

OTTAWA'S LEGAL OFFENSIVE: AN EASY WIN

BY DANIEL DRACHE

If we look candidly at it, Ottawa has every reason to think that making the Supreme Court of Canada a central element in its unity campaign is an astute move. It is looking for an easy win against Bouchard and it is obvious why it has such confidence in its legal offensive.

First, Ottawa is counting on the Court to defend Canada's integrity as a matter of law and uphold the constitution. The operative word is the way the Court plans to uphold the constitution. The judges of the Supreme Court do not need the federal government to instruct them on their responsibilities to ensure "the peace, order, and good government" of Canada. As the highest legal authority in Canada, the Court is duty-bound to defend and protect Canada as it is currently constituted. None of English Canada's high-powered legal scholars disagree.

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They can quibble about the fine print, but the bottom line is that the federal government's rendezvous with the rule of law appears on course.

A second compelling reason for Ottawa's bullishness is that it has convinced itself that its use of the Court for stark political ends holds few risks. Its constitutional arithmetic is simple to grasp. As a general principle, constitutions permit the "addition" of territory, but never the "subtraction" of a part. Even if there are exceptions to the rule, every state looks kindly on its own expansion; secession is another story entirely. This is why Ottawa has few doubts that the Supreme Court is going to let one of Canada's founding nations go, without first imposing an unreasonable number of conditions that Quebec will have to meet.

BUYING EXTRA INSURANCE

Even so, Ottawa is leaving nothing to chance. It has adopted a much tougher stance towards Quebec than at any time in the last thirty years of Liberal rule. This is why Prime Minister Chrétien and Stéphane Dion, his chief Quebec adviser, have bought extra insurance by appointing Mr. Justice Michel Bastarache, a former legal associate of the Prime Minister and a leading scholar, as the new judge to the Supreme Court. In the United States, under the gaze of Congressional scrutiny, Chrétien's choice would have raised a holy furor. In Canada, where such appointments are made without any public consultation, English Canada's opinion makers (at least those outside Quebec) generally applauded Chrétien's choice to beef up the Court's bench. Mr. Justice Bastarache is a

leading federalist who headed the "Yes" campaign in support of the Charlottetown Accord. In any other context, his federalist activities should have disqualified him from the top legal post; in Canada, it was a crucial reason for his appointment to the job.

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For a country that prides itself on having an independent judiciary, the last thing the Court requires is more federalist muscle. Rather, what the judges cannot afford to ignore is the other half of their mandate, namely, to defend Quebec's democratic rights up to and including self-determination. The Court may disagree with Quebec's commitment to self-determination, but it has a clear and irrevocable duty to protect Quebec's democratic rights to decide its future.

A FAIR HEARING?

Stéphane Dion, the Minister in charge of Canada's constitutional future, has the merit of speaking candidly in assessing Quebec's chances to get a "fair" hearing from a strongly federalist Court. According to Dion, he intends to make it as difficult as possible for Quebec to achieve its democratic goals legally. For the international press, this is hardly an earth-shattering revelation. In

a recent issue, *The Economist* ridiculed Ottawa's legal arguments as "essentially political propaganda" and pointed out that when the issue is independence, it is the primacy of the vote that matters, not what courts decide. If the Court cannot stop Quebec from leaving, what is the point of compromising the independence of Canada's highest court in such an ill-conceived, last-ditch effort?

This is the real issue that should worry the Premiers and send a clear wake-up call to the rest of Canada. The pseudo-respect for the rule of law is not going to help Canada end its constitutional wars and arrive at a settlement that includes Quebec. Inevitably, there is a price to be paid for the politicization of the Court in this overt way.

Daniel Johnson, Quebec's Liberal leader, will likely be the first casualty. The prospect that he will shortly be teaching constitutional reform at a university near you seems increasingly likely. Bouchard is already calling him English Canada's candidate in the next provincial election. In the eyes of Quebec's voters, he looks more like a certain loser than a confident winner of the next provincial election. None of this qualifies as good news for Quebec's federalist forces.

