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Canada Watch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

SPECIAL DOUBLE ISSUE ON THE QUEBEC SECESSION REFERENCE

In search of plan A

BY DANIEL DRACHE AND PATRICK J. MONAHAN

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When the Supreme Court of Canada handed down its historic judgment in the *Secession Reference* this past August, the nine justices achieved the impossible. Both Ottawa and Quebec claimed to find in the unanimous ruling support for their own preferred positions. Does this mean that we have turned the corner on the never-ending national unity saga, with the court having created the legal and political conditions for a consensual resolution of Quebec's claims? Possibly, but not quite.

The re-election of the Bouchard government on November 30 adds a new urgency to this matter. Premier Bouchard has stated that he will hold a third sovereignty referendum only in the event of "winning conditions." Yet the continued disarray in federalist ranks over how and whether to reform the institutions of the federation suggest that Bouchard may well decide before too long that such winning conditions have emerged. And despite the much-repeated vow that Canada will be better prepared for the next referendum than it was during the near-debacle of the 1995 referendum campaign, the evidence of such preparation is far from apparent. Moreover, it recognized a duty to negotiate secession following a

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The duty to negotiate

BY PETER W. HOGG

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To understand the *Secession Reference* (Supreme Court of Canada, 1998) we must go back to the referendum that was held in Quebec on October 30, 1995. In that referendum, the voters were asked:

> Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Quebec and the agreement signed on June 12, 1995?

The referendum was defeated by the narrow margin of 50.6 percent to 49.4 percent. Had it been carried, "the bill respecting the future of Quebec" (which had been introduced into but not enacted by the National Assembly of Quebec) made clear that the National As-

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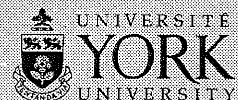

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clear and unambiguous "Yes" vote. Thus the Supreme Court has foreclosed a federalist strategy premised on the threat of a "black hole" on the day after the referendum, while simultaneously reassuring borderline Quebec voters that the potential risks in voting "Yes" may well be tolerable.

A MORE IN-DEPTH ANALYSIS

With so much at stake, the court's decision and its impact on both Ottawa and Quebec's constitutional strategy requires a more in-depth analysis. It also raises equally fundamental questions about aboriginal rights in any secession of Quebec from Canada and the prominent role of the court in redefining Canada's constitutional rules of the game. The political ground is shifting and the court is at the centre of it.

To explore what may turn out to be the most important judgment in the Supreme Court's history, this past November *Canada Watch* gathered together at York University's Glendon campus 50 leading scholars, government policy makers, lawyers, and commentators from both sovereigntist and federalist perspectives. 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. Our participants were particularly impressed by the fact that the court denied total victory to both sides while at the same time allowing each to avoid the humiliation of a total defeat.

If the Supreme Court, in Stephen Clarkson's words, "pulled off a coup . . . showing that the constitution is not a straitjacket," what is it about this judgment that has leading Quebec and English Canadian constitutionalists in broad agreement on the most disputatious of issues — namely, Canada's constitutional impasse?

AN UNFAMILIAR ROLE

The obvious answer is that the court provided leadership that had been wanting among Canada's political and intellectual elites. This is one of those rare occasions when the court did something few would have predicted. It recognized that Ottawa and Quebec have a constitutional duty to negotiate secession based on a clear majority "Yes" on a clear question. Osgoode Hall Law School Dean Peter Hogg describes this duty to negotiate as the "stunningly new element that the Supreme Court of Canada added to the constitutional law of Canada in its opinion." But, as a matter of strict law, as Hogg explains, it is not easy to see where the obligation comes from since, in Hogg's view, "the vague principles of democracy and federalism . . . hardly seem sufficient to require a federal government to negotiate the dismemberment of the country that it was elected to protect."

John Whyte, deputy attorney general of Saskatchewan and a participating counsel in the reference, echoes Dean Hogg's assessment in this regard, observing that "the court pulled the duty to negotiate out of rarefied air." Still, while raising doubts about the legal pedigree of the duty to negotiate, Hogg was favourable enough in his assessment of its implications to state firmly that

> Even without the court's ruling, the political reality is that the federal government would have to negotiate with Quebec after a majority of Quebec voters had clearly voted in favour of secession. It is safe to say that there would be little political support for a policy of attempted resistance to the wish of the Quebec voters. The court's decision simply converts political reality into a legal rule. Indeed, it is not entirely clear why it is a *legal* rule, since it appears to have no legal sanctions.

For Bloc québécois MP and law professor Daniel Turp, this duty to negotiate is a radical new development, for it "will allow sovereigntists to oppose any pre-emptive argument that the rest of Canada will not negotiate with Quebec following a 'Yes' vote in a Quebec referendum, such as those made during past

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CanadaWatch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

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A balanced judgment?

BY JACQUES-YVAN MORIN

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The gist of the court's answer appears to be the following: in theory, sovereignty is for Quebec a legitimate goal to pursue and the *right* to secede cannot democratically be denied; in practice, however, the federal power is entitled to raise obstacles and difficulties that are important and numerous enough so as to negate any attempt to achieve sovereignty and to throw off track any negotiation on the issue. How did the court arrive at this conclusion?

THEORETICAL CORRECTNESS: HALF THE STORY

If it is true that the principles underlying the Canadian constitution — democracy, federalism, the rule of law, and respect for minorities — make it imperative for the federal government and the English-speaking majority in Canada to recognize the legitimacy of a democratically supported movement in favour of the secession of Quebec, then certain federal politicians and self-appointed spokesmen will have to modify their behaviour.

Indeed, if the will to secede is a "right," provided it is pursued by democratic means, the appeal to the Canadian Air Forces by a McGill academic to bomb the Hydro-Quebec installations in case of secession appears to be somewhat exaggerated if not outright illegitimate. In fact, the court's reasoning undermines the federal "plan B" and it is not surprising that the Quebec government should have been pleased with this unexpected pat on the back.

Similarly, the "obligation" to negotiate when and if the people of Quebec choose sovereignty (or some other type of constitutional reform) is in stark contrast to the unilateral attitudes of the federal government in its dealings with Quebec since it decided to put an end to Privy Council appeals in 1949 and to Westminster's control over the constitution in 1981. As a matter of fact, these attitudes largely account for the progress — gradual but steady — of the idea of independence in Quebec. Has the Supreme Court become belatedly aware of this situation?

For their part, the Parti québécois leaders have always known and said that they would negotiate. Indeed, at every referendum they have put forward a number of elements of negotiation, including a common market, free circulation of persons, goods, and capital, and the protection of minority rights. It is only when confronted with a dogmatic affirmation by federal politicians that they would under no circumstances negotiate that Premier Parizeau evoked the possibility of a unilateral declaration at the expiry of a one-year delay.

The court went even further. It warned that, in the absence of negotiations, the possibility of a unilateral decision to secede *de facto* remained open. Such a move on the part of Quebec would be unconstitutional, but its success would depend on the recognition of the new sovereign state by the international community, which no doubt would take into account any refusal to negotiate. And the court went so far as to recognize that obstruction might create a "right" to secede, although it did not rule on whether such a norm is firmly established in international law.

So far, those who support Quebec's independence have every reason to be pleased with the court's answers. But the nine judges failed to carry their theoretical considerations through to their practical consequences and left enough questions open to allow Ottawa as much leeway as it needs to negate Quebec's right to self-determination.

DENYING QUEBEC'S CLAIM IN PRACTICE

The Supreme Court is wary lest it appear to usurp the role of politicians. Yet, it ventures deeply enough into the political arena to raise insoluble questions concerning the actual working of referendums.

Nobody will contest the idea that a referendum must allow the people to express their will without ambiguity. Unfortunately, the court, instead of pursuing its principles and political considerations to their logical conclusion, is content with the vague language of politicians. What indeed can be considered a "clear" question by a federal politician other than one that will ensure the failure of any attempt to obtain independence?

"Sovereignty" has a clear meaning in international law, but Mr. Chrétien insists on "separation" because of its negative connotation. Similarly, any mention in the referendum question of an economic association between Canada and Quebec or any arrangement of the common market type should be banished from Ottawa's viewpoint, as it might appear reasonable to Quebec voters.

The expression "clear majority" used by the court also opens the door to endless bickering. United Nations practice has always observed the norm of 50 percent of votes plus one in such matters, and indeed this has been considered reasonable in the Canadian context until it was very nearly attained in 1995. Now, thanks to the court's lack of "clearness," the only clear majority that will satisfy federal politicians is one that will be out of reach for Quebec.

This would mean minority rule and the court should have known that few situations are more likely to thwart the fine democratic principles on which it has based its decision. Indeed, the margin of interpretation left to the federal government is such as to undermine the whole democratic process in Canada.

SOME LOOSE ENDS

What will happen if, in spite of these obstacles, Quebec decides in favour of

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Globalizing sovereignty

BY DANIEL TURP

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In its advisory opinion dated August 20, 1998 on Quebec sovereignty, the Supreme Court of Canada expressed views on several aspects of the process of Quebec's accession to sovereignty. From a political standpoint, the key element of this advisory opinion is that the court affirms that "*a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognise*" (at paragraph 150). But, from a legal standpoint, such a duty to recognize entails a right to "seek to achieve sovereignty" and would place "an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations" (at paragraph 88).

A SURPRISING NEW DEVELOPMENT

This obligation to negotiate, to which the Supreme Court gives a constitutional value, now has a prominent role in the process of accession to sovereignty. The existence of such an obligation will allow sovereigntists to oppose any pre-emptive argument that the rest of Canada will not negotiate with Quebec following a "Yes" vote in a Quebec referendum, such as those made during past referendum campaigns by federalist leaders such as Pierre Elliott Trudeau or Mike Harris. Whereas the domestic use of the new legal argument provided to sovereigntists by the Supreme Court of Canada is obvious, its international use is also provided by the Supreme Court in the light of the linkages that the court itself makes between such an obligation and the international community. Hence, the court internationalizes the process of Quebec's accession to sovereignty in inviting other sovereign states to act not only as interested witnesses of the process of Quebec's accession to sovereignty, but also as involved parties in such a process.

The Supreme Court does not hesitate to link the obligation to negotiate to the international context when it affirms "that the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane" (at paragraph 103). In so doing, the court acknowledges that the consequence of a "Yes" vote, inasmuch as it stems from a clear question and a clear majority, internationalizes a matter that in the past was seen as exclusively domestic.

What is new is that the Supreme Court does not simply recognize that other states might show, as they always have, an interest in attitudes of both Canada and Quebec governments in these matters, but it also considers that they can play a role in relation to an obligation to negotiate, which is a domestic constitutional obligation. Hence, the court appears to grant such states standing, which is more political than legal, and confers on them a key role.

THE ROLE OF THE INTERNATIONAL COMMUNITY

Such an internationalization occurs first during negotiations themselves. It implies that foreign governments can evaluate, albeit indirectly, whether Quebec and the rest of Canada are in compliance with the obligation to negotiate. This conduct "would be governed by the same constitutional principles, which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities" (at paragraph 90). Thus, foreign governments are invited by the Supreme Court of Canada to evaluate the way in which these constitutional principles are taken into account during the negotiations and how the interests of the federal government, of Quebec and other provinces, of other participants, and of the rights of all Canadians inside and outside Quebec (at paragraph 92).

Those interests are also linked to the subjects of negotiation that the Supreme Court of Canada refers to in its opinion and that would "address a wide range of issues" (at paragraph 96). It seems, for the court, that among the issues to be discussed would be the "high level of integration in economic, political and social institutions across Canada," the "national economy and a national debt," "boundary issues," and "linguistic and cultural minorities, including aboriginal peoples" (ibid.). The Supreme Court thus implies that state members of the international community will indirectly evaluate all these aspects of the negotiation. But the court seems to confer an additional and even more critical role on the international community and its member states in suggesting that such states could become involved parties in the process of Quebec's accession to sovereignty.

NEGOTIATION AND RECOGNITION

If the Supreme Court of Canada does grant a role to other sovereign states in the phase of negotiations, it seems that they will also have a key role in the post-negotiation period. The court clearly links the violation of the obligation to negotiate with the issue of international recognition. In a statement of great significance, the court affirms (at paragraph 103):

> Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognised than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law,

and the perceived legitimacy of such action, would be important considerations in the recognition process.

