

Canada Watch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

a publication of the York University Centre for Public Law and Public Policy and the Robarts Centre for Canadian Studies of York University

SPECIAL ISSUE: THE QUEBEC SEPARATION REFERENCE

STÉPHANE DION: BEARER OF THE UNITY TORCH OR ANOTHER CANDLE IN THE WIND?

BY A. WAYNE MACKAY

The line between law and politics has never been a distinct one and it is rarely more blurred than in matters constitutional. This point is clearly illustrated by the recurring issues concerned with the separation of Quebec from Canada. Traditionally, the federal government has fought the battle against Quebec sovereignty in the political rather than the legal arena. There was a sense that to even enter the legal debate would lend a credibility to separation and in some subtle way make the departure of Quebec more likely.

After Canada's near-death experience in the 1995 referendum in Quebec, the federal government decided to reconsider its strategies with respect to Quebec and the thorny issue of separation. The first sign of this new approach came with the appointment of Stéphane Dion as Minister of Intergovernmental Affairs. Mr. Dion brings to this challenging portfolio an enthusiasm, credibility, and academic credentials that have not

been seen since the days of Pierre Elliott Trudeau. While Dion brings a Trudeauesque intellect to the unity debate, he does not carry the same federalist baggage as did Mr. Trudeau. Like Trudeau, Stéphane Dion turned to the Supreme Court of Canada to provide the legal foundation for the federalist edifice.

In 1981, then Prime Minis-

ter Trudeau defended the unilateral federal patriation of the Constitution in the Supreme Court of Canada. While the original legal references arose in the provinces of Manitoba, Newfoundland, and Quebec, the federalists did not shrink from a fight in the Supreme Court of Canada. The Court, speaking through the late Chief Justice Bora Laskin, in its first televised decision, (ironically and, some would say, significantly, the sound system failed for the first part of the broadcast), held that unilateral patriation by the federal government was constitu-

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FOREIGN AFFAIRS, NATIONAL UNITY, AND SOVEREIGNTY

BY DANIEL TURP

Canada has always been a country proud of its foreign affairs record. As a middle power, Canada has played a significant role in the post-1945 period and has earned the reputation of a responsible state actor. Building on the legacy of Nobel Prize winner Lester B. Pearson, Canada has been committed to the peace-keeping efforts of the United Nations and of other international organizations in which it continues to play a key role. The active involvement of Canadian governmental depart-

ments and agencies in the processes of electoral monitoring and democratic development has also given Canada an enviable reputation.

The most recent, and daring, initiative of the minister of Foreign Affairs, M. Lloyd Axworthy, in the area of anti-personnel land mines has also proven the ability of the government of Canada to go beyond peace-keeping and to ensure that measures of peace-building become a priority

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by Paul Joffe

tional in the legal sense, but unconstitutional in the conventional sense. This remarkable act of judicial evasion drove the federal and provincial forces back to the bargaining table and ultimately produced the *Constitution Act, 1982* (complete with the *Charter of Rights and Freedoms*), which became part of the supreme law of the land without the consent of Quebec.

The *Patriation Reference* is a clear precedent for turning to the courts for the dispensing of constitutional wisdom, when the political avenues to constitutional reform have come to a dead end. Stéphane Dion may also have appreciated the value of making the constitutional reference—a strategy that allows the federalist forces to formulate the questions and control the evolution of the case. In the earlier *Anti-Inflation Reference*, former Prime Minister Trudeau did seize this strategic advantage by referring his controversial *Wage and Price Restraint Act* to the Supreme Court, as a pre-emptive strike against challenges from the labour unions. The Court upheld the federal legislation on the basis of the emergency (or

crisis) branch of “peace, order and good government”, rather than the national dimensions branch which the drafters of the law expected to emerge as the constitutional foundation. Nonetheless, the Supreme Court did provide the needed legal buttress to the economic strategy of the federal government.

This rejection of legal processes in favour of democratic political processes would have more credibility if the Quebec government did not, in its next breath, resort to international law to buttress its political claims.

In contrast to the *Patriation Reference*, the federalist forces in the *Separation Reference* are arguing against unilateral action but, as in the *Anti-Inflation Reference*, they are hoping to provide a secure legal foundation upon which

to build the federal unity strategy. The official Quebec government response has been to decry the legitimacy of the Supreme Court of Canada to make decisions affecting the sovereignty of Quebec. The Parti Québécois has taken the position that any Court decision would be an interference in the democratic processes within Quebec.

