

# We were not invited

BY ALAN CAIRNS

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*This exercise in futurology, looking back in the year 2010, is intended to be both playful and serious. However, if we act now to counteract the bias toward the past in the negotiation process recommended by the court, we can avoid the unhappy future chronicled below.*

[Canadian Press, March 16, 2010]

Yesterday, former prime minister of New Canada, Preston Manning, released his account of the process that led to the emergence of his country as an independent state. Dated March 15, 2010, the memo — written with numbered paragraphs in an apparent attempt to accord his words the degree of legitimacy that a similar practice accords to Supreme Court opinions — is the former prime minister's attempt to deflect the blame for the sorry, fragmented condition of New Canada away from his own recently defeated government to the flaws in New Canada's founding. Manning's focus is the systematic process of voice appropriation, or silencing, which deprived Rest-Of-Canada (ROC) or Canada-Without-Quebec (CWOQ) — the then labels for what became New Canada — of a voice in the latter's emergence.

Manning attributed the governance disabilities he inherited as the country's first prime minister to the unwieldy arrangements foisted, he would say, on New Canada.

Preston Manning's memo, unedited, follows:

## **WE WERE NOT INVITED (MARCH 15, 2010)**

The following, in point form, is my attempt to explain why no one represented our interests in the constitutional process that led to our emergence as an independent country at the same time as that of Quebec. The issue is especially troubling because Quebec, the catalyst for the breakup of Canada, was a full-fledged partici-

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pant, and the interests of the "No" voters — especially aboriginal nations and anglophone and allophone minorities — were well represented by the Quebec contingent in the federal government delegation, in effect performing a trustee role, while our interests were not represented as such.

1. Those of us who lived through the difficult years that preceded the breakup of Old Canada will remember the psychological shock outside Quebec that followed the 1995 referendum result, won by the "No" forces by a whisker. The recognition that the victory of the "Yes" forces was now thinkable, and that both governments and peoples outside Quebec were completely unprepared, led to what came to be called "plan B."

2. Plan B, more an orientation than an elaborate plan, had two objectives — to establish rules for the

possible breakup of Canada, and to deter Quebec voters from voting "Yes" by making it clear that Canada outside Quebec would not be a marshmallow in the secession negotiations, but a tough actor. The message that independence was at the distant end of a very rocky road was intended to reduce the number willing to travel it.

3. Plan B defined the priority issue as the secession of Quebec — how to prevent it or, if that failed, how to subject its achievement to rules that would weaken the possibility of a unilateral declaration of independence (UDI) and its attendant chaos. The Supreme Court reference, the centrepiece of plan B, addressed three questions to the court. All three referred to the right of the National Assembly of Quebec to effect the secession of Quebec from Canada unilaterally, under the Canadian constitution or under international law. If domestic and international law disagreed, the court was to advise which took precedence.

4. The single — with hindsight one might say obsessive — focus of the reference was the secession of Quebec from Canada by a fair process sensitive to constitutional requirements. The justices were not asked whether all secessions should be subjected to the same constitutional rules; whether, with all deference to Prince Edward Island, its secession should be distinguished from that of Quebec's. The departure of the former would leave a recognizable Canada behind; that of the latter would not. Quebec's departure would create two new countries — PEI's would not. The obvious distinction that the federal government of Old Canada would be a reasonable proxy in negotiations for the federal government of Canada with-

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out PEI (CWOPEI) but that same federal government could not be a proxy for the federal government of Canada without Quebec was lost on the justices.

5. The judges were not asked what constitutional process would be fair to New Canada. They were more concerned with fairness to Old Canada, "Canada as a whole" (paragraph 93), which did not survive Quebec's exit four years later, than with the different country of New Canada, which emerged at the same stroke of midnight as the seceding Quebec.

6. The court was not asked and therefore did not answer the question of what amending formula and prior negotiating process was appropriate for the creation of two new countries. The court expressed the hope that the interests of the aboriginal peoples would be taken into account. It carefully juggled the interests of Canada-as-a-whole and Quebec in the interest of fairness. It was, however, oblivious to ROC (or CWOQ), the predecessor of our New Canada. No thought was given to the appointment of an *amicus curiae* for New Canada. No lawyer before the court addressed the reality that Quebec's secession would create two countries, not one. The issue was never posed this way before the court, and, accordingly, in a lengthy judgment, our prospective existence as citizens of New Canada was ignored. It is possible that the indisputable fact that the court was recommending a process that might lead to the creation of two new countries was not recognized by a single justice.

I have often thought that if our prospective country had been given a different name ahead of time in the 1990s — for example, say Adanac, to indicate the then reversal of our fortunes — the court could not have sustained the fiction that the breakup of Canada created only one new country.

7. When the sovereigntists won the referendum in 2002, the court's

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definition of the situation was not only conventional wisdom, it had become the regnant constitutional morality. In the period preceding and following the Supreme Court decision, several commentators tried to draw attention to the reality that Old Canada could not be a proxy for New Canada in the breakup discussions. The issue was brilliantly explored in an occasional paper by Denis Stairs. "Starkly put," he sums up an elaborate argument, "the government of a united Canada *cannot* act for the people of a partitioned Canada." (*Canada and Quebec After Québécois Secession: "Realist" Reflections on an International Relationship* (Centre for Foreign Policy Studies, Dalhousie University, 1996), 36 [italics in the original]). A retired political scientist raised similar concerns at a small conference at York University in November 1998, but these were unable to deflect the juggernaut of history. The big battalions lined up behind the court's decision.

