EDITORIAL

WHY OTTAWA WAS RIGHT TO INTERVENE IN THE BERTRAND CASE

BY PATRICK J. MONAHAN

Ottawa's decision to intervene in the constitutional challenge brought by Guy Bertrand aroused a chorus of criticism from both sovereigntists and federalists in Quebec. While Premier Lucien Bouchard's outrage at Ottawa's "provocation" was predictable and almost tiresome, what was surprising was the negative reaction of Quebec federalists such as Daniel Johnson and Jean Charest. Critics of Ottawa's decision argued that any time Ottawa succeeds in uniting Lucien Bouchard, Daniel Johnson, and Jean Charest on the same side of an issue, it must be doing something wrong.

In fact, however, this negative reaction in Quebec to an eminently reasonable decision by the federal government is compelling proof that the intervention was both right and necessary.

THE BERTRAND CASE

To understand why this is so, it is necessary to briefly review precisely what it is that Guy Bertrand is seeking from the Quebec Superior Court.

Bertrand's complaint is that Bill 1 — the Quebec legislation that was the subject of last October's referendum — purported to authorize the Quebec National Assembly to unilaterally proclaim the province's independence from Canada. True, such a unilateral declaration (UDI) could be made only after a "formal offer" of a political and economic partnership had been made to Canada. But there was no requirement that Canada agree to the terms of Quebec's secession from Canada before the UDI could be issued.

Quebec, in short, was claiming that it was not bound by the rules of the Canadian constitution. This prompted Bertrand to seek an injunction prohibiting any future referenda conducted on this footing; Bertrand maintained that any future referendum could be consultative only since secession required a constitutional amendment approved by Parliament and the other provinces.

Quebec's response? In a brief filed in April, Quebec claimed that it was not bound by the Canadian constitution once it obtained majority support for secession in a referendum. Rather, Quebec claimed, principles of international law recognized the province's right to secede unilaterally following a sovereignty referendum.

THE SIGNIFICANCE OF QUEBEC'S POSITION

Had Ottawa chosen to remain silent, it would have been implicitly acknowledging the legitimacy of Quebec's brazen claim. Moreover, it would have been inviting an illegal UDI — and not just from Quebec. Law is not self-executing. Any state that signals that it will not defend its constitution and laws in the face of a UDI can expect to be faced with such illegal declarations before too long. Conversely, the best way to ensure that illegal secessions are never attempted in the first place is to signal clearly and convincingly that a UDI will be steadfastly resisted with all the resources at the state's disposal.

So the Quebec's government's brief in the Bertrand case marked a key turning point in the sovereignty debate. Ottawa had an important choice to make. If, in fact, it is willing to tolerate a province unilaterally seceding contrary to the Canadian constitution, then all it had to do was sit tight and await the inevitable. If, on the other hand, Ottawa believes that the constitution and the rule of law means something and that a UDI should not be tolerated, now was the time to speak up.

The fact that it was Ottawa's reasonable response, rather than the Quebec government's brazen position, that was seen within Quebec circles as the "provocation" confirmed the necessity and importance of Ottawa's intervention. Evidently it was news in Quebec that secession required the prior agreement of the federal government and the provinces. What would have been surprising — not to say irresponsible — would have been if Ottawa had failed to insist on this position. There is no state anywhere in the world today that authorizes sub-national governments to unilaterally secede without first coming to an agreement on terms with the national government.

QUEBEC AS A RENEGADE REGIME?

There was a second significant feature of the Quebec government's argument in the Bertrand case. While Quebec was claiming that it was not bound by the Canadian constitution, it insisted that unilateral secession was authorized by principles of international law.

In short, Quebec insists that a UDI is perfectly legal — just that the applicable rules are international rather than Canadian.

Here is an opening that Ottawa must not fail to exploit. Every international law scholar who has examined this question — including a panel of five international law experts headed by French scholar Alain Pellat that reported to the Quebec National Assembly in 1992 — have concluded that Quebec is wrong. International law does not recognize Quebec's right to secede from Canada.

There is no doubt that a Quebec UDI would be illegal under Canadian law. (Quebec has, in effect, acknowledged as much by arguing that Canadian law is irrelevant and can be ignored.) But what if Ottawa can demonstrate convincingly that international law also stands against Quebec's unilateral secession?

Lucien Bouchard would then be faced with two options: either he would be forced to abide by the rules of international law and acknowledge that Quebec must come to an agreement with Ottawa prior to secession, or he could simply thumb his nose at international law as well and announce that, as Quebec's supreme ruler, he need not abide by any law other than his own.

