has been seen from the federal government, nor is any likely under the current prime minister. That certainly makes plan A activity more difficult — but not impossible. And, of course, the "current" prime minister is only that.

ELEMENTS OF PLAN A

The general thrust of plan A is decentralization and devolution. The technically correct word is "rebalancing," because most proposals would add some powers to the central level of government.[4] In addition, certain democratic reforms, whether to the federal electoral system or to the composition and rules of Parliament, could have the effect of legitimizing the centre.

But it cannot be doubted that most proposals for the reform of the Canadian political system — in common with the experience of countries around the world under the influences of technology and globalization — speak more of the devolution of power, to provinces, to local government, and to the private sector.

These ideas are not new. The *Beige Paper* and the *Allaire Report* are major

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of Quebec voters had clearly voted in favour of secession. It is safe to say that there would be little political support for a policy of attempted resistance to the wish of the Quebec voters. The court's decision simply converts political reality into a legal rule. Indeed, it is not entirely clear why it is a *legal* rule, since it appears to have no legal sanctions.

Moreover, by crafting a decision that was pronounced acceptable by the government of Quebec, the court seems to have caused a public renunciation of the theory, so frequently and dogmatically asserted by the premier of Quebec before the decision, that no constitutional law could stand in the way of the wish of a majority of Quebeckers. It is not easy to see how Quebec could repeat the 1995 assertion of a right of unilateral secession from Canada. Given the potential for chaos and disorder in a secession that has not been accomplished in compliance with the law, the court has conferred a benefit on the nation by causing the leaders of the Parti québécois to rule out that course of action.

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statements in the history of the Quebec Liberal Party. The *Pepin-Robarts Report* was ahead of its time in this regard as well. Most proposals from English Canada, such as those of the *Group of 22* have been more modest, though my *Thirty Million Musketeers* sets out a more ambitious agenda. The European Union concept of *subsidiarity* is a common touchstone.

The usual concerns about plan A, once the dialogue gets beyond annoyance at Quebec for forcing us to think about such things, are the "slippery slope" or "critical mass" arguments. "With significant devolution," goes the concern, "will there be enough left at the centre to continue a robust entity called Canada?"

GETTING ON WITH IT

So, in operational terms, what to do? In reverse order, the plan A activity in the federal legislature will be restricted to the official opposition, which is currently the Reform Party. Should the so-called united alternative come into being with significant non-Reform support and adopt Reform policies on this file, it would be an important message to and option for the Canadian people. However, in the short term, the federal government still relies on plan B, and need not call an election for three and a half years.

The provinces are showing interesting activity in developing a new vision of the federation, above all in the social union area. Equally fascinating, the Quebec government of Lucien Bouchard has become an active player in this game, risking (in a sense) proving that the federation can work. Can any student of federalism fail to have noted that, while Mr. Bouchard talks of sovereignty and a new referendum, he also talks of an amendment to the existing constitution of Canada re: opting out? Mixed messages indeed.

Through the smoke, one thing is very clear. The provinces are working together in a way that is absolutely unprecedented in the history of this country. They remain tentative and even fearful about developing their own vision of the federation — their own plan A — but they are moving inexorably in that direction.

The missing ingredient in all of this is the leadership of ideas that should be coming from the remaining prime mover, the academic community. It is always easier for politicians to watch reactions to the ideas of others, rather than take the risk of advancing their own. With some honourable exceptions, that sort of leadership on a plan A has been lacking.

CONCLUSION

The court has cut away the foundations of plan B, and with the Parti québécois victory in the Quebec election at the end of November, there is an urgent need for a plan A. Even had the Quebec Liberal Party won, we would have quickly come to understand that they too would have settled for nothing less.

But to look at things in a constructive way, Quebec is only the engine on this journey, not the driver. Are we up to the imagination, the flexibility, the successful adaptation required to preserve this country? In its ruling, the Supreme Court explicitly left all such questions — rightly — as political issues. That is the court's real challenge to the rest of us.

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1 "Plan B" has become the shorthand for the stonewall, scorched earth, "You can't do it" stance, which argues that the separation of Quebec would be politically, economically, and legally very unwise, and virtually impossible to achieve. "Plan A" (or "plan C" in some formulations) addresses a different agenda — namely, "What acceptable amendments to the Canadian federal structure, if any, would reduce sovereigntist support and secure the union?"

2 The ability to effect a UDI is an essential ingredient in the sovereigntist strategy, in response to a plan B stonewall. If there is no "or else," there will be no bargaining in such a situation. For a secessionist, bargaining without a UDI option would be like a trade unionist bargaining without a strike option.

3 Stated by the court to be federalism, democracy, the rule of law, and respect for minorities.

4 Powers to prohibit provincial restraint of interprovincial trade are a common theme, for example.