This rejection of legal processes in favour of democratic political processes would have more credibility if the Quebec government did not, in its next breath, resort to international law to buttress its political claims. As Minister Dion emphasized in his exchange of letters with Mr. Bernard Landry, Quebec cannot rely on law when it appears to favour her and reject it when it goes against her. Either we are operating under the rule of law or we are not. Stéphane Dion in his reference to the Supreme Court of Canada and in his exchange of letters has succeeded in exposing some of the contradictions in the separatist arguments and in giving the rest of Canada (ROC) the sense that the federalists are prepared to

fight for Canada within the realm of law as well as politics.

A further blow to the Quebec reliance on democratic political processes in Quebec is the apparent reluctance of the Quebec government to give the same respect to the First Nations within the province. If Quebec can by unilateral, albeit democratic, processes partition Canada, why could not the First Nations do the same? The same international law principles which Quebec claims would result in the recognition of a sovereign Quebec could also result in the recognition of a sovereign Cree First Nation within the existing boundaries of Quebec.

Another weakness in the Quebec position at both a political and a legal level is the assertion that the separation of Quebec from Canada is an issue for Quebecers alone. Surely the separation of Quebec from the rest of Canada has a significant impact on the other 22 or so million Canadians, and nowhere is this effect more apparent than in Atlantic Canada. In practical political, as well as legal, terms the

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phasizes the conditions of secession of Québec and calls into question the democratic rules that have governed the

This Plan B, which I believe will prove to be a fatal strategic error on the part of the federal government and those who favour such a plan, could be echoed in international circles by the foreign service of Canada, diplomats, members of Parliament, and ministers alike. If such were the case, the Bloc Québécois will not hesitate to denounce Plan B in the same international milieu and affirm that such a plan is an unacceptable attempt to hijack the democratic process in Québec. The Bloc Québécois will point out that Québec's own plan for sovereignty has always been democratically driven and that it is inclusive in its outlook.

previous referenda on the future of Quebec. It also appears to support the partition of Quebec along ethnic and lin-

guistic lines.

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The international community will also be told that the Bloc Québécois favours an authentic partnership with Canada and that it thus continues to argue for the preservation of an economic and monetary union following the accession of Québec to statehood.

In any case, the Bloc Québécois will launch an offensive to promote sovereignty on the international scene and to obtain, at the appropriate time, international recognition. Meetings with foreign diplomats and of parliamentary associations have given the Bloc Québécois, its leader and foreign affairs critic as well as other parliamentarians, an audience and will continue to do so. Those forums shall be used extensively in the coming months and will allow the Bloc Québécois to make its case for sovereignty and partnership. The case for Québec's independ-

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details of the separation would be a matter of negotiation with the ROC. Even if Québec could establish the right to unilaterally separate from the ROC, it cannot dictate to the ROC the terms of that separation. This is as true in the political world as it is in the legal one. The ROC will not be a passive observer in the breakup of Canada.

Keeping the country together should always be Plan A, but there is nothing wrong with a Plan B, aimed at an orderly and informed dissolution of the country. Canada should be a nation that operates under the rule of law in bad as well as good times.

Part of the appeal of Minister Dion's strategy is that it attempts to clarify the basic legal ground rules in advance. The heated emotions that would likely follow a vote by Québec to separate from the ROC is hardly the climate in which to make up the rules. To use the worn metaphor of the marriage, Minister Dion is attempting to get a belated prenuptial agreement about what will happen in the event of separation. It is my hope and the hope of many Canadians that Québec will remain as a valued member of Canada. However, I do not see establishing the legal ground rules for separation as detracting from the objectives of Cana-

dian unity. Keeping the country together should always be Plan A, but there is nothing wrong with a Plan B, aimed at an orderly and informed dissolution of the country. Canada should be a nation that operates under the rule of law in bad as well as good times.

One of the attractive aspects of Minister Dion's unity strategy is that he does not put all of his eggs in one basket. While waging the legal battle in the Supreme Court of Canada, he continues to fight in the political arena for the hearts and minds of the Québécois. He has done this most notably in his exchange of letters with Mr. Bernard Landry. Recognizing the close link between law and politics, he uses legal arguments to advance the federalist position and to expose weaknesses in the sovereigntist position. He has also risen above the trenches of personality assassination and reclaimed an intellectual constitutional mantle that was last worn by Pierre Trudeau. Dion's appeal to the mind is a welcome supplement to Prime Minister Chrétien's "from-the-heart patriotism".

