Monahan's Constitution: Dead Branch or Living Tree?

by Allan C. Hutchinson

Constitutional lawyers are much like weather forecasters—both are in the dubious game of predicting the future on the basis of the past. As often wrong as they are right, they hope that authoritative accents will make up for their intrinsic insecurity and uncertainty. Like the weather, constitutional law follows certain trends, but is impossible to predict on any particular day or issue.

Who could have guessed the unfolding of the repatriation drama in 1982 and the pivotal role of the Supreme Court? By what measuring rod could the eventual resolution of the federal government's anti-inflation program in the 1970s or unemployment legislation in the 1930s be predicted?

If his paper for the C.D. Howe Institute, *Cooler Heads Shall Prevail: Assessing the Costs and Consequences of Quebec Separation*, is anything to go by, Patrick Monahan considers himself blessed with the rare gift of constitutional prescience. Discussing the possible secession of Quebec, he confidently asserts that "secession can be legally accomplished under the existing Constitution only if it is approved by all the other partners in the federation."

He reaches this conclusion with hardly a shred of doubt or qualification. He offers it not as an opinion, but instead as a seemingly incontrovertible statement of constitutional fact. He depicts law as "a brooding omnipresence in the sky" that speaks in a clear and precise voice to those possessed of the appropriate expert hearing. There is almost no reference to Canada's rich and stormy constitutional past.

While Monahan's assessment of the constitutional context is not without considerable merit or cogency, he is informed enough to know that only one certainty can be predicted about Canadian constitutional law—its enduring uncertainty and pervasive unpredictability. At the hands of its judicial interlocutors, the whole history of constitutional law is one of discontinuity, U-turns, contortions, and backflips.

For instance, in 1980, almost no constitutional lawyers predicted that the Supreme Court would hold that constitutional convention required that re-patriation could not occur without substantial provincial consent. Canadian judges have a penchant for overlooking what is on the written face of the constitutional text when it is expedient to do so and, equally important, reading in what is not textually obvious when it suits their purposes.

Monahan incorrectly treats the constitutional living tree as if it had died, carbonized, and been reduced to a tablet of stone—inert, unchanging and inflexible. However, constitutional law is not exclusively about the careful parsing of formal legal documents; it is a dynamic exercise in political judgment. Whether dealing with liquor licensing, black marketeering, resource taxes, unemployment insurance, anti-inflation measures, aboriginal claims, repatriation, or racist legislation, the courts have shown a willing capacity to rain on the constitutional experts' parade.

Of course, the courts are not always on the side of the constitutional angels: there are as many obstructive decisions as facilitative ones. But, more like the weather than the forecasters, judges have been prepared to sense the force and direction of the political winds that blow. What Monahan says about politics is as true for law—"political events, once set in motion, rarely unfold according to a predetermined script."

Unlike Monahan's analysis, the courts have been willing to recognize that political realities can and should intrude on constitutional analysis. Ultimately, judges recognize that the law's legitimacy is fragile and can only be sustained through, and not in spite of, general approval and public support. Popular sovereignty is the source of the constitution's authority, not its result.

There is no predicting how the courts will respond to efforts by Quebec to go it alone. Political necessity is the mother of judicial invention. For example, there is no telling if the fact that Quebec was part of the 1982 constitutional compact—not only without its consent, but with its express dissent—will or will not loom large in any future judicial pronouncements.

Nevertheless, it is what Monahan leaves largely unsaid that is as significant as what he actually says. What hangs on these sweeping declarations about this or that manoeuvre's constitutionality? What follows from the pronouncement that something is unconstitutional? For Monahan, the answer is somehow important and decisive.

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However, if history is any guide, the more authentic answer is that absolutely nothing necessarily follows or happens. Political realities tend to obscure constitutional niceties. Whether it is about resource taxes, language laws, or inter-governmental delegation, "unconstitutionality" is simply one more card to be played in the larger game of political power. Ironically, one of the best studies of this is Monahan's earlier *Politics and the Constitution.*

But the rhetorical effect of "unconstitutionality" ought not to be underestimated. Although Monahan declares its eventuality to be "extremely unlikely," there seems to be the veiled threat that Quebec's resolve to act unconstitutionally (and without the support of international law) might force the federal government's hand and justify, at least, the threat of military intervention.

Indeed, Monahan seems to suggest that constitutional propriety might actually mandate such intervention in order to fulfill the existing constitutional responsibility to the First Nations. The reliance by the federal government on such a duty seems ironic, at best, and downright self-serving, at worst, in the light of its past attitude and actions toward Canada's aboriginal population.

Of course, Monahan is chillingly correct when he concludes that the costs and consequences of Quebec's separation are very high. But he seems to be impervious to the fact that it is commentators, like him, that insist on raising the stakes so high and making the consequences so drastic—strategic sensationalists passing themselves off as hard-headed realists.

The more commentators and experts persist in telling Quebec that it cannot do this or that, the more likely Quebec is to treat such opinion as a partisan challenge to its resolve than a constructive contribution to resolution. Monahan manages to make an olive branch look a lot like a billy club.

The better and more democratic tack is for commentators and experts to use their collective ingenuity and insight to suggest ways in which Quebec and the rest of Canada can separate with a minimum of political disruption and economic upheaval. In this way, Quebec might be more tempted to view such initiatives as a genuine act of good faith and reconsider its determination to secede. Carrots are always better than sticks.

In the contest between legality and democracy, the constitutionally empowered courts know where their allegiance must lie. In the light of a "Oui" vote in any future Quebec referendum, it would be a foolish court of judges that closed its legal ears to such a resounding democratic voice. And there is no historical evidence for that kind of judicial naiveté.

If *prevailing heads would cool*, cool heads might have a chance to prevail. And constitutional pundits might concede that, unlike their meteorological colleagues, their forecasts can and do have an effect (for bad as well as good) on the constitutional climate.

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The Unfinished Agenda of the Charlottetown Accord

by Harry Glasbeek

When the Charlottetown Accord was defeated by the people, the politicians who had hoisted their flags to the passage of the Accord did not seem to be eager to assume that it was their ineptness, their undemocratic arrogance, and their paternalism, which had led to the rejection of their proposals. Rather, they put it down to a sort of country-wide constitutional fatigue, to the fact that the people of Quebec, Canada, and of the First Nations were sick and tired of being presented with abstract concepts couched in hard-to-penetrate legal language. Therefore, said these unrepentant politicians, they would now bend their efforts toward addressing what the people really wanted to have their governments do—that is, deal with concrete economic problems. Under this rubric they set out to implement the unfinished economic agenda of the Charlottetown accord.

Capital already had made great gains at the expense of the state in recent years. From a constitutional perspective, the conclusion of the FTA and the NAFTA and the Uruguay-GATT round meant that the federal government (and through it, the provincial ones) had agreed to give up massive amounts of its right to manage trade and to use its power to create a universal social wage and social net although, in a narrow legalistic way, it remains constitutionally empowered to do so. Cor-