

What can small provinces do?

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What is the possible impact of the *Quebec Secession Reference* (QSR) opinion on the national unity activities of small provinces — provinces that have one million people or fewer? These “have-not” provinces, situated in the Canadian hinterland, have both small size and economic conditions which give them a great stake in preserving national unity. Their specific interests, however, will often differ from those of big provinces in the ROC, whether heartland (Ontario) or hinterland (Alberta and British Columbia). The three big provinces are also “have” provinces. Small provinces may become lost in the shuffle among the big players, and they cannot expect the federal government to protect their interests. They need to begin their plan C preparations.

THE DUTY TO NEGOTIATE

Plan A ensures a duty to negotiate. The four key principles referred to in the Supreme Court’s judgment also constrain the exercise of the legal rights of participants. The court states: “Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations . . . which constitute substantive limitations upon governmental action” (paragraph 54). Principles will restrict decisions taken pursuant to legal rules in part V of the *Constitution Act, 1982*. Thus, if parties exercise their veto under s. 41, or withhold their consent under s. 38, for reasons that violate the principles, their action is unconstitutional.

Outside the national unity context, the opinion’s elevation of principles certainly gives small provinces cause for concern. Rules protect small players from “might makes right” practices. They provide stability of expectations for small provinces. If constitutional principles trump the exercise of rights given by rules, then they weaken or erase the protection that rules give small provinces. When small provinces agree to a provision, they will not know whether it will last beyond the next court decision that

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uncovers and applies principles. However, in the context of national unity deliberations, a small province’s realization that other parties could act in spite of its singular dissent on a widely accepted position may promote agreement.

ENLARGING THE NEGOTIATIONS

The opinion may change the personnel around the negotiating table. The court says that the right to initiate constitutional amendments, which is found in the *Constitution Act, 1982*, generates a corresponding duty to engage in constitutional discussions. Presumably, the court was referring to s. 46 of the Act. The right holders in s. 46 are not first ministers, but legislative bodies. Will the right holders also become the duty holders, thus transferring primary negotiating responsibility to the legislatures from the executive branches of government? If legislatures must authorize negotiating teams, then a larger number of opposition leaders may participate than

in previous negotiations. (Several were present during the Charlottetown round.) The early involvement of the legislature could foster public acceptance of a plan to renew federalism. One vocal complaint about Meech Lake centred on the unacceptability of 11 first ministers forbidding any changes to their agreement at the legislative stage. If this change in process did occur, it would not affect small provinces differently from large ones.

Previous efforts to negotiate a plan A agreement have foundered in part because of the conflict between fulfilling Quebec’s traditional requests and complying with the principle of equality of the provinces. The former imperative leads toward asymmetrical federalism, while the latter insists on identical powers and treatments of all provinces, regardless of differences in size, history, or needs. The conceptions of federalism underlying these competing dynamics roughly correspond, respectively, to multinational and territorial federalism.

If politicians wish to successfully conclude a plan A strategy, they have several options. They can try to reconcile the principle of equality of the provinces with Quebec’s demand for recognition as a distinct society. The Calgary declaration tries to square this circle, in an unsurprisingly messy fashion. Alternatively, they can dispense with the principle of equality of the provinces and negotiate asymmetrical federalism. With this option, one critical problem for many ROC politicians, in small and large provinces, is their electorate’s widespread acceptance of the notion of equality of the provinces.

EQUALITY OF THE PROVINCES: A SOFT MAYBE

Could politicians say that the court has tempered the principle of equality of the provinces, thus providing them with a justification to strike a deal that accommodates Quebec’s concerns in a more

What can small provinces do? page 37

What can small provinces do? continued from page 24

straightforward manner? Of course, the court could not forsake outright the principle of equality of the provinces without overtly rejecting s. 41 of the *Constitution Act, 1982*, which it does not do. I have argued elsewhere (see "The *Quebec Secession Reference*: Goodbye to Part V?" (1998), 10 *Constitutional Forum* 19) that, in the secession context, the court's opinion softens considerably the application of the part V amending rules, including s. 41. However, politicians need clear statements to influence public discourse quickly, not complex arguments based on implications and inferences. From that perspective, the opinion is unhelpful. It does not categorically reject the principle of equality of the provinces, nor explicitly support or reject a multinational conception of federalism, whether two nations or more.

At best, the court offers meagre words and tacit references on which to pin a political argument that it has diluted the principle of equality of the provinces. In narrating Confederation history, the court quotes approvingly from Cartier's articulation of the new political nationality that would emerge from the federation of "different races" — today we would say "different nations" — and describes federalism as the "political mechanism by which diversity could be reconciled with unity" (paragraph 43). Later, in discussing the federalism principle, the court states that federalism "recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction" (paragraph 58). While this passage appreciates that Canada was not composed of homoge-

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neous units, it does not accord any *distinctive* place to Quebec.

The court also states that federalism "facilitates the pursuit of collective goals by cultural and linguistic minorities that form the majority of the population 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" (paragraph 59). While this passage, standing alone, could contribute to a multinational conception of Canada, in the very next paragraph the court explains that other provinces welcomed federalism for the same reason, implying that all provinces had identical motivations and hence lending support to an equality of provinces view. The court does say that Quebec has a "distinct culture" (paragraph 59) while Nova Scotia and New Brunswick welcomed federalism to protect their "individual cultures" (paragraph 60), and it mentions the French language only in reference to Quebec. Overall, the opinion does not help politicians prepare the soil for public acceptance of an agreement that recognizes, in one way or another, the unique place of Quebec.

GETTING READY

If plan A and plan B both fail, and a Quebec referendum triggers the duty to negotiate in the secession context, small

provinces will find themselves at the secession negotiating table. These negotiations will be difficult and controversial. They may begin with efforts to negotiate new federal arrangements, and they will likely be accompanied, at some stage, by plan C negotiations to establish a new country, Canada without Quebec.

Small provinces should immediately start preparing for all forms of negotiations. Once the negotiations begin, they will likely proceed very quickly. Time will be short, and provinces need to ponder now what they hope to achieve. They will not be able to rely on their legal rights to command attention. Their influence will depend on their creativity, wisdom, nimbleness, and overall persuasiveness, all of which are enhanced by good preparation.

Their power will also depend on their allegiances. One small dissenting province may be easily labelled as breaching its constitutional duty to abide by principles, but it is harder to dismiss two or three small provinces who unanimously complain about a particular position. Perhaps if small provinces begin the hard work of moving away from the political rhetoric of the principle of equality of the provinces, and at the same time prepare for secession and plan C negotiations, other provinces will wisely follow suit. ♦

Anglophone media continued from page 26

its balance — should prevent Lucien Bouchard from playing the humiliation card to electoral effect. At the same time, the prospect of tough negotiations with their Canadian partners will force sovereigntists to discuss the costs of

separation realistically with the Quebec electorate.

Canadians have good reason to be proud of the passionate yet lucid and extraordinarily peaceful manner in which the debate over separatism has

been waged for four decades. Such pride should be enhanced by this new chapter in the long-running Quebec-Canada saga that, however wearying we sometimes find it, has defined our country in our time. ♦