

# Anglophone media and the court's opinion

## CANADA'S MEDIA SOLITUDES

During the first 15 minutes of the CBC-TV coverage of the Supreme Court's opinion on Quebec's right to secession, viewers could have been forgiven for thinking that the court had etched the federal Liberals' tough-love "plan B" in constitutional stone.

*Newsworld's* Don Newman and his colleagues were telling us the court's nine judges had unanimously ruled that neither the constitution nor international law gave Quebec the right to secede from Canada unilaterally. What a victory for Prime Minister Jean Chrétien, his intergovernmental affairs minister Stéphane Dion, and all of those gleeful federalists who thought their carefully formulated questions could hardly be answered without devastating the sovereigntist position. What a rout for Premier Lucien Bouchard and his hapless party, including Maître André Joli-Coeur, of whose sovereigntist arguments as *amicus curiae* the judges made short shrift.

And yet, if viewers switched to *Radio Canada's* more sustained, intense, and intelligent coverage or, better still, if they were able to access the text of the court's judgment over the Internet, it soon became clear that "plan B" was in ruins. The judges were also telling Canada's federalists that, following a properly conducted victorious referendum, the governments of Canada would be *obliged* to negotiate. No longer could Quebecers be threatened with humiliation, as Prime Minister Pierre Trudeau threatened them during the 1980 referendum campaign when he insisted that English Canada would refuse to negotiate. Instead, the court went so far as to state that, if such negotiations were not conducted in good faith, Quebec would have cause to declare *de facto* independence — however unconstitutional such a move would be — and could well gain international recognition as a result.

BY STEPHEN CLARKSON

Stephen Clarkson is a political economist at the University of Toronto.

---

How odd then that this group of nine justices, deemed by many legal experts to be of less than outstanding talent, should have written a clearly argued document of historic moment without falling into the traps carefully prepared for them in Ottawa and Quebec City.

---

## WINNERS AND LOSERS

At the same time that the court denied Ottawa total victory, it denied Premier Bouchard the provocation he had been anticipating for his immediate electoral purposes. How could the court be attacked as the instrument of a dastardly federalist plot when it had made Canada's constitution one of the few in the world to legitimate the democratic right to secession of its constituent members? Even Jacques Brassard, Quebec's minister of intergovernmental affairs, had not a single vituperative word to say

about the court's judgment when he emerged from his government's referendum-day huddle to face the media.

But having gone the extra mile in endorsing the Parti québécois's referendum process, the nine judges then turned round and made the prospect of an easy accession to independence far from automatic. Post-referendum negotiators would have to include not just the federal government but the other provinces. And they would have to consider the interests of minority groups — specifically those of the native peoples.

With this set of surprises the Supreme Court has pulled off a coup. It has affirmed the value and virtue of Canada's federal system while showing that the constitution is not a straitjacket. In effect it has introduced a constitutional amendment specifying how a province can secede. It has assured all the players that their interests would have to be taken into account during the post-referendum negotiations.

Earlier this year, big-brained legal talent, both professional and professorial, convened in Toronto to pass judgment on the Supreme Court's recent rulings and found them wanting in consistency and inferior in quality. How odd then that this group of nine justices, deemed by many legal experts to be of less than outstanding talent, should have written a clearly argued document of historic moment without falling into the traps carefully prepared for them in Ottawa and Quebec City. How curious that a court long denounced within sovereigntist circles for its inveterate centralizing tendencies should have reached the ultimate in decentralizing positions.

## A QUINTESSENTIAL CANADIAN DECISION

This generous, intelligent, decent judgment — so quintessentially Canadian in

Anglophone media, 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-

**[P]rovinces need to ponder now what they hope to achieve. They will not be able to rely on their legal rights to command attention.**

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. ♦