The court's emphasis on recognition is further evidenced by statements that again link the conduct of parties to negotiations. The court asserts that "[t]he ultimate success of [the] secession would be dependent on effective control of a territory and recognition by the international community" (paragraph 106), and further adds (at paragraph 155):

> The ultimate success of [the] secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.

THE LEGAL FRAMEWORK AND PROCESS

The court thus shows a great deal of interest in the role of recognition and appears to suggest that the legal framework and process it has created to deal with Quebec's claim to sovereignty within the Canadian context will be highly relevant. From such a standpoint, the court states that "one of the legal norms which may be recognised by states in granting or withholding recognition of emergent states is the legitimacy of the process by which the *de facto* secession is, or was, being pursued" (at paragraph 144). It hastens to add that "the process of recognition, once considered to be an exercise of pure sovereign discretion, has come to be associated with legal norms" (ibid.) and quotes the *European Community Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union* to support such a position.

These statements of the Supreme Court of Canada clearly reveal that the court sees other state members as involved parties in the process of Quebec's accession to sovereignty. The involvement of third parties is obviously not seen as a violation of Canada's independence and the court does not condemn in advance any recognition of Quebec sovereignty as "premature." Quite on the contrary, it appears to accept the idea that foreign governments could recognize Quebec if Canada did show intransigence during the negotiations and did not abide by its obligation to negotiate in good faith with Quebec.

On August 21, the importance of these views expressed by the Supreme Court of Canada was noted by the premier of Quebec, Mr. Lucien Bouchard, who stated that the court was "sending a clear signal to the international community by saying that, after a 'Yes' vote, if Canada and the other provinces were intransigent towards Quebec in the process of negotiations, Quebec's recognition would be easier to obtain." He also added, using language reminiscent of the electoral campaign, that court was giving Quebec "one of the additional conditions to successful negotiations."

In the light of the numerous statements of the court with regard to the key role that states could play in the process of Quebec's accession to sovereignty, the sovereigntists have reiterated that they are committed to fulfill their obligation to negotiate with the rest of Canada. They intend to negotiate in good faith all matters related to Quebec's accession to sovereignty and, furthermore, to conclude a treaty of partnership in order to maintain the existing economic and monetary union. This commitment is made principally to Canada, but is also addressed to all those states that are considered by the Supreme Court of Canada as interested witnesses and, possibly, involved parties in Quebec's process to become a sovereign country.

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one form or another of sovereignty and, so to speak, wins the steeple-chase? Here again, the court's answers are not "clear" and it was at the very request of the federal government that it did not indicate which one of the constitutional amending procedures should be applied to the secession of a province. This is essentially a "legal" question but was left open for what appear to be purely political reasons. Few points in its reasoning suggest as clearly that the court is still dependent on the federal government — indeed, on the prime minister himself — for its appointments.

In accordance with its own precedents, the court could have abstained from answering questions of a political nature. Instead, the judges have ventured on this perilous ground enough to embroil matters but not sufficiently to provide clear direction for the two majorities that will have to adjust their relations under difficult circumstances.

What indeed can be considered a "clear" question by a federal politician other than one that will ensure the failure of any attempt to obtain independence?

The Supreme Court, with an eye on international law and opinion, has legitimized the *objectives* pursued by a substantial part of the Quebec people, but has failed to set out the *means* by which the principles upon which it has based its arguments can be carried out peaceably and with the greatest chances of mutual success.

Can one speak of a "balanced" judgment? For Quebec, there is the satisfaction of being right in the field of principles; for Ottawa, a victory in the decisive elements that are the instruments of *realpolitik*.

Quebec's sovereignty project and aboriginal rights

BY PAUL JOFFE

Paul Joffe is an attorney who practises law in Quebec. He specializes in aboriginal matters.

The interpretations and rulings of the Supreme Court of Canada in the *Quebec Secession Reference* should prove to be of far-reaching significance for aboriginal peoples. In particular, the aboriginal dimensions have extensive implications for Quebec's sovereignty project.

Although the judgment includes a few key pronouncements specifically relating to aboriginal peoples, the court indicated that it was not necessary to explore further in this reference their rights and concerns. The court took this position only because it had concluded that there is no right to unilateral secession by Quebec authorities under Canadian or international law (*Secession Reference*, paragraph 139). Since the judgment expressly highlights the importance of aboriginal peoples' rights and concerns, it would be erroneous to presume that the judgment can be properly analyzed solely in federal-provincial or non-aboriginal terms.

Before examining the aboriginal aspects of the reference, it is important to raise a preliminary, overarching concern. On the day after the Supreme Court rendered this historic judgment, Premier Lucien Bouchard emphasized in televised interviews that the rest of Canada would be constitutionally bound to negotiate with Quebec following a successful referendum. At the same time, he declared that the Quebec government would not be bound by the court's judgment. Such a view creates an unworkable double standard. A future Quebec referendum on secession could only acquire legitimacy, as set out in the judgment, if the Quebec government first accepts that it is bound, like all other political actors in Canada, by all aspects of the judgment. Otherwise, from the outset, there would be no common legal and constitutional framework for any secessionist project.

SOME MAJOR NEW DEVELOPMENTS

With regard to Quebec's sovereignty project, I would like to list a number of points in the court's judgment that appear vital for aboriginal peoples. These points serve to balance legality and legitimacy. They also give rise to principles and norms that reflect the importance of dignity, equality, and mutual respect for all peoples in Canada. Many of the points summarized below go well beyond aboriginal peoples in their scope and significance, both for the present and the future.

1. **Unilateral secession.** As a result of the Supreme Court judgment, the threat of unilateral secession by Quebec is not totally eliminated. *De facto* secession (paragraphs 142 and 155) could still be attempted by Quebec in the future. However, the likelihood of unilateral action in the next few years has been considerably diminished in favour of aboriginal peoples, among others, in Canada.
2. **Increased importance of clarity.** In terms of clarifying the rules for any secession project, the court's judgment goes beyond requiring in the future a clear referendum question on secession and a clear majority vote. Unlike the situation that prevailed during the 1995 referendum on Quebec secession, there are now a number of judicial interpretations, criteria, and rules arising from the court's decision to use to measure the alleged validity or legitimacy of any party's position. Increased clarity and transparency should be the result.
3. **Legitimacies are all relative.** The court's judgment makes clear that legitimacy is a relative concept (paragraph 66). Following any successful referendum in the future, the legitimacy claims of Quebeckers must still be balanced by the legitimacies, rights, and interests validly asserted by others. Therefore, should the Quebec government seek to deny the legitimacy and rights of aboriginal peoples to determine their own future, then any claim of legitimacy by the Quebec government would itself be severely undermined.
4. **Principle of democracy applicable to all.** The democratic principle is not limited to Quebeckers clearly expressing their collective will through a referendum. The court's judgment stipulates that the rights, obligations, and legitimate aspirations of everyone in Canada must be reconciled (paragraph 104). Therefore, in the Quebec secession context, should aboriginal peoples express their own collective will through their own referendums or other democratic means, these legitimate and democratic voices must be accorded equal recognition, consideration, and respect without discrimination or other double standard.

ABORIGINAL RIGHTS STRENGTHENED

Neither Canadian nor international law recognizes any doctrine of superiority of one people over another. As the preamble of the *International Convention on the Elimination of All Forms of Racial Discrimination* provides: "any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous."

5. **Aboriginal peoples not simply minorities.** The judgment generally includes aboriginal peoples under the constitutional principle of "protection

of minorities" (paragraph 82). This does not mean that the court intended to imply that aboriginal peoples are simply "minorities." In the 1996 case of *R. v. Van der Peet*, Chief Justice Lamer, on behalf of the majority, emphasized the original occupation of North America by aboriginal peoples and then stated: "It is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status."

6. **Participants in future secession negotiations.** In terms of who has a role in the political aspects of any future secession process, the court refers generally to "political actors" (paragraphs 98, 100, 101, 110, and 153). In some instances, federal and provincial governments are mentioned (paragraph 86), but it cannot be concluded that they are the only "political actors" involved. "Participants," other than federal and provincial governments, are expressly contemplated by the court for any future secession negotiations (paragraph 92).

It is clear that, for secession and other constitutional purposes, aboriginal peoples are distinct "political actors" in Canada. Section 35.1 of the *Constitution Act, 1982* expressly provides for the direct involvement of representatives of aboriginal peoples in first ministers conferences, whenever amendments are contemplated to s. 35 and other constitutional provisions pertaining to them. Also, the established practice in Canada is to include the representatives of aboriginal peoples in constitutional negotiations as distinct "political actors."

7. **Number of "peoples" in Quebec.** The court chose not to answer the question of who constitutes "peoples" in Quebec for purposes of self-determination under international law. However, it indicated that the characteristics of a "people" include a common language and culture (paragraph 125). These criteria suggest that the court is not heading toward any definition of a single "people" in Quebec, based simply on provincial territorial considerations.

Should the Quebec government seek to deny the legitimacy and rights of aboriginal peoples to determine their own future, any claim of legitimacy by the Quebec government would itself be severely undermined.

With regard to aboriginal peoples in Quebec, their cultures and spirituality are not those of Quebeckers. Aboriginal peoples each have their own way of life. They each clearly choose to identify themselves as a distinct people. While French Canadians in Quebec are likely to constitute "a people" for purposes of self-determination, there is no Canadian or international law principle that would compel aboriginal peoples against their will to identify as one people with Quebeckers.

8. **Right to self-determination part of Canadian law.** The judgment states that "the existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond 'convention' and is considered a general principle of international law" (paragraph 114).

INTERNATIONAL LAW AND SELF-DETERMINATION

The term "general principle of international law" is highly significant. According to international jurists, this term refers at least to rules of customary international law. The term may also overlap with other principles. However, the sentence and overall context in which the Supreme Court used the term, as well as the references cited on this point in the judgment, lead to the conclusion that the court was describing the right to self-determination as nothing less than customary international law.

Canadian case law suggests that norms of customary international law are "adopted" directly into Canadian domestic law, without any need for the incorporation of these standards by statute. This is true, as long as there is no conflict with statutory law or well-established rules of the common law. In this way, the right to self-determination can be said to be a part of the internal law of Canada. This has far-reaching positive implications, which go beyond the Quebec secession context, for any aboriginal peoples who demonstrate they are "a people" under international law.

9. **Boundary issues must be addressed in negotiations.** The issue of Quebec's boundaries is not only underlined by the court in terms of Canada's "national existence" (paragraph 96), but also with regard to aboriginal peoples — especially their "northern lands" (paragraph 139). In conformance with the judgment, boundary issues must be addressed in any negotiations on Quebec secession.

Moreover, the court adds that "none of the rights or principles under discussion is absolute to the exclusion of others" (paragraph 93). Therefore, the Quebec government could not rely on constitutional guarantees for its present provincial boundaries to prevent division of the province in the event of secession. Since Canada and Quebec would both be divisible in secession negotiations, the Quebec government could not insist that the international law principle of *uti possidetis juris* must prevail to preserve the province's current boundaries.

10. **Constitutional amendment procedures not absolute.** The court states that underlying constitutional principles, such as democracy and

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The next steps for Canadian federalists: Strategy and process

BY STANLEY H. HARTT

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The Supreme Court of Canada's recent judgment on the reference concerning the secession of Quebec from Canada makes a fundamental argument against unilateral secession by invoking the deep, extensive, and complex ties established since Confederation among Quebec and its partner provinces. At paragraph 42, the court refers to the attempt by Nova Scotia's Premier Joseph Howe in 1868 to persuade the Imperial Parliament to undo the new constitutional arrangements. The colonial secretary, citing "vast obligations, political and commercial . . . already . . . contracted on the faith of a measure . . . so solemnly adopted . . . [and] so many extensive consequences already in operation," refused to endorse this early secession.

HISTORY MATTERS

The same reasoning is applied, *a fortiori*, to the current constitutional dilemma. The court, at paragraph 92, spells out the requirement that Quebec respect the rights of others. They point out that there exists "[after] 131 years of Confederation . . . a high level of integration in economic, political and social institutions across Canada" (paragraph 96).

This presumed institutional reliance by Canadians living outside Quebec who are not voters in the referendum on Quebec's sovereignty project emphasizes the view that Confederation was a contract, not an imperialist form of government imposed on the conquered Quebecois minority as often presented in sovereigntist mythology.