8. This was evident when negotiations got under way in 2002. There was some pressure to take account of the fact that two new countries might be in the making; that Old Canada could not represent New Canada; and that negotiations, and even the decision rules, should accommodate these facts. Various proposals were made, the details of which are now only of historical interest, to build the concerns of a possible New Canada into the process. The proposals were crushed. The Canadian team described them as

creating a two-headed monster that would additionally complicate an already difficult task. We now know as well that the federal team sought without success to negotiate a renewed federalism offstage while secession terms were being discussed in official arenas. Intimations of a New Canada suggesting the definitive end of Old Canada were unwelcome to federalists engaged in their failed salvage operation.

The government of Quebec was opposed to any modification of the basic federal team. Indeed, Mr. Parizeau, who had been appointed by Bouchard to handle the negotiations for Quebec, threatened UDI on more than one occasion. He tartly reminded everyone who would listen that such a complication as giving a negotiating voice to a prospective New Canada, and the incoherence to which that would lead on the non-Quebec side, would give Quebec a virtually unassailable claim that Canada had not conducted the good faith negotiations required by the court — a constitutional failure that would carry immense weight internationally and facilitate the international recognition of Quebec following UDI. The court, in effect, gave the seceding party — Quebec — a weapon to exclude from participation the country it would share borders with.

9. The difficulties confronting our people are not the result of a conspiracy. Bouchard, Chrétien, Dion, Parizeau, and Chief Justice Lamer did not strike a deal to marginalize

us or silence any expression of our interests from the time plan B emerged. The Supreme Court, whose decision in the secession reference has often been criticized by our own public intellectuals since Quebec left Canada, was caught up in an inherited Canadian dilemma that was embodied in the questions asked of it. The federal government was not concerned with the possible future of New Canada when it formulated three questions focusing on the secession of Quebec. Admittedly, the court not only elaborated on the definition of the situation present in the questions it was asked, but, one might say, it constitutionalized that definition; it froze it and gave it such legitimacy that rival definitions of the priority question on our agenda — for example, what is the appropriate constitutional process for the creation of two new countries out of the shell of Old Canada? — appeared unconstitutional.

So, once momentum built up be-

hind the thesis that the big question on the Canadian agenda was how to deal with the secession of Quebec, our fate here in New Canada was an accident waiting to happen. Its likelihood was strengthened by the regrettable fact that ROC was headless, voiceless, and had no institutional existence. Unlike Czechoslovakia, Old Canada was not a two-unit federation — two halves that could bargain with each other. Even so, it was not absolutely inevitable that we were absent from the negotiations that attended our birth. The Supreme Court might have peered into the future, detected our pending existence, noted that we were not simply Old Canada writ small, and then tried to accommodate our concerns. That, however, was not to be. On the contrary, the Supreme Court decision firmly put us in the audience. Four years later that decision helped achieve the outcome the court sought should the Quebec electorate vote “Yes” — the constitu-

tional exit of Quebec. It also, however, contributed to another outcome the court neither sought nor appreciated — the creation of New Canada for which the Old Canada it privileged in negotiations was an imperfect proxy.

Our country has become a prison, paralyzed by partnership and other arrangements unwisely negotiated in our absence by what the Supreme Court called “Canada as a whole” in its much studied 1998 secession decision. That phrase meant that Quebec was represented on both sides of the negotiating table from which we were absent. This is the context for the present threatening secession movements in Atlantic Canada, British Columbia, and Alberta. If different, more realistic questions had been asked of the Supreme Court in the '90s, this memo might have been unnecessary.

Sincerely,  
Preston Manning



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referendum campaigns by federalist leaders such as Pierre Elliot Trudeau or Mike Harris.”

Had the current court's vision of federalism been applied 15 years earlier in the *Quebec Veto* case, according to many of Quebec's constitutional experts, the federal government would never have been permitted to patriate the constitution from Britain over the objections of Quebec. As Jean Leclair puts it, “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.” This time, in the *Quebec Secession Reference*, the court quite consciously avoided a narrowly legalistic approach and provided incentives for both sides to compromise in any future secessionist scenario. In so doing, according to York University political scientist Kenneth McRoberts, the court “transformed

**We can report that the vast majority of the participants at the Glendon meeting gave the court extremely high marks for producing a balanced and carefully nuanced judgment.**

the terms of the public debate over Quebec sovereignty by cutting through the posturing and pretence and focusing all sides on the central questions at hand.”

In taking this unprecedented step, the justices were not disinterested actors but together formed a court that wanted to guarantee its own survival and integrity as Canada's primary legal institution. In refusing to keep Quebec in at any price, in Andréé Lajoie's analysis of the judg-

ment, the court saw its primary role as preservation of the Canadian state and preparation of the groundwork for an orderly exit of Quebec if it comes to that. From the outset, Quebec boycotted the entire proceedings but, ironically, in the end, the court gave Quebec more than it would have obtained had it appeared before the court. The advisory judgment conferred legitimacy on Quebec's right

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