Bouchard doesn't want to be faced with that choice since, for him, it is a lose-lose proposition — which is precisely why Ottawa should insist that he be put to that choice well in advance of the next referendum. (I will explore the best way to achieve this objective in a forthcoming *CW* column.)

IS LAW IRRELEVANT?

What of those who claim that law and legalities are irrelevant to this debate and that, for this reason, the Bertrand litigation is an amusing but

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irrelevant sideshow?

If Canada were an anarchic society ruled by guns and force of arms, then law and legality would, indeed, be irrelevant to this debate. But Canada is an advanced liberal-democratic state where law and the rule of law matter. The rule of law also matters to the other G7 countries whose decision on whether to recognize a Quebec state following independence would be of critical importance.

This is not to suggest that law will determine political outcomes. But law is far from irrelevant to those outcomes — as the Quebec government's insistence that its position is consistent with international law unwittingly demonstrates. This is why Ottawa did the right thing by intervening in the Bertrand case. Here's hoping that the federal government has the fortitude to stay the course despite the heavy criticism that it will face on this issue from its friends as well as its foes in the months ahead.

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WHY QUEBEC IS AFRAID OF A NAFTA-TYPE ARRANGEMENT WITH CANADA

BY ALAN M. RUGMAN

With the prospect of another Quebec referendum, it is time for a realistic analysis of how a separate Quebec would conduct its economic relationship with Canada. In the October 1995 referendum, the Quebec separatists argued an ambiguous position concerning future trade relationships with Canada.

A separate Quebec would like to continue the current customs union with Canada and also enter the North American Free Trade Agreement (NAFTA). This, indeed, would be the best of both worlds from the separatist perspective, but neither is likely to occur.

The reason lies in the complex institutional fabric of the NAFTA, a free trade treaty between three very different countries of Canada, the United States, and Mexico. If Quebec is to be a separate country, it will have to be treated like Mexico from the viewpoint of the rest of Canada. This will break up the existing customs union and create great economic hardship in Quebec.

FREE TRADE VS. CUSTOMS UNION

To see this requires that we understand the distinction between a free trade agreement (like the NAFTA) and a customs union or common market (like the current Canadian federation). In a free trade area there is tariff-free movement of goods and services, national treatment for foreign investment and little else. In contrast, a customs union provides for much deeper economic integration, especially with the free movement of people and capital.

As a result, a customs union requires some form of political integration, as has occurred in the European Common Market (now the European Union). But as Quebec wants independence from Canada, a sovereign Quebec cannot realistically expect to partake in such a deep customs union or common market with Canada.

An alternative to the customs union demanded by the PQ would be to extend a NAFTA-type arrangement to Quebec. Then Quebec would essentially be like Mexico — a trading partner of Canada but one at a respectable political distance.

Although Quebec wants to use the Canadian dollar and continue with free trade, there is no economic reason for Canada to extend these preferences to an independent Quebec. Instead, Canada should opt for a NAFTA-type arrangement with Quebec.

The potential trade and investment linkages between a sovereign Quebec and the rest of Canada require more careful consideration than was given during the referendum campaign. The Parti Québécois (PQ) position is to request a continuation of the current customs union, with free trade in goods and services, labour mobility, a common currency, and a sharing (with the percentage amount disputed) of the interest on Canada's national debt. Each of these items needs to be considered separately. By unbundling the PQ package of economic demands, Canada can gain considerable negotiating leverage.

An alternative to the customs union demanded by the PQ would be to extend a NAFTA-type arrangement to Quebec. Then Quebec would essentially be like Mexico — a trading partner of Canada but one at a respectable political distance. For example, if Quebec has a NAFTA-type arrangement with the rest of Canada, there would no longer be free trade in goods and services and national treatment for investment. However, as in the NAFTA, there would be many sectoral exceptions from free trade and also many reservations from the national treatment principle. Let us consider these issues in turn.

CONSEQUENCES OF A FREE TRADE ARRANGEMENT WITH QUEBEC

First, a free trade arrangement would not give Quebec full and secure access to either the Canadian or the American market. Canada would be able to use rules of origin (as does the United States against Mexico) to keep out many manufactured goods, including automobiles. Canada would have the legal right to start using countervailing duties (CVD) and anti-dumping (AD) actions against subsidized and dumped Quebec exports to Canada. Given the large role of the state in the Quebec economy, there would be a great deal of business for CVD and AD trade lawyers in Toronto and Vancouver. Quebec could, of course, reciprocate with its own CVD and AD actions against Canada but, be-