The degree of legal and economic integration among Quebec and its partners increases the difficulty of dismembering these profound links while attempting to avoid chaotic outcomes.

The integration of Canada's economy is not merely the result of s. 121 of the *Constitution Act, 1867*, mandating tariff-free trade in manufactured goods originating in the various provinces, but is also the product of the division of legislative responsibility under ss. 91 and 92, with the result that many of the most fundamental economic matters fall under the control of the central government: interprovincial and international trade and commerce, the monetary and banking systems, bankruptcy and insolvency, interprovincial transportation (rail and air including, by extension, broadcasting and telecommunications), shipping and navigation, works for the general advantage of Canada (grain elevators), and matters determined to have been conferred on the federal government (for example, atomic energy and national energy policy).

CANADA'S REGULATORY STRUCTURE

This division of responsibilities, giving such important subject matters to the federal level, creates a national regulatory structure for these matters and, thus, markets operating on a national scale, all of which would need to be reconstituted by new institutional arrangements after secession. Doing so on a basis that would ensure a smooth transition has never been adequately addressed by sovereigntist theory, other than to say that it would be in Canada's best interest to do whatever is necessary to avoid institutional chaos.

Also ignored are the unheralded links between us as partners represented by the multiplicity of interprovincial legal arrangements as well as reciprocal legislation that ensures standing before the courts for the collection of trade receivables, measures for the taking of security, and procedures for compelling the attendance of witnesses and for the enforcement of judgments between provinces. For the wheels of commerce to continue to turn, the basic assumptions of business people — order, the rule of law, predictable institutional arrangements — must continue in force. The complexity that this adds to the deconstruction of existing laws and regulations, and their replacement by newly negotiated structures, has always been ignored or underestimated by sovereigntists who claim that everything that binds us together now could be replaced in relatively short order by equivalent, negotiated partnership arrangements.

A deadline of one year for negotiations has been included in previous Quebec legislation regarding the accession to sovereignty, with unilateral secession held out as an option in the event of failure of negotiations. One consequence of the Supreme Court decision is that one-sided time limits, outrageously inadequate in the face of the complexity of the issues to be resolved, will not be seen as legitimate.

The contribution of the Supreme Court has been to stress that, although Quebeckers alone will be asked to vote in the referendum that may ultimately decide to sever these economic and institutional arrangements, it does not follow that self-determination means that Quebec voters are the only ones with something to say about how institutions are dismantled and wealth destroyed.

FUTURE OF CANADA

If the rest of us will have our say on the future of our country, not in voting on Quebec's proposal for secession, but in the disposition of its request for a constitutional amendment, the Supreme Court has also sounded a significant warning: it will not be sufficient for Canada to respond to Quebec with an

"over my dead body" attitude. The duty of Canada will be to negotiate in good faith the constitutional amendment proposed by Quebec (paragraph 69).

At paragraph 97, the justices state that "it is foreseeable that . . . negotiations . . . could reach an impasse." In the face of failed negotiations, Quebec could appeal to the international community for recognition (paragraph 103).

This raises the futility of continuing to rely on the tough love of "plan B" to deter the sovereigntist project. Merely increasing the complexity and difficulty of achieving a negotiated settlement does not obviate the chaotic consequences of failure; indeed, it may well increase them, because in the event that negotiations fail amidst charges of bad faith on both sides, a unilateral declaration of independence will have contested legitimacy, which maximizes the chances of a chaotic outcome. The only thing that could avert the penalty that all Canadians would pay for uncertainty and unpredictability is constitutional reconciliation in order to avoid an exercise in secession.

[A]lthough Quebeckers alone will . . . vote in the referendum that may . . . sever these economic and institutional arrangements, it does not follow that self-determination means that Quebec voters are the only ones with something to say about how institutions are dismantled and wealth destroyed.

THE DANGER OF CHAOS

In 1995, the C.D. Howe Institute published a series of papers on likely outcomes of a post-"Yes" negotiation on secession (the referendum papers). On all fronts — the economic cost of unilateralism, the unavailability of the Canadian currency to Quebec's new government, stunted trade relations, lost citizenship, and the burden of a full share of the public debt — the outlook for Quebec was bleak indeed. It is noteworthy that this series was premised not on seeking terms for secession that would punish Quebec for daring to divide our country, but on Canada's likely negotiating position based solely on its self-interest.

Robert Young's work, *The Secession of Quebec and the Future of Canada*, argued that, in a negotiation designed to quickly end uncertainty and minimize economic damage, an agreement would be rapidly arrived at because rational motivation would lead to this result. I fundamentally disagree and see the negotiations as acrimonious, slow, and unable to settle the intractable issues of borders, First Nation rights, minority protection, asset division, currency, debt, citizenship, and trade relations before the damage inflicted by uncertainty has actually occurred.

Perhaps more important, while there is broad agreement on the list of the large, divisive issues that would need to be negotiated, there does not exist as yet any comprehensive academic study of the components of the economic union that would need to be laboriously stitched back together by constructive cooperation between two sovereign states. Issues such as the credit allocation system (replacing the *Bankruptcy Act*); treaties for the avoidance of double taxation; full faith and credit for the enforcement of judgments emanating from Quebec or a province of Canada; free movement of capital, goods, services, and labour within the former Canadian economic space; mobility rights and immigration; portability of social benefits; and other matters would all take time to replace.

Although the model of Europe (which took 50-plus years to evolve a common external tariff, an internal common market, common agricultural, labour, and social policies, collective external policies on fisheries and other matters, and a common currency) is certainly not applicable, what can be concluded from the European experience is that cooperative efforts at building common or shared institutions work best when they are evolved from mutual interest and not imposed by artificial time limits. Five to ten years seems to be a reasonable time-frame to restructure the severed economic union.

THE NEED FOR DIALOGUE AND PLAN A

Like it or not, the sovereigntist project necessarily involves massive institutional discontinuity and no one has produced a study that would establish an inventory of the laws and regulations which would need re-enactment (or replacement by treaty) in order to rebuild the former, discarded system. Before we leap to the conclusion that, with goodwill, Canada could be reshaped in a time-frame consistent with political expectations, we should know more about this.

The point is that by far the most useful response to the Supreme Court's determination that a sovereigntist request for a constitutional amendment contemplating secession (based on a clear mandate obtained by asking a clear question) would be legitimate, and that Canada's obligation would then be to consider this demand and respond to it along constitutional principles, is to develop satisfactory plan A solutions that avoid this extremely risky exercise. Quebec's aspirations for recognition of its specificity and for institutional (including constitutional) support for this are understandable and justified. The problem will be for Canada to have a dialogue on what form a plan A solution should take in or-

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The Judiciary Committee of the Privy Council

BY GUY LAFOREST

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SOME HISTORY TO RECALL

We should remember that the prime minister of Canada comes from Quebec. The minister of finance, the presidents of the Treasury Board and of the Privy Council of the Queen for Canada, come from Quebec. The top advisers of the prime minister, as well as the clerk of the Privy Council, come from his own province.

The chief justice of the Supreme Court (and two other judges), the commander-in-chief of the Armed Forces, and the Canadian ambassador to the United States come from Quebec. Since the Quiet Revolution, Quebec has been remarkably well represented in Ottawa. What are Quebeckers complaining about?

Interestingly, a similar approach can be found in the judgment rendered by the Supreme Court of Canada in August 1998, in the *Reference* case concerning the secession of Quebec. In its reply to the second question asked by the federal government, the court had to ascertain whether international law, and particularly the various documents giving life to the right of peoples to self-determination, could be interpreted as paving the way to a unilateral declaration of independence (UDI) by Quebec. In its judgment, the court argues that Quebec does not fall into the category of peoples that are colonized, subjugated, or manifestly dominated by an imperial power. In paragraph 132, the court concludes that the right of colonized peoples to detach themselves from an imperial power is thus not relevant in the present case. But in paragraph 135, the court moves on to discuss a trickier issue. What happens, beyond classical colonial subjugation, when the faculty of a people to exercise an internal right of self-determination within a political system is "totally thwarted" ("totalement contrecarrée" in French)?

THE RIGHT OF SELF-DETERMINATION?

The court notes both that international law is not clear on the issue, and that it is pointless to find an appropriate answer in the case at hand. The court expedites the question by stating tersely that the Quebec situation is not close to such total thwarting. Why? The arguments provided in paragraphs 135 and 136 look like my favourite "ouverture" for an international audience on the Canada-Quebec question. It would be unreasonable to pretend that the people of Quebec do not have access to government. Quebeckers occupy very important positions in the government of Canada (paragraph 136). The court claims to be on solid ground on the issue because its opinion is shared by the *amicus curiae*. This is, if I am not mistaken, the only time in the judgment that the brief of the *amicus curiae* is quoted at length. Moreover, the *amicus curiae* is the only reference provided by the Supreme Court to support its position. The court appears to find of the utmost importance the recognition by the *amicus curiae* that Quebec is not an oppressed people.

To make such an important point, the court would have been wise to use additional sources. It should be remembered that the *amicus curiae* was selected by the Supreme Court itself, in the absence of any official participation by the government of Quebec in the *Reference* case. Moreover, the argument in these paragraphs, supporting the thesis that Quebec's international right to self-determination is not totally thwarted, is not made by a neutral and international tribunal of arbitration. It is made by a Canadian national tribunal, as the Supreme Court calls itself in the *Reference* case, whose members are all unilaterally appointed by the prime minister of Canada.

THE INSTITUTIONAL CONTEXT OF THE DECISION

One cannot understand the nature of an institution such as the Supreme Court without taking into consideration the imperial context that led to the birth of the Canadian federation in 1867. Our judicial system had a three-tiered hierarchy, with the Judiciary Committee of the Privy Council in London at the apex. The Judiciary Committee, as a court of last instance, disappeared for Canada in 1949. But the principle of an imperial hierarchy has been preserved. Any significant comparison with the constitutional tribunal of a modern federation (such as the German court in Karlsruhe) will reveal the fragile legitimacy of the Supreme Court as an impartial arbitrator of the conflicts between the central government and federated entities. I consider this weakness to be heightened when it comes to evaluating the extent of Quebec's internal right of self-determination. Responding to questions formulated by the federal government, the court examined in these paragraphs whether or not it would be appropriate to resort to a UDI as a consequence of the *total thwarting* of a people's internal right to self-determination. In *R. v. Oakes*, [1986] 1 SCR 103, the Supreme Court of Canada has judged that the notion of proportionality is essential when evaluating whether or not governmental actions are reasonable limits to rights in a free and democratic society. The implicit idea here, it seems to me, is that in some circumstances a UDI would be in an appropriate relationship of proportionality with the total quashing of one's internal right to self-determination.

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In the best Canadian tradition

BY KENNETH McROBERTS

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On the face of it, the federal government's reference had to do with clarifying the law. Within its own terms, the reference sought to determine the status of a Quebec UDI (unilateral declaration of independence) under Canadian and international law.

A POLITICAL PHENOMENON ABOVE ALL

Nonetheless, over the months leading up to the Supreme Court's hearing on the reference, it became evident that much more was at stake than the specifics of the law. The reference had become a profoundly political phenomenon. It had become the central element in a public debate over the future of Canada — indeed whether Canada was to have a future.

When the reference was put forward, Canada had not yet recovered from the shock of the 1995 referendum result. In fact, it was because of that referendum that Ottawa felt the need to make the reference. For the very first time in Canadian history, the victory of sovereigntists in a Quebec referendum stood as a real possibility.

Outside Quebec, public debate had become consumed with how Canadians should respond to such a referendum result. For over three decades, most Canadian political and intellectual leaders had maintained that a democratically expressed desire of Quebeckers to secede should be recognized and good faith negotiations should be undertaken to produce an agreement over the terms of Quebec's departure. But this understanding had not been very well articulated or theorized. Typically, it was presented in purely pragmatic terms, as with L$3ter Pearson's statement: "If it comes to secession, and the decision is democratically taken, do we accept it or fight?" In any event, it was geared to an eventuality that was generally seen as highly hypothetical.

That all changed on October 30, 1995. In the deep shock and anger produced by the referendum result, the weakly articulated understandings of the past seemed to fade to the sidelines. It was as if Canadians were debating the question of Quebec secession for the first time. Indeed, many of them were.

The genius of the court's decision is to transcend the impasse of the post-referendum debate by showing that no one principle can prevail, whether it be "the rule of law" or the "democracy" of a referendum.