THE GENERATION GAP

What is depressing today is the realization that the federalists and the Premiers who run Canada are caught in a time warp. They are no longer able to come up with any other scheme to win Quebecers over. The test of good governance demands that every political generation—even in the final days of its mandate—must be prepared to rise above the ordinary and establish a new balance of forces which form the country. It is the only yardstick that matters and it is the one farthest removed

from the strategizing of the Chrétien federalists.

The hard truth is that Canada's unity parties can no longer win elections in Quebec as they once did. Their electoral fortunes peaked over two decades ago. So Ottawa's power brokers increasingly need to conduct politics by other means—the Supreme Court, constitutional conferences, if necessary, such as Meech Lake, Charlottetown and now the Calgary Declaration and, recently, federalist legislation such as the *Regional Veto Act* designed to prevent any kind of fundamental constitutional change from being implemented.


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Behind these initiatives is a mind-set and a vision. The Trudeau generation, still in power, continues to believe its old idea that Ottawa can deliver a definitive knockout blow to Quebec's national aspirations, at least for a generation. This is the genesis of Plan "B" even before it was called Plan "B". It stems from the idea that federalist Canada can strong-arm Quebec to accept an inferior status as one of Canada's provinces. Ottawa is attempting to do this one last time by using the Supreme Court to hear the Reference

Case, but Canada's federalist leadership will fail again. Must this happen? Probably, unless the Trudeau generation loses power or reaches out for a new beginning.

ELITE DISCOURSE

Yet, there is an alternative. It is worth recalling that, long before Bouchard came on the scene with his own ideas of partnership, federalist thought had a much different view of nationalism and politics. Ramsay Cook, a leading historian of French-Canadian nationalism, wrote almost three decades ago that the only way to halt Quebec's natural evolution out of Canada was to build "a fruitful partnership in a single state". If English Canadians could bring Canada's constitutional reality closer to the goal of partnership with Quebec, they could avoid the kind of crises they have witnessed in the recent past.

Three decades on, there is still no solution to establishing a new balance of forces in the country. At the very least, no one should pretend that there is no outline for one. Relying on the Supreme Court will only hasten the inevitable of having to negotiate, in trying circumstances, with a sovereign Quebec. 

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within the international community. Canada's overseas development aid has been generous at times and the Canadian International Development Agency (CIDA) has assured Canada an outstanding reputation in the developing world.

THE BLOC AND FOREIGN AFFAIRS

This good record of Canada has never been challenged by Quebeckers, including those who have promoted and continue to promote sovereignty for Québec. On the contrary, Quebeckers have participated fully in the making of Canadian foreign policy and have played an influential role in the implementation of Canada's foreign aid policy.

The values that underlie the foreign policy of successive Canadian governments (peace, security, human rights, and solidarity) are shared values and it would thus be surprising that there be major conflicts. Hence, during the 35th Parliament, the Bloc Québécois regularly gave the government of Canada its support and participated in a constructive fashion in the debates of the House of Commons and the Standing Committee on Foreign Affairs and International Trade.

There remain areas of disagreement. The Bloc Québécois has insisted that there be a linkage between human rights, trade, and aid and has strongly criticized the Chrétien government for its inconsistent decisions in these matters. The Bloc Québécois has also opposed foreign policy initiatives dealing with education and culture, which are matters of provincial jurisdiction and which have been used by the federal government to justify its increasing involvement in these areas. The Bloc Québécois has also considered the

positions of the federal government on the inclusion of social and cultural exemption clauses in international trade agreements to be contradictory.

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The constructive attitude and legitimate opposition of the Bloc Québécois will continue to dictate the policy of the Bloc in these matters. But, the Liberal government and Bloc Opposition might soon be on a collision course if the federal government attempts to use, and abuse, its foreign policy to thwart the democratic drive of Québec towards sovereignty. If the means to promote national unity are seen to be illegitimate by sovereigntists, and the government's Plan B can be qualified as such, the collision might be very direct.

PLAN B AND FOREIGN AFFAIRS

Plan B relies heavily on legal argument and brings into play the Supreme Court of Canada, which is called upon to affirm that Quebeckers have no right to declare sovereignty without Canada's consent. Plan B em-

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