The Dion blend of law and politics is all the more appealing when contrasted with the well-intentioned but fluffy political strategy that has been called the "Calgary Accord". By eschewing the constitutional route to changing the federalist structure, the premiers have lost in substance what they have gained in flexibility. Armed with an understanding of both constitutional and international law, Stéphane Dion may emerge as a better champion for Canadian unity than nine premiers and two territorial leaders, clothed only in transparent political rhetoric. Indeed, it

shows a greater respect for the legitimate aspirations of sovereigntists within Quebec to respond to their arguments on the basis of law and logic, rather than to insult them with

bland political rhetoric and expressions of love, which can only ring hollow. Whether or not we win the battle for Canadian unity, it is worth fighting on the higher ground. Quebec

and the ROC must be able to respect each other the next morning—regardless of whether they decide to live together or go their separate ways.



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THE CALGARY DECLARATION: "NATIONAL UNITY" FOR A CHANGE? *from page 91*

laration fare in Quebec as simply a "framework for discussion"?

After the 1995 referendum, no less a figure than Claude Ryan had proposed that Quebec be recognized as a "people". More recently, he has mentioned "nation" as an alternative. Just as Ryan's credentials as a federalist are indisputable, so there is nothing inherently "separatist" about either term.

In the end, the document may be tripped up by the very strategy that was designed to secure its approval in English Canada. And Reform's tacit blessings may become a curse.

After all, the term "distinct society" has become a benchmark in Quebec. The Meech Lake Accord made the term famous. English Canada's rejection of the Accord ensured that Quebecers would look for it, or an equivalent, in any new proposal. It's one thing to surround the term with other principles, such as the seemingly contradictory notion of equality of the provinces. It's yet another to remove "distinct society" altogether.

Of course, there are other terms than "distinct society" that would resonate well in Quebec. After the 1995 referendum, no less a figure than

Claude Ryan had proposed that Quebec be recognized as a "people". More recently, he has mentioned "nation" as an alternative. Just as Ryan's credentials as a federalist are indisputable, so there is nothing inherently "separatist" about either term. Indeed, as the recent referenda campaigns demonstrated, British leaders quite freely refer to Scotland and Wales as "nations".

WHAT WE HAVE LOST

For that matter, there was a time when even English-Canadian leaders applied such terms to Quebec. Back in the 1960s, Prime Minister Pearson called Quebec "a nation within a nation" and "the homeland of a people". Both the Progressive Conservatives and the New Democratic Party adopted the language of "two nations".

Of course, Pierre Trudeau's tenure as Prime Minister put an end to such talk. And the premiers' invocation of Quebec's "unique character" is itself testimony to the hold which the Trudeau vision of Canada has secured outside Quebec. The term it replaced, "distinct society", apparently had been itself adopted to avoid such words as "nation" or "people". But even it violated the Trudeau vision, and during the debate over Meech Trudeau personally made sure that all Canadians were aware of this. Now, apparently, it too has disappeared from the lexicon of Canadian politics.

Time will tell whether the Calgary Declaration provides a framework that is not only acceptable to English Canadi-

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COLONY, NATION, EMPIRE

BY GUY LAFOREST

In earlier times, just prior to the referendum of May 1980 on sovereignty-association, when our political lives were much simpler, the late Donald Smiley wrote that Canada almost had a unified judicial system. I shall use Smiley's comments, and his overall evaluation of the nature of the Canadian federation, as a springboard in my analysis of the political context linked to the Reference soon to be heard by the Supreme Court of Canada.

In his book, *Canada in Question: Federalism in the Eighties* [3d ed. (Toronto: McGraw-Hill Ryerson, 1980) at 22-24], Smiley argued that the Canadian political system was quasi-federal. This judgment was based on the recognition of the imperial context which presided over the birth of the Canadian federation. Westminster named the judges whose task it was to oversee the Dominion, while Ottawa named the judges whose duty

it was to oversee the provinces. This included the judges

Since 1982, Canada is no longer a colony. But the provinces remain subordinate to Ottawa in judicial matters.

of superior and appellate courts of all provinces and, from 1875 onwards, the members of the Supreme Court of Canada. In 1949, British judges disappeared from our affairs. Since 1982, Canada is no longer a colony. But the prov-

inces remain subordinate to Ottawa in judicial matters.

Smiley used the expression "colonial subordination" to describe the relationship of the provinces *vis-à-vis* Ottawa produced by such powers as reservation and disallowance. The passing of provincial legislation can be deferred and, ultimately, blocked. The lieutenant-governor, whose nomination is recommended by the Prime Minister, is essentially in my understanding an imperial envoy in the provincial capitals. Smiley mentioned other matters: spending powers, emergency powers, the de-

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