THE RULE OF LAW AND A "YES" VOTE

Clearly, some English-speaking Canadians saw the Supreme Court reference as a way of eliminating outright this suddenly real possibility of Quebec secession. By asserting "the rule of law" the court would show that Quebec could not leave, period. The question would be settled once and for all. In the face of such a court judgment, few Quebeckers would be ready to vote "Yes" in any future referendum. But if a majority of them did, the Canadian government would have the right to use whatever means were needed to preclude Quebec's departure. The surge of interest in analogies with the US civil war may have reflected a new bellicosity in the Canadian public.

Evidently, the majority of Canadians outside Quebec, both in the general public and in more specialized publics, continued to subscribe to the past undertaking to recognize a democratic vote for sovereignty and to enter into good faith negotiations. But this view seemed to have lost its pertinence. Federal leaders did reiterate it from time to time, but this never made the headlines.

By addressing UDI, and UDI alone, the reference served to focus public attention on the worst of scenarios and to deflect attention from the prospect of negotiating an agreement to Quebec's departure. For that matter, the federal government provided no coherent leadership at all on the question of negotiations. Moreover, some academic analyses insisted that negotiations were not really a viable option anyway. They were almost bound to fail given both the emotional climate in which they would be conducted and their own procedural and substantive complexities.

In short, within public debate Quebec sovereignty increasingly was reduced to a matter of the rule of law. For most English Canadians, there could be no question about that.

Among Quebec francophones, the newly real possibility of a future vote for sovereignty also had its impact. The stakes had become higher for them too. Out of this emerged a heightened sense that Quebeckers should be able to determine their futures. A positive vote should itself be sufficient for Quebec to become sovereign.

THE DEMOCRATIC LEGITIMACY OF A REFERENDUM

The Supreme Court reference seemed to fly in the face of this. By addressing the issue of law, and only the issue of law, the reference seemed to be deny-

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ing the democratic legitimacy of a referendum. The rule of law would negate the will of the Quebec people.

Thus, Quebec federalist leaders denounced the reference. Even the archbishop of Montreal was moved to proclaim that the people of Quebec have the right to decide their future, and the court has no business in the matter. By the same token, surveys showed that most francophones disapproved of Ottawa's initiation of the reference. Indeed, support for a "Yes" vote increased with the court's hearing of the reference. To the extent that the reference was motivated by a "plan B" desire to dampen support for sovereignty, as was undeniably the case, it apparently did not achieve its objective.

As long as the public debate over Quebec sovereignty was framed in terms of two mutually exclusive principles, the rule of law and the democratic legitimacy of a Quebec referendum, it could only result in an impasse, and an increasingly bitter one.

For whatever reason, the court seems to have recognized that the issues confronting it greatly exceeded the specific points of law raised in the reference. It saw that it had a constitutional responsibility in the fullest sense of the term and it acted accordingly. In the process, the court went far beyond providing the predictably negative answers to the specific questions contained in the reference.

AN EYE ON PUBLIC OPINION

In a decision that was clearly written with an eye to making it accessible to the general public, the court traced the historical development of fundamental principles of Canada's constitutional tradition and showed how they can, indeed must, be applied to the Quebec sovereignty question. In the process, it gave eloquent form to the weakly articulated notions that Canada's political elites had voiced in the past, and which had largely faded from sight in the trauma of post-referendum Canada.

Through the carefully constructed and balanced positions it did take, the court has transformed the terms of public debate over Quebec sovereignty, cutting through the posturing and pretence and focusing all sides on the central questions at hand.

The genius of the court's decision is to transcend the impasse of the post-referendum debate by showing that no one principle can prevail, whether it be "the rule of law" or the "democracy" of a referendum. In fact, these two principles are joined by two others, federalism (which is given pride of place) and respect for minorities, to form a fourfold structure of principles that must be brought into balance. And "rule of law" shares title with its most important manifestation: constitutionalism.

Thus, through the application of this framework of principles, Quebec cannot declare sovereignty unilaterally but neither can the rest of Canada ignore the democratic legitimacy of a "Yes" vote. Both sides are constitutionally obligated to enter into good faith negotiations. Moreover, an illegal UDI by Quebec is still possible, and might well succeed, should the rest of Canada fail its constitutional obligation to negotiate.

As such, the decision has had a profoundly salutary effect on Canada's political and intellectual climate. As to be expected, both federalists and sovereigntists claimed vindication in the decision. Typically, these involved partial and selected readings of the decision. Yet, the fact remained that all Canadians, federalist and sovereigntist, were now debating within a common framework, and one that was rooted in Canada's constitutional tradition. Indeed, by giving such a central status to the principle of federalism, the court seemed to be distancing itself from the reasoning that it had followed in its two decisions about the 1982 patriation — a process which served, in a variety of ways, to produce the very crisis that had generated the UDI reference.

EVERYONE A WINNER?

Arguably, the court did not fully complete the task it had assumed for itself. For instance, it did not take a clear position on the procedures through which, upon an agreement, Quebec would be removed from the constitution. Here, there has been a real debate among legal scholars as to which amendment formula should apply. And what should happen if the amendment should fail? Could one or two provincial legislatures block implementation of an agreement over Quebec sovereignty? The very possibility of an orderly transition to Quebec sovereignty could hang on this point of law. The court's claim that it lacked "sufficiently clear facts" to make a ruling on this matter is not compelling. Perhaps the court simply wanted to avoid having to assert the need for provincial unanimity, given the dangers that would pose for any negotiated transition to sovereignty.

Similarly, the court's formulation of "a clear majority in response to a clear question" leaves much unanswered. If the court could not have been expected to spell out the terms of a question, it could at least have pronounced unambiguously on the 50 percent-plus-one is-

sue. The court's characterization of a "clear majority" as "a qualitative evaluation" is not very helpful.

By the same token, despite the claims of some, the court's allusions to a Canadian tradition of "enhanced majorities" (paragraph 77) do not bear on the question of a referendum on Quebec sovereignty. The notion of "enhanced majorities" is presented as part of the Canadian understanding of democracy, but the evidence that is offered deals not with the procedures in vote-taking among citizens or the members of a legislature, but the number of provincial legislatures needed to ratify a constitutional amendment. In other words, it bears upon the principle of federalism rather than democracy. The fact remains that within any given jurisdiction simple majority always has been the main operative principle of democracy in Canada. It might be argued that a provincial referendum on secession is so consequential and unprecedented as to require a higher threshold than 50 percent plus one. Yet it is difficult to make this argument in terms of past Canadian practice. In short, it would require a different methodology than the court's.

Still, through the carefully constructed and balanced positions it did take, the court has transformed the terms of public debate over Quebec sovereignty, cutting through the posturing and pretence and focusing all sides on the central questions at hand. By restoring to its proper place the best of Canada's political tradition, the court provided a leadership that had been wanting among political and intellectual elites alike.

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protection of minorities, apply to more than secession negotiations (paragraphs 93-95). These principles "animate the whole of our Constitution" (paragraphs 148 and 32), including the "amendment process" (paragraph 92). This suggests that the express provisions to amend the constitution of Canada are qualified by unwritten principles and are not absolute.

The Quebec government could not rely on constitutional guarantees for its present provincial boundaries to prevent division of the province in the event of secession.

In an extreme situation such as secession, underlying constitutional principles could serve to limit the powers of federal and provincial legislatures. Should legislatures violate the principle of democracy in relation to aboriginal peoples, the courts could rule that the amendment procedures used to allow Quebec secession were "not in accordance with the authority contained in the Constitution of Canada" (*Constitution Act, 1982*, s. 52(3)).

As the above 10 points illustrate, the question of legitimacy of Quebec secession is inextricably tied to the respect accorded to the rights, legitimacies, and aspirations of aboriginal peoples, among others. Non-aboriginal governments and legislatures in Canada do not have the discretion to determine the future of aboriginal peoples. This is fortified by the fact that the Canadian system of government has been "transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy" (paragraph 72).

NEW RULES OF THE GAME

The status and rights of aboriginal peoples are fundamental elements in Canada's constitution. Protection of these rights "reflects an important underlying constitutional value" (paragraph 82). Should a successful referendum in Quebec lead to secession negotiations in the future, the court's judgment has strengthened the position of aboriginal peoples in Quebec to make their own collective choices, participate directly in negotiations, and assert their basic rights. As the court stipulates in the *Secession Reference*, any future negotiations on Quebec secession must be "principled" (paragraphs 104, 106, and 149).

In particular, the right of aboriginal peoples to self-determination militates against their forcible inclusion in any future seceding Quebec. With regard to the James Bay and Northern Quebec Agreement, the right to self-determination of the Cree and Inuit reinforces the fact that any alteration of their constitutionally protected treaty rights requires their free and informed consent.

While clearly there are no guarantees, the Quebec government may ultimately be able to negotiate an independent Quebec state. However, consistent with principles of fairness, democracy, and respect for human rights, this would not necessarily include the vast northern and other traditional aboriginal territories currently in Quebec.

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der to make it attractive to all parts of the country, including Quebec.

Working on plan A is invariably going to be easier and more rewarding than facing the (likely) consequences of a failed secession negotiation, bogged down in its own complexity in the face of unrealistic expectations that it could be settled quickly.

The double and inextricable role of the Supreme Court of Canada

BY ANDRÉE LAJOIE

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The *Reference* decision has been unanimously well-received by all constitutional parties in Canada, where the national norm has been to disagree about everything. Three possibilities surrounding the decision and its reception come to mind. First, one group's interpretation could eventually be shown to be wrong because the court's opinion cannot be favourable to both federalists and sovereigntists. Second, people could be responding favourably because the court has shown more competence than expected. But most important is the third possibility: the court seems to have done me a personal favour in explicitly confirming my theory about its own behaviour. My theory holds that, like all judicial bodies, the court does not merely apply rules to facts, but constructs both as it gives meaning to law while supporting the state of which it is a part. This explains the choices it made in the *Reference re: Quebec Secession*.

What the court actually did was give each side a half victory. On the one hand, it granted Ottawa the two "nos" that it required to its questions, plus some vague requirements about a clear question and a clear majority. On the other hand, it awarded Quebec the legitimacy of the referendum process and an international recourse in case of obstruction by Canadian authorities.

> **The court divided the pie in two, as it did in the *Patriation Reference*, awarding legality to Ottawa and legitimacy to Quebec, but with such obvious pitfalls that its concessions to the minority would not endanger seriously the vital interests of the majority.**

PRODUCING MEANING

As interpreter of the constitution, the court gives meaning not only to its open-ended language, but to its silences. Vague terms are not lacking in constitutional documents: "free and democratic society" or "aboriginal rights" are but two examples of terms that beg further definition.

What the court does is produce meaning and, just as any other interpreter of a text, this production is not entirely discretionary. It is bound first by the text itself. The legitimacy of any interpretation is also linked to fulfilling the expectations of both the legal community, who require legal coherence, and more generally the public, who seek equity in the case at hand. Unfortunately for the court, society is rarely unanimous, and judges must often choose between deciding in favour of the values of the majority and the values of one or more minorities.

This task is rendered even more complex by the second role of the court in constitutional matters: to maintain state support, as a central institution of the Canadian state. The court cannot survive outside this context. Bluntly put, the court is fond of applying the "living tree" metaphor to the constitution, but it cannot saw off the branch on which it is sitting! Its choices are limited not only by the anticipated effect of its decisions on the expectations of its "maîtres" but by the need of the state to preserve itself. Moreover, these conditions are more coercive than is usually acknowledged because both these roles of the court are linked. Indeed, unlike elected politicians who can use extra-judiciary discourse and direct political action, judges have no means other than their judgments to support the state. As such, the requirements of that support cannot but be reflected in their interpretations and orientation.

THE CONTEXT

This, then, is the context in which the *Reference* must be read. No one expected the court to decide in favour of Quebec, least of all the Quebec government, which refused to intervene. And rightly so. Yet the judges could not have given Quebec more this time even if they had wanted to. However, courts rarely succeed in opposing the will of the legislature as shown by the Weimar Republic in the '20s, the New Deal in the United States in the '30s, and, more recently, the constitutional crisis in India. Yet, if my analysis is right, the court could not decide entirely in favour of Ottawa either, unless it was ready to provoke Quebeckers into outright secession. It has consequently chosen "negative support" for Ottawa's position, which entails not giving the Canadian government all it was asking for but

rather telling it "how far it can go." Indeed, the government must have known, at least unconsciously, the rules of the game, and was probably expecting this call to order. So it is true that the court and the state write constitutional law together.

Not unexpectedly, the court divided the pie in two, as it did in the *Patriation Reference*, awarding legality to Ottawa and legitimacy to Quebec, but with such obvious pitfalls that its concessions to the minority would not endanger seriously the vital interests of the majority.

There are no innovations in the means the court has chosen to neutralize its concessions. Using the same kinds of devices so useful in other cases, where, constrained by the rigidity of the constitution or the resistance of conservative legislatures, the court has affirmed a set of progressive principles only to limit their short-term application.

Examples of this kind of thinking are provided by recent decisions on the rights of gays and lesbians and of aboriginal peoples. In the first instance, the court has included sexual orientation as a prohibited ground of discrimination in the Charter and human rights codes of reluctant provinces. But, strangely enough, it never produced a finding of actual discrimination in any of these cases. In the second example, it has furthered the cause of aboriginal peoples, most notably in *Delgamuukw*, by validating oral evidence relating to Indian title. But in the same breath, it has limited economic use of such lands to those that are compatible with their original usage.

CONCLUSION

In sum, the court seems to have had two objectives in mind: above all to preserve and strengthen the Canadian state and, at the same time, to maintain its own legitimacy within that state. The almost unanimously favourable reception of its *Reference*, both by Ottawa and Quebec, shows that it has succeeded in this regard. The judges have pleased (almost) everybody and yet have refused to oversee the process that they have prescribed. As for the court's first objective, the survival of the Canadian state, the jury is still out.

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The conclusion in the *Reference* case is that this question was not relevant with regard to Quebec. The Supreme Court is not the ultimate authority on the matter. And, a different question would have been more appropriate: Is Quebec's internal right of self-determination significantly or substantially thwarted in the Canadian political system?

A different question would have been more appropriate: Is Quebec's internal right of self-determination significantly or substantially thwarted in the Canadian political system?

The attempt to provide a coherent and positive answer to this question is the core issue. Quebec, and all the provinces for that matter, are placed at the mercy of Ottawa in a number of key institutions and legal instruments: the judicial system, Senate, reservation and disallowance, as well as its spending powers, and the imposition of national norms in the absence of appropriate institutions of collaborative coordination with the provinces. The constitutional reform of 1981-82 and the process preceding it have strongly curtailed Quebec's internal right of self-determination.

FOUR NORMATIVE PRINCIPLES

In the *Reference* case, the Supreme Court identifies four normative principles of Canada's constitutional and political order: federalism, democracy, constitutionalism and the rule of law, and, finally, respect for the rights of minorities. The reform of 1982 failed to respect all of these principles as they existed in our political culture and institutions at the time. In other words, as an actor in the struggles of 1981-82, the Supreme Court of Canada supported with all its authority a constitutional coup d'état. Out of this chapter of our history has emerged the tremendous empowerment of all judges, but mostly the members of the Supreme Court. A price had to be paid for this, and it is the significantly decreased legitimacy of the institution in Quebec.

If indeed Quebec's internal right to self-determination has been significantly or substantially thwarted in 20th-century Canada, then the sovereignty-partnership proposal of 1995, open to negotiations in good faith based on the principle of reciprocal concessions, was a proportional response. What institution would be an impartial assessor of the validity of such claims and arguments? It is hard to believe that the Supreme Court, in its current form, would qualify for such a task. I count myself among those in Quebec who would not be satisfied by the pronouncements of a court that is, for all intents and purposes, Canada's new Judiciary Committee of the Privy Council.

Constitutionalism and nation

BY JOHN D. WHYTE

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In the final paragraphs of the portion of his factum dealing with the first question (Can Quebec effect unilateral secession from Canada under the constitution?), the attorney general of Saskatchewan speculated on the political conditions and processes that would likely trigger the passing of a requisite number of resolutions for amending the constitution. In these paragraphs, he listed a clear expression of support for independence in Quebec expressed through a referendum; some expression of the national will to negotiate with Quebec; and, finally, negotiated terms of separation touching on such things as assets, debt, borders, rights of minority communities, citizenship, monetary matters, pensions, rights of office holders, and so forth.

A DEFINITE MAYBE

This section of the factum is explicitly disconnected from the argument on the content of the constitutional order. It did not appear in the factum in order to establish any sense of an answer to the question about what our constitutional rule for secession is but, rather, to show that constitutional rules operate in political contexts and that their normative effect is determined by their relevance to those contexts. Saskatchewan was, in short, reassuring the court that those rules could well bear on political developments around a secession initiative. The factum also recognized that those rules could be irrelevant to those developments. The Saskatchewan factum was meant to be a partial answer to the many voices saying that the constitutional reference was a mistake because the practices of national birth and national dissolution were not amenable to legal norms. It said, in short, "Maybe yes, maybe no, but we are not free to prejudge the weight of law on politics."

The factum proceeded from a certain assumption about law and legitimacy — that we cannot always count on the legitimacy of high stakes national politics being measured in terms of whether it sustains the integrity of what has gone before. It is clear that our American constitutional heros (by whom, of course, I mean Bob Cover and Bruce Ackerman) see the constitutional order as establishing a national narrative that is, at the same time, enabling of social and legal transformation and suppressive of, or outflanking, revolution; generative of new normative communities, and constantly expressive of fidelity to original commitments and structures. The Canadian sense of constitutionalism, as represented in the factum, is less embracive of political order and accepts the strange fact that, even in a nation governed by constitutionalism, politics does not necessarily engage law.

The court's own, more modest, factoring process — its attempt to bridge constitutional principle with politics — is not particularly convincing. The court pulled the duty to negotiate out of rarefied air.

There is another way to put this. If we do have an organic sense of our nation, our constitution is not a powerful site of that organic understanding. The transformative effect of nation-creating on the identity of its parts, and on all of its people, is not thought to be captured in the constitution or through constitutional law. It is not in constitutionalism that the intellectual basis for our nationalism is expressed. It is not in the constitution, or in its application, that national virtues are enumerated and tied to basic structures and arrangements. For Canada, the organic nation is an expression of commerce or transportation or, for example, in the discovery of Marius Barbeau (of the National Museum) of Emily Carr and his connecting her to a developing indigenous artistic sensibility. (Readers of John Ralston Saul will recognize this example of organic nationalism from *Reflections of a Siamese Twin*.)

AN ORGANIC SENSE OF NATION?

The factum, then, although in other parts supportive of an organic understanding of nation, adopts a view of constitutional order that is modest, limited, and contingent — contingent on ideas of political legitimacy and political identity that likely have their origins elsewhere and whose vitality is renewed not through practices of honouring our constitution but through other, barely seen and understood, processes that flow, perhaps, from the PMO, or from various centres of influence on Front Street West.

From one perspective, the Supreme Court of Canada in the *Secession Reference* would have none of this modesty. Consider paragraph 69. This paragraph concludes the court's reflections on the constitutional principle of democracy. The court states:

> The *Constitution Act, 1982* gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in

Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces.

The court in these two sentences leaves behind the careful delineation of law and political legitimacy that has marked Canadian constitutionalism. This is not to say that this shift is unfortunate or mistaken. The political role of constitutionalism, especially since it has been a narrow role, is not fixed. As David Schneiderman has pointed out, our constitutionalism was, for a long time, focused on maintaining structures conducive to energetic economic development, albeit, perhaps, as an adjunct to national development. It could well be time to adopt a larger state project for constitutionalism — the project of measuring political legitimacy.

WHAT IS DIFFERENT

What has changed for the court is the political unrealism of the view that such strong propositions can be factored into our constitutional law. The court's own, more modest, factoring process — its attempt to bridge constitutional principle with politics — is not particularly convincing. The court pulled the duty to negotiate out of rarefied air. There is nothing in the democratic principle that gives it a trumping effect over other more fundamental constitutional ideas. In fact, the court embraces an extremely simple or direct form of democratic expression over the multilayered understandings of democracy that are actually required to coordinate the democratic principle with constitutionalism.

Furthermore, the court's lack of legal rigour is also found in its unconvincing and inconsistently expressed claim of the blanket non-justiciability of all issues with respect to the essential legal requirements in the process leading to secession — legal requirements that will bind the parties to a secession arrangement but, evidently, that are not subject to adjudication or enforcement by the courts. The court's connection of constitutional principle to the politics of extreme choices, and its disconnection of constitutional principle from the rule of law's chief instrumentalities, reveals a remarkable shift toward constitutionalism as a passive marker of political legitimacy. The court believes that its role is to reveal constraints on the politics of dissolving a nation through certain moral demarcations.

The court placed the Canadian nation somewhere between a compact of states and Lincoln's view of the nation as a "perpetual union."

What can one say about this calculation of the role for constitutional law? One might say it lacks conviction. It is based on the twin beliefs that our constitution contains a complex moral vision of rights and entitlements and respect for individuals, communities, branches, and jurisdictions, and that those moral visions provide a constitutional chart for appropriate legal behaviour. The judgment is not, however, based on the idea that the court's sense of constitutional meaning will be defended by the nation as the nation's sense of constitutional meaning. From an American perspective, this is an unthinkable concession to the political branches' understanding of constitutional meaning. It shows that our court is willing to subscribe to a less mature idea of Canadian constitutional democracy than was embedded in our political culture before the Charter of Rights.

CONSTITUTIONALISM AND THE NATION

The decision demonstrates not only a particular conception of constitutionalism but also of nation. The paradox in these two elements of the decision is that normally belief in a rich substantive national constitutionalism — one, for instance, that contains elaborate ideas about political communities and cultural communities and their inter-relationship — would go hand in hand with a strong sense of nation — of a national identity and national integrity. Of course, it may not be an accurate inference from the court's holding that there is a constitutional duty to negotiate about national dissolution that there is a thin view of the Canadian nation. In fact, the court in referring to the words of George Étienne Cartier has deepened and historicized the conception of the Canadian federation to present it as generative of a new political entity, all of whose members could have a claim to participate in fundamental reformation. The court quotes Cartier's view that "[w]hen we are united we shall form a political nationality independent of the national origin or the religion of any individual." Cartier, while insisting on the confederation promise of the non-assimilability of the founding nations of Canada, went on to say:

> In our own federation, we will have Catholics and Protestants, English, French, Irish and Scots and everyone, through his efforts and successes, will add to the prosperity and glory of the new confederation. We are of different races, not so that we can wage war on one another, but in order to work together for our well-being.

The court did not take from this passage, however, the moral notion of nationhood and there can be no turning back. Rather, the court chose to focus primarily on the accommodation of diversity. But it did end its reflection on Cartier with the diluted Cartier-like sentiment that Canada is "a unified and independent political state in which different peoples could resolve their disagreements and work together toward common goals and a common interest."

The result of the *Reference*, however, clearly avoids the strong version

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Unexpected consequences of constitutional first principles

BY JOSÉ WOEHRLING

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It has now been clearly established by the court that a unilateral declaration of independence (UDI), such as contemplated in the bill introduced by the Parizeau government before the 1995 referendum, and referred to in the referendum question, would be unconstitutional. Should another separatist government embark on the same strategy, the Supreme Court ruling will make it easier for the federal government, or indeed any citizen, to challenge its validity or even to ask for a court order prohibiting a new referendum.

However, the court's decision also contains a number of elements that were assuredly not desired by the federal government and will almost inevitably assist the cause of the Quebec sovereigntists.

A QUEBEC-FAVOURING DECISION

First, the court proclaims the "democratic legitimacy" of a secession initiative approved by a clear majority vote in Quebec on a clear question. In the past, there have been affirmations from certain quarters in the rest of Canada that the mere attempt to separate Quebec from Canada was illegitimate and even illegal. Such arguments have now been put to rest. It is true that the highest federal authorities have sometimes recognized that it would be difficult, on a political level, to refuse any negotiations with Quebec after a positive referendum on secession. Yet the court goes much further by stating that, in such a case, there would exist for the rest of Canada a constitutional and legal obligation to negotiate. This is very important, because politicians in the other provinces have occasionally proclaimed that they would refuse to negotiate with a secessionist Quebec altogether. Now that it is clear that a victorious referendum will trigger negotiations, a certain number of "soft nationalists" in Quebec will be less hesitant to vote "Yes" in the future.

Eventual negotiations on secession must be conducted bilaterally, between Quebec and the rest of Canada, and not multilaterally, between Quebec on the one side, and each province and the federal government on the other.

The second favourable element for the sovereigntists is that the court seems to give little importance to the constitutional amending formula in the event of a secession. During the hearings of the reference before the Supreme Court, counsel for the federal government put considerable weight on the argument that the secession of a province could be conducted only through the amending formula. This would mean that Quebec has to obtain the separate approval of the legislative assemblies of the nine other provinces as well as of both houses of Parliament (the court says nothing about the applicable amending formula, but for the great majority of constitutional lawyers, secession would require the unanimity procedure). In addition, if the Charlottetown referendum is to be considered as a political precedent, Quebec's accession to independence would also have to be approved in a popular referendum by a global majority of Canadian voters as well as by a majority in each of the five "regions." By insisting on compliance with such a cumbersome procedure, the federal government was able to claim that it abstractly recognized the right of Quebeckers to decide their own constitutional future while, at the same time, denying such a right on a practical and political level. The court brings this scheme to ruin by establishing a sequence of events that leaves only a secondary role for the amending formula. Should Quebeckers approve secession, there would be a negotiation on the precise conditions. If the negotiations fail, there would be of course no need to use the amending formula. If, on the other hand, negotiations succeed, recourse to the amending formula would still be required, but it is difficult to see how a province or the federal government could then refuse its formal approval, and thus negate the political agreement arrived at. However, should this happen, the court recognizes that Quebec could then try the UDI route and that such a course would be subject to evaluation by the international community — each foreign state having to take a position based on its judgment of the conduct, during negotiations, by Quebec on the one hand, and the rest of Canada on the other (paragraph 103).

A KEY CLARIFICATION

Finally, the court makes it clear that eventual negotiations on secession must be conducted bilaterally, between Quebec and the rest of Canada, and not

multilaterally, between Quebec on the one side, and each province and the federal government on the other:

> The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be (paragraph 93).

The best way to make sure that the will of a majority of Quebeckers has been clearly expressed is to hold a second referendum once the results of negotiations between Quebec and the rest of Canada on the terms of secession are known.

The court enjoins Canada to speak with one voice during the negotiations with Quebec. This is crucial because one way of indirectly refusing to negotiate secession, present in the writings of some ROC academics, is to claim that the rest of Canada could not possibly agree on a common position vis-à-vis Quebec, thus any attempted negotiations would be doomed to fail.

In the text of the reference, the court stresses many times that the obligation of the rest of Canada to negotiate will be triggered only by "a clear majority vote in Quebec on a clear question in favour of secession." However, the court leaves it to the political actors to determine what these notions mean. The question in a future referendum should be agreed to by all political parties present in the Quebec Legislative Assembly. In a situation where the Parti québécois formed the government, the official opposition would be the Liberal Party of Quebec, a political party strongly opposed to secession. Nobody could thus claim that the question was unclear or ambiguous. Such a solution avoids the inextricable problems that would exist if the federal government demanded to participate in the formulation of the question.

Requiring a special majority (more than 50 percent plus one) for secession would, however, depart from precedents since all past Canadian referendums, as well as the two referendums necessary to bring Newfoundland into Confederation, have been held on the basis of the simple-majority rule. Any attempt to impose a higher threshold would run into insuperable difficulties as the choice of any number larger than 50 percent would appear to be entirely arbitrary.

The best way to make sure that the will of a majority of Quebeckers has been clearly expressed is to hold a second referendum once the results of negotiations between Quebec and the rest of Canada on the terms of secession are known. Voters will then be able to evaluate the true consequences of secession on matters like Canadian citizenship, the Canadian dollar, the proportion of the public debt of Canada to be assumed by Quebec, the economic or political ties maintained with Canada, as well as the territorial integrity of Quebec. This time, voters will be very aware of all the difficulties and disruptions that may be caused by secession, as it must be assumed that ROC representatives will have stressed them amply during the period of negotiations. Therefore, if the second referendum is also positive, the will of Quebec voters will have to be considered as sufficiently clear.

A FINAL REMARKABLE ASPECT

For legal scholars, the most remarkable aspect of the ruling is how the court answered all the questions without ever referring to the actual specific provisions of the constitution. This case admirably illustrates the considerable margin of freedom a supreme or constitutional court can exercise in applying the constitution. The whole judgment is based strictly on four general principles that are present today in every democratic, liberal, and federal constitutional system in the world. These are: the democratic principle, which gives Quebeckers the right to decide their own political future and grounds the obligation of the rest of Canada to negotiate a secession approved by a clear majority on a clear question; the federal principle, which forms the basis of the obligation of Quebec to negotiate with its federation partners the rupture of a union existing more than 131 years; the protection of minorities, which asks for respect of minority rights in the conduct as well as in the outcome of negotiations; and, finally, the rule of law and the principle of constitutionalism, which demand that secession of a province be achieved within the existing constitutional framework.

Ironically, if the court had decided the patriation reference in 1981 and the Quebec veto reference in 1982 by applying the same four principles, it never could have arrived at the answers actually given in these two cases. The federal principle would not have allowed it to pronounce the legality of a major constitutional reform to which only two provinces had consented at that time, and the protection of minorities would have prevented it from ruling that the nine English-speaking provinces and the federal authorities, controlled by an English-speaking majority, could impose the same kind of constitutional change on the only province where francophones form the majority. The 1982 patriation did not respect the rights of the most important minority in Canada, the francophones, 90 percent of whom are living in Quebec.

A Solomonic judgment?

BY MICHAEL MANDEL

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The Supreme Court gave the federal government the answer it was looking for when it held that even a successful referendum would not give Quebec the right to secede "unilaterally," either under the constitution of Canada or under international law. However, the court disappointed hardline federalists with its recognition that "a clear majority on a clear question" would "confer democratic legitimacy" on Quebec's secession initiative and oblige the rest of Canada to participate in negotiations that might lead to sovereignty.

Both sides immediately claimed victory and the word "Solomonic" was heard frequently in the days following the release of the judgment, meaning to suggest that it wisely gave something to both sides. However, the essence of Solomon's judgment in the *Mothers' Case* was not that it gave something to both sides but that it pretended to, flushing out the wrongful claimant by trickery and ultimately handing total victory to her adversary.

If the Supreme Court's judgment is to be considered Solomonic, it is because it, too, is full of pretence and trickery. The main pretence is that the court even answered the question it was asked. In fact, the court pulled a typical legal trick and posed itself a completely different question, transforming the key notion of "unilateral secession" from *secession without agreement*, even after negotiations (which is what Quebec was proposing in the sovereignty referendum) into *secession without negotiations*:

> [W]hat is claimed by a right to secede 'unilaterally' is the right to effectuate secession without prior negotiations with the other provinces and the federal government.

A PRETENCE OF OBJECTIVITY

A second pretence is that the Supreme Court decided anything at all, even about the question it asked itself. In what may well be a judicial first, the court was adamant that it would not enforce compliance with *any* aspect of its judgment. It would leave the question of whether "a clear majority on a clear question" had been achieved and whether the parties were complying with the duty to negotiate, to the parties themselves:

> [I]t will be for the political actors to determine what constitutes "a clear majority on a clear question." . . . [T]he courts . . . would have no supervisory role.

To appreciate how really extraordinary this is, imagine if at the end of a trial, the judge said, instead of "guilty" or "not guilty," that "*the guilty one is the one who clearly did it, but I leave it to the prosecutor and the accused to decide who that is.*"

However, despite the earnest attempts of PQ lawyers to put a good spin on the decision, there was a clear winner and it was not Quebec — which was clearly assigned the role of the false mother. The federal government got the one thing it really wanted: a way to delegitimate a democratically won referendum. And here the court delivered the goods in many ways: the effective subordination of international law to Canadian law, the idea of a "clear question," and, above all, the idea of "a clear majority." As even most sovereigntist Quebeckers have had to admit, this can only mean that an old-fashioned, plain and simple majority of "fifty percent plus one" — the majority that Quebec came within a whisker of achieving in October 1995 — would not be enough.

This response was highly predictable, because, in the modern world, going to constitutional court is the preferred way of denying people what they want and still calling it "democracy." That is why Trudeau imported the whole system into Canada: to "trump" democracy when it became inconvenient to the established order. The court's constitutional *raison d'être* depends on this preposterous redefinition of democracy as not being about majority rule, otherwise known as "one person, one vote."

A CONSOLATION PRIZE FOR QUEBEC

What the Supreme Court gave to Quebec as a consolation prize was essentially worthless: in place of the democratic right to independence after an affirmative vote by a majority of the population, Quebec got an unenforceable right to negotiations, with all the obstacles the rest of Canada could raise at negotiations underlined three times in red ink, and no promises about the outcome:

> While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached.

All this plus a blunt reminder that secession would require an amendment of the constitution, and no suggestion that Quebec could do that unilaterally: "Under the Constitution, secession requires that an amendment be negotiated."

So, if the government of Quebec is serious about independence, it is seriously mistaken in straying from its original strategy of boycotting the whole thing, relying on international law, and emphasizing the fact that the Canadian constitution was imposed on it and that the Supreme Court was appointed by the level of government that did the imposing. In fact, though Trudeau passed the first constitutional amendment

against Quebec's will, it was the Supreme Court of Canada that said it was constitutionally acceptable to do so.

A QUESTION OF BIAS?

But if the court is biased, why not hand the federal government total victory? Why give Quebec any concessions, even these puny rhetorical ones? The answer is that the court is biased in favour of federalism and not any particular government wearing the federalist mantle, much less that particular government's strategy.

The court reads the polls. It knows that the sovereigntists have been weakened, and it knows that nothing strengthens weak sovereigntists like fresh insults from Canadian institutions. Better to show a little rhetorical generosity. This, after all, was the strategy of the Meech Lake accord, and here it is worth mentioning that, unlike the court that torpedoed Meech with its ruling on the signs law in 1988 (a "Trudeau" court in which all the judges were appointed by Meech's most implacable foe), this court is still dominated by judges appointed by Meech architect Brian Mulroney (6/9 — a "clear majority" if ever there was one). But Meech was no gift to the cause of Quebec sovereigntism; it was meant to be the kiss of death. This judgment is of no more value to Quebec than the "distinct society" clause, and for the same reason: its interpretation lies entirely in the hands of an institution that will always put federalist interests first. These judges will turn on a dime if the political need arises. They've done it before, and in Quebec, too, with much less jurisprudential leeway than they have given themselves in this case.

The word "Solomonic" was heard frequently in the days following the release of the judgment. But . . . the essence of Solomon's judgment . . . was not that it gave something to both sides but that it pretended to, flushing out the wrongful claimant by trickery and ultimately handing total victory to her adversary.

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of the organic state whose integrity can be compromised only in truly exceptional circumstances. The court placed the Canadian nation somewhere between a compact of states and Lincoln's view of the nation as a "perpetual union." (For example, Lincoln stated, "I hold, that in contemplation of *universal* law, and of the constitution, the union of these states is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments," or "The principle [of secession] is one of disintegration, and upon which no government can possibly endure." Finally, in the Gettysburg address, Lincoln's admission of how paltry his dedication of the memorial space was compared with the consecration of nation by men who fought and died is, perhaps, designed to recognize the ultimate form of national organicism — a nation built on people giving up their lives for the sustaining of the new entity. This, for Lincoln, is a transformative creation from which there can be no unravelling.)

Canada's highest court, however, did not venture so far. It chose a middle course to capture the idea of nation in Canada. It recognized a constitutional barrier to unilateral secession *and* a constitutional requirement on the nation as a whole to conduct negotiations with a single province seeking to effect secession from the nation. This is not an idea of nation that stirs loyalty anywhere. Is it, however, the right idea of the Canadian nation?

NATIONAL INTEGRITY AND NATIONALISM

At the level of national romanticism, some argue that a nation that is not forged through the ultimate transformation represented by the movement from personal death to birth of a nation is not likely to have an organic sense of itself. However, endless numbers of Canadian nationalists have seen the pattern of sacrifices, sharing and cross-fertilization in Canada as being constitutive of a nation whose integrity has pre-eminent value.

The court's view may, however, represent the modern conception of nation as an arrangement of market convenience, whose role has been seriously diminished. It is futile to cling to national integrity when the national role for the modern state is so attenuated.

Whatever the court's deep thinking was behind its invention of the duty to negotiate, it has generated a view of the state as susceptible to fundamental changes in order better to reflect the needs, interests, and identities of its component parts. Perhaps this is the sane way for all nations to see themselves. It may be the view that forestalls bloodshed. It does not, however, stand as a note of confidence in the viability of pluralistic states and, in that way, the vision of nation implicit in the judgment may not be the least bit modern.

A ruling in search of a nation

THE REJECTION OF THE ATTORNEY GENERAL'S POSITIVIST APPROACH

First and foremost in its judgment in the *Secession Reference*, the Supreme Court of Canada rejected the attorney general's positivist approach to the constitution that requires the court to follow strictly the letter of the law.

Justice requires more than blind adherence to established legal rule. It requires the recognition that law fulfills other purposes than reinforcing the state's authority and that such purposes are often historically contingent. Seen in this way, law must be conceived as a system of rules whose object is to facilitate human relations. If it fails in this task, it will cease to be obeyed and eventually lack legitimacy.

In its judgment, the Supreme Court embraced a concept of law that recognized that the constitution also encompasses underlying principles that "inform and sustain the constitutional text" (paragraph 49), including federalism, democracy, constitutionalism and the rule of law, and respect for minority rights (ibid.). None of these principles is absolute to the exclusion of the others (paragraph 93). In fact, these principles are said to function in symbiosis (paragraph 49). The rule of law, constitutionalism, and the democratic principle are thus closely intertwined (paragraph 67).

The court also recognized the need to take into account Quebec's specificity in Confederation (paragraph 59):

> The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867.

BY JEAN LECLAIR

Jean Leclair teaches law at the University of Montreal.

The reasoning adopted in the *Secession Reference* could and should have been adopted in the *Quebec Veto Reference*. Quebec's specificity in Confederation would then have been considered an essential element of a proper understanding of the federal principle in Canada.

Suddenly, history appeared relevant, in contrast to 1982, when it was felt that it was "not . . . necessary to look further in these matters." 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. In other words, in the eyes of the court, the federal principle is not an ethereal concept universally applicable in all federations; it is historically contextualized.

THE IMPACT OF THE COURT'S NEW CONSTITUTIONAL VISION ON THE FATE OF CANADA

What could be the impact of this more historically informed vision of our constitutional order? Will it have any?

First, it comes years too late. The reasoning adopted in the *Secession Reference* could and should have been adopted in the *Quebec Veto Reference*. Quebec's specificity in Confederation would then have been considered an essential element of a proper understanding of the federal principle in Canada. As a consequence, the court could have concluded that patriation without Quebec's consent contravened the law of the constitution and that Ottawa failed to respect the underlying federal principle that sustains our constitution.

Second, the impact of the court's ruling might be insignificant because it did not provide any means for a provincial federalist government in Quebec to ensure the recognition of their demands. Outside an obligation to negotiate in good faith, the ruling provides no answer on this issue. Faced with an impasse, such a government would be condemned to eternal negotiations.

Unfortunately, the secession-obsessed members of the federal Cabinet do not share the court's new vision. No one in Ottawa wishes to take the result of the 1995 referendum for what it is: an undeniable dissatisfaction with the present state of the federation. In truth, no political party appears interested in understanding the reasons that lie behind the ambivalence of the Quebec electorate. But the federal Cabinet, sooner or later, will have to recognize that a quarter of Quebeckers who voted "No" in the 1995 referendum, the sovereigntist "Nos" as they are called, prefer that Quebec remain in Canada, but only on the condition of a renewal of federal-

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A court for all seasons

BY GORDON F. GIBSON

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WHAT THE COURT SAID TO FEDERALISTS

The court said some things that were new, and some that were reminders. Both are important. The two *new* elements of greatest importance are as follows:

1. The sovereignty project is a legitimate quest.
2. If certain tests for popular support are achieved, the rest of Canada has an obligation to negotiate on the matter of sovereignty in good faith.

The two important *reminders* are as follows:

1. The provinces are an integral part of all constitutional processes, including those that could lead to Quebec sovereignty.
2. Any province can begin a process of constitutional change.

On the surface, these things are nothing more than common sense, at least in the context of the Canadian political tradition.

However, they represent a serious blow to the main thrust of the historic federal government position, particularly as represented by Liberal governments since 1968. Ottawa has both directly and indirectly taken the position that it will not in any way cooperate in the division of Canada (though it might in some circumstances have to accede to the *force majeure* of an overwhelming vote) and that the very quest for sovereignty is morally illegitimate and shameful.

The great advantage of such a position for the federal Liberals has been that if one dismisses the idea out of hand, there is no need to further discuss the possible causes and cures of the underlying discontent that gives rise to the secessionist impulse. Such a discussion inevitably leads to questioning the very heart of our federal structure — questioning it is better to avoid if one believes that the distribution of political power in Canada is as good as it could possibly be, short of perhaps a bit more central power here and there.

The quest for sovereignty is *not* illegitimate. Stonewalling is *not* an acceptable tactic.

PLAN B AND PLAN A

Accordingly, the central government strategy has been to focus on "plan B."[1] This approach is simple to understand, apparently patriotic in its motives, and has the virtue of requiring no thought about significant change. It has been very popular in English Canada.

Unfortunately for the proponents of this approach — who in a delicious irony were responsible for the Supreme Court reference in the first place — the court delivered a great deal more than it was asked to.

It did indeed say that a unilateral declaration of independence (UDI)[2] would be illegal. But then the court gave back what it took away and more, thereby undermining the main foundations of plan B. The quest for sovereignty is *not* illegitimate. Stonewalling is *not* an acceptable tactic. The court even hinted at the end of its statement that if Canada refused to engage in good-faith bargaining, a UDI (while still illegal) might be successful.

So now what are federalists to do? The focus on plan B has been the strategy of the federal Liberals as well as pleasing to the public. But there has been a significant and growing body of federalist thought that would devote far more attention to "plan A." The search for a reconfigured Canada would retain the essential elements of the country,[3] while amending the arrangements of federalism in such a way that the main goals of the sovereigntists could be achieved *within* the union.

The two most publicized moves in this direction have involved provincial governments other than Quebec, and the official opposition in Ottawa. The first provincial move was very tentative, as evidenced by the Calgary declaration. Nevertheless, it was highly significant as the first provincial acceptance of responsibility for the shape of Canadian federalism.

The official opposition has been more direct, specific, and bold in their draft *New Canada Act*, which paints a picture of a markedly more decentralized country.

No such interest has been seen from the federal government, nor is any likely under the current prime minister. That certainly makes plan A activity more difficult — but not impossible. And, of course, the "current" prime minister is only that.

ELEMENTS OF PLAN A

The general thrust of plan A is decentralization and devolution. The technically correct word is "rebalancing," because most proposals would add some powers to the central level of government.[4] In addition, certain democratic reforms, whether to the federal electoral system or to the composition and rules of Parliament, could have the effect of legitimizing the centre.

But it cannot be doubted that most proposals for the reform of the Canadian political system — in common with the experience of countries around the world under the influences of technology and globalization — speak more of the devolution of power, to provinces, to local government, and to the private sector.

These ideas are not new. The *Beige Paper* and the *Allaire Report* are major

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What can small provinces do?

BY DONNA GRESCHNER

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What is the possible impact of the *Quebec Secession Reference* (QSR) opinion on the national unity activities of small provinces — provinces that have one million people or fewer? These "have-not" provinces, situated in the Canadian hinterland, have both small size and economic conditions which give them a great stake in preserving national unity. Their specific interests, however, will often differ from those of big provinces in the ROC, whether heartland (Ontario) or hinterland (Alberta and British Columbia). The three big provinces are also "have" provinces. Small provinces may become lost in the shuffle among the big players, and they cannot expect the federal government to protect their interests. They need to begin their plan C preparations.

THE DUTY TO NEGOTIATE

Plan A ensures a duty to negotiate. The four key principles referred to in the Supreme Court's judgment also constrain the exercise of the legal rights of participants. The court states: "Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations . . . which constitute substantive limitations upon governmental action" (paragraph 54). Principles will restrict decisions taken pursuant to legal rules in part V of the *Constitution Act, 1982*. Thus, if parties exercise their veto under s. 41, or withhold their consent under s. 38, for reasons that violate the principles, their action is unconstitutional.

Outside the national unity context, the opinion's elevation of principles certainly gives small provinces cause for concern. Rules protect small players from "might makes right" practices. They provide stability of expectations for small provinces. If constitutional principles trump the exercise of rights given by rules, then they weaken or erase the protection that rules give small provinces. When small provinces agree to a provision, they will not know whether it will last beyond the next court decision that uncovers and applies principles. However, in the context of national unity deliberations, a small province's realization that other parties could act in spite of its singular dissent on a widely accepted position may promote agreement.

> **Overall, the opinion does not help politicians prepare the soil for public acceptance of an agreement that recognizes, in one way or another, the unique place of Quebec.**

ENLARGING THE NEGOTIATIONS

The opinion may change the personnel around the negotiating table. The court says that the right to initiate constitutional amendments, which is found in the *Constitution Act, 1982*, generates a corresponding duty to engage in constitutional discussions. Presumably, the court was referring to s. 46 of the Act. The right holders in s. 46 are not first ministers, but legislative bodies. Will the right holders also become the duty holders, thus transferring primary negotiating responsibility to the legislatures from the executive branches of government? If legislatures must authorize negotiating teams, then a larger number of opposition leaders may participate than in previous negotiations. (Several were present during the Charlottetown round.) The early involvement of the legislature could foster public acceptance of a plan to renew federalism. One vocal complaint about Meech Lake centred on the unacceptability of 11 first ministers forbidding any changes to their agreement at the legislative stage. If this change in process did occur, it would not affect small provinces differently from large ones.

Previous efforts to negotiate a plan A agreement have foundered in part because of the conflict between fulfilling Quebec's traditional requests and complying with the principle of equality of the provinces. The former imperative leads toward asymmetrical federalism, while the latter insists on identical powers and treatments of all provinces, regardless of differences in size, history, or needs. The conceptions of federalism underlying these competing dynamics roughly correspond, respectively, to multinational and territorial federalism.

If politicians wish to successfully conclude a plan A strategy, they have several options. They can try to reconcile the principle of equality of the provinces with Quebec's demand for recognition as a distinct society. The Calgary declaration tries to square this circle, in an unsurprisingly messy fashion. Alternatively, they can dispense with the principle of equality of the provinces and negotiate asymmetrical federalism. With this option, one critical problem for many ROC politicians, in small and large provinces, is their electorate's widespread acceptance of the notion of equality of the provinces.

EQUALITY OF THE PROVINCES: A SOFT MAYBE

Could politicians say that the court has tempered the principle of equality of the provinces, thus providing them with a justification to strike a deal that accommodates Quebec's concerns in a more

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A partnership proposal

A WAY OUT OF THE IMPASSE

BY BARBARA CAMERON

Barbara Cameron is Chair of the Department of Political Science, Atkinson College, York University.

A solution to the ongoing crisis in the relationship between Quebec and the rest of Canada is imaginable, but it requires a break from the formula that has been central to all constitutional proposals since the mid 1980s. The failing formula links a weak recognition of the national rights of Quebeckers to the erosion of the rights of social citizenship vital to the sense of national identity of Canadians outside of Quebec. This discredited formula was at the heart of the Meech Lake accord, the Charlottetown agreement, and, recently, the Calgary declaration.

The key to escaping the current constitutional impasse is to substitute for this formula one that links the full recognition of the historic rights of Quebeckers to the protection and even the expansion of the democratic and social rights of Canadians outside Quebec.

An important element of the legacy of historic rights for Quebeckers and Canadians in English-speaking Canada is the accountability of executives to elected legislatures, embodied in the principle of responsible government and won in central Canada through an alliance of French and English 150 years ago. There are also protections for the English minority in Quebec and French minorities outside Quebec. In addition, there are different traditions of historically evolved rights for Quebeckers and for other Canadians, which are placed in competition in the federal arrangements that have evolved since the World War II.

The historic rights of Quebeckers centre on control by a legislature accountable to a majority French-speaking electorate of those areas of jurisdiction fundamental to the protection and promotion of the distinct culture of that majority, including, centrally, areas of life now affected by modern social programs. These were won in 1791, removed in 1841 as punishment for the Rebellion of 1837, reinstituted in the division of powers in the *British North America Act* as a precondition for Confederation, challenged by the expansion of Canada's post-war welfare state, and ignored in the 1982 constitutional amendments.

ENGLISH CANADA'S PARALLEL RIGHTS

Canadians outside Quebec have a parallel set of historically evolved rights, dating from the innovations to Canadian federalism during and after World War II. These concern the protection and promotion of a shared social citizenship by a democratically accountable national government. For most English-speaking Canadians, the recognition of democratic and equality rights in the *Constitution Act, 1982* and the recognition of multiculturalism form a new and integral part of their common rights. Mobilization in defence of these two sets of rights was important to opposition in English-speaking Canada to both the Meech Lake accord and the Charlottetown agreement.

The formula of "provincial equality" cannot accommodate the different traditions of historically developed rights of Quebeckers and English-speaking Canadians. Rather, it places them in opposition.

Accommodating the differing political traditions can only be done through federal institutions structured to reflect a partnership between Quebeckers and English-speaking Canadians. (I would add, for a host of reasons, that new federal institutions should accommodate a partnership of the three territorially based types of society in Canada: First Nations, Quebec, and English-speaking Canada).

To win support outside Quebec, a partnership proposal would need to link recognition of the national rights of Quebeckers and aboriginal peoples to the protection and expansion of the social and democratic rights of Canadians in English-speaking Canada. Positioned in this way, such a partnership proposal would resonate with a wide section of the population and win the support of the social advocacy organizations in English-speaking Canada that have already endorsed the "three nations" concept of Canada. It could be the basis for a political alliance between Quebeckers and English-speaking Canada and between political elites and the majority in Canada outside Quebec.

BUILDING THE PARTNERSHIP

The following is a scenario for arriving at such a partnership.

A new prime minister would announce that his or her government recognizes that the existing strategy of renewing federalism is not working. Specifically, what is failing is a strategy of trying to accommodate provincial governments by subjecting federal spending power in the area of social programs to a provincial veto, inviting the provinces to define national standards for social programs and unilaterally provincializing other responsibilities, such as training programs. He or she might add that the strategy is unacceptable because it insufficiently addresses the concerns of Quebec, does not have the support of Canadians outside Quebec, and removes control of executive power from democratically accountable legislatures. In place of this approach, his or her government would adopt a new strategy, based on the following two elements:

1. A declaration affirming the clear constitutional authority of the federal government to exercise its spending power in areas of exclusive provincial jurisdiction, including social programs, post-secondary education, and labour market policy, and to attach conditions to that spending.

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Anglophone media and the court's opinion

BY STEPHEN CLARKSON

Stephen Clarkson is a political economist at the University of Toronto.

CANADA'S MEDIA SOLITUDES

During the first 15 minutes of the CBC-TV coverage of the Supreme Court's opinion on Quebec's right to secession, viewers could have been forgiven for thinking that the court had etched the federal Liberals' tough-love "plan B" in constitutional stone.

Newsworld's Don Newman and his colleagues were telling us the court's nine judges had unanimously ruled that neither the constitution nor international law gave Quebec the right to secede from Canada unilaterally. What a victory for Prime Minister Jean Chrétien, his intergovernmental affairs minister Stéphane Dion, and all of those gleeful federalists who thought their carefully formulated questions could hardly be answered without devastating the sovereigntist position. What a rout for Premier Lucien Bouchard and his hapless party, including Maître André Joli-Coeur, of whose sovereigntist arguments as *amicus curiae* the judges made short shrift.

And yet, if viewers switched to *Radio Canada*'s more sustained, intense, and intelligent coverage or, better still, if they were able to access the text of the court's judgment over the Internet, it soon became clear that "plan B" was in ruins. The judges were also telling Canada's federalists that, following a properly conducted victorious referendum, the governments of Canada would be *obliged* to negotiate. No longer could Quebeckers be threatened with humiliation, as Prime Minister Pierre Trudeau threatened them during the 1980 referendum campaign when he insisted that English Canada would refuse to negotiate. Instead, the court went so far as to state that, if such negotiations were not conducted in good faith, Quebec would have cause to declare *de facto* independence — however unconstitutional such a move would be — and could well gain international recognition as a result.

How odd then that this group of nine justices, deemed by many legal experts to be of less than outstanding talent, should have written a clearly argued document of historic moment without falling into the traps carefully prepared for them in Ottawa and Quebec City.

WINNERS AND LOSERS

At the same time that the court denied Ottawa total victory, it denied Premier Bouchard the provocation he had been anticipating for his immediate electoral purposes. How could the court be attacked as the instrument of a dastardly federalist plot when it had made Canada's constitution one of the few in the world to legitimate the democratic right to secession of its constituent members? Even Jacques Brassard, Quebec's minister of intergovernmental affairs, had not a single vituperative word to say about the court's judgment when he emerged from his government's reference-day huddle to face the media.

But having gone the extra mile in endorsing the Parti québécois's referendum process, the nine judges then turned round and made the prospect of an easy accession to independence far from automatic. Post-referendum negotiators would have to include not just the federal government but the other provinces. And they would have to consider the interests of minority groups — specifically those of the native peoples.

With this set of surprises the Supreme Court has pulled off a coup. It has affirmed the value and virtue of Canada's federal system while showing that the constitution is not a straitjacket. In effect it has introduced a constitutional amendment specifying how a province can secede. It has assured all the players that their interests would have to be taken into account during the post-referendum negotiations.

Earlier this year, big-brained legal talent, both professional and professorial, convened in Toronto to pass judgment on the Supreme Court's recent rulings and found them wanting in consistency and inferior in quality. How odd then that this group of nine justices, deemed by many legal experts to be of less than outstanding talent, should have written a clearly argued document of historic moment without falling into the traps carefully prepared for them in Ottawa and Quebec City. How curious that a court long denounced within sovereigntist circles for its inveterate centralizing tendencies should have reached the ultimate in decentralizing positions.

A QUINTESSENTIAL CANADIAN DECISION

This generous, intelligent, decent judgment — so quintessentially Canadian in

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We were not invited

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.

BY ALAN CAIRNS

Alan C. Cairns is John T. Saywell Visiting Professor, Faculty of Arts, York University.

[*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 participant, 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.

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.

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 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.

Mr. Parizeau, who had been appointed by Bouchard to handle the negotiations for Quebec, threatened UDI on more than one occasion.

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 behind 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 constitutional 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 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."

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.

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 Andreé Lajoie's analysis of the judgment, 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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to *de facto* secession but upheld the legality of Ottawa's position that Quebec did not have the right to secede "unilaterally," either under the constitution of Canada or under international law.

Osgoode Hall Law School constitutional expert Michael Mandel, and the University of Montreal's Jacques-Yvan Morin, read the current judgment in a somewhat different light. Mandel argues that all Quebec received was at best "a consolation prize . . . [in place of] the democratic right to independence after an affirmative vote by a majority of the population." Morin takes the view that the court created a theoretical possibility of achieving secession, but then imposed so many obstacles as to make its achievement a practical impossibility.

The court provided leadership that had been wanting among Canada's political and intellectual elites. This is one of those rare occasions when the court did something few would have predicted.

THE DUTY TO NEGOTIATE: UNANSWERED QUESTIONS

Readers of this issue will also discover that the court's assertion of "the duty to negotiate" — the pivotal concept in its decision — is anything but clear and straightforward. Stanley Hartt, who served as chief of staff to former Prime Minister Brian Mulroney, makes the powerful point that in the event that negotiations were undertaken and failed to produce an agreement amid charges of bad faith, this could, in fact, lead directly to a unilateral declaration of independence by Quebec. If Quebec contested the legitimacy of Ottawa, nothing would prevent it from outright secession. The possibility of such an outcome, Hartt argues, would maximize uncertainty and unpredictability, a state of affairs that serves no one's interests. So good faith bargaining as defined by the court is too open-ended and imprecise when push comes to shove. Don't expect that the court has settled this issue in any definitive sense of the term.

Another equally contentious issue left in abeyance by the court's decision is who has a right to participate in the negotiations as envisaged by the Supreme Court. According to the Université de Montréal's José Woehrling, the court's judgment supports the view that the negotiations on secession must be conducted bilaterally, between Quebec and the rest of Canada, rather than multilaterally, between Quebec, on the one side, and each province and the federal government. Mark one for Quebec.

But the University of Saskatchewan's Donna Greschner comes to precisely the opposite conclusion: not only has the court required the involvement of the other provinces, but she suggests that provincial *legislatures* are likely to play a direct role in the process. Given their status as parties, they will have the right to initiate constitutional amendments directly in any negotiations should Quebec decide to secede.

The court's judgment also took a major step in recognizing the rights of Canada's First Nations to be at the negotiating table. For Quebec lawyer Paul Joffe, the court went very far in recognizing that aboriginal peoples living in Quebec are "political actors" who have a right to participate in secession negotiations. Joffe also interprets the court's judgment as establishing that boundary issues are a legitimate matter for negotiations and that the international law principle of *uti possidetis juris* could not be relied upon by Quebec to conserve the province's current boundaries.

NO KNOCK-OUT BLOW

If Ottawa went to the court with three narrow questions, expecting a legal knock-out, it didn't get it. The court did not give three simple answers to three deceptively simple queries. In a way that no one could have predicted, the Supreme Court took a very different tack in "internationalizing" the process leading to potential Quebec secession. As Daniel Turp observes, the court envisages the international community as being directly involved in the secession process, in the sense that other states will (according to the court) monitor the negotiation proceedings to ensure that the domestic Canadian parties are meeting their constitutional obligations. Turp highlights the court's statement in paragraph 103 of its judgment to the effect that other states would be more likely to recognize an independent Quebec if it had declared sovereignty in the face of bad faith conduct by Canada.

It is not at all clear, however, how or whether other states would make such a judgment. Indeed, in the court's answer to question two, dealing with secession in the context of international law, the court notes that "international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of states" (paragraph 122). In fact, just seven paragraphs after having predicted that international states would be more inclined to recognize an independent Quebec in the event that Canada refused to negotiate secession in good faith, the court expresses the seemingly contradictory view that it is "wary of entertaining speculation about the possible future conduct of sovereign states on the international level." The court explains that it will not

engage in such speculation because "the Reference questions are directed only to the *legal* framework within which the political actors discharge their various mandates" (paragraph 110).

INTERNATIONAL PERSPECTIVES

Numerous commentators have suggested that the Supreme Court's judgment is likely to be widely read elsewhere and to establish an important international precedent on secession. That prediction seems to be confirmed by the papers contributed by three French jurists (Hamon, Emeri, and Avril) and two Belgian legal scholars (de Bruyker and Corten). Professor Francis Hamon of Faculté Jean Monnet, Université de Paris XI, suggests that the Supreme Court's decision constitutes an important precedent that could, in the future, be invoked to support other separatist demands in other countries. Hamon describes the Supreme Court as "daring" in confirming that a referendum can give rise to a constitutional obligation to negotiate, but he also describes the court as being cautious in describing the way in which this principle would be applied. Hamon also regrets that the court did not provide greater clarification of certain key points, such as what would constitute a clear majority or a clear question.

Professor Claude Emeri of the University of Paris praises the court's decision as a wise one. He also suggests that it backfired on the federal government, which had hoped to delegitimize the referendum as a method of achieving secession. Professor Emeri says the court has provided a remarkable lesson in constitutional and political theory, which brings honour to the members of the court. As for Professor Pierre Avril of the Université de Paris II et Institut d'études politiques de Paris, he likens the court's intervention to that of an arbitrator between the political actors, an intervention that may well take the heat out of a political controversy. However, he cautions that there are risks in the court assuming this role, particularly the possibility that the court will be tempted to take an activist stance, and to impose as a legal requirement the political solutions that the judges deem opportune.

Numerous commentators have suggested that the Supreme Court's judgment is likely to be widely read elsewhere and to establish an important international precedent on secession. That prediction seems to be confirmed by the papers contributed by three French jurists and two Belgian legal scholars.

Professor Olivier Corten of the University of Brussels is critical of the court's treatment of international law on secession, arguing that the court attempted to transpose the domestic norms of Canada into binding rules of international law. He argues that international law is neutral with regard to secession, with the only relevant question being whether the secession is successful as a matter of fact. Professor de Bruyker of the University of Brussels is also critical of the court for imposing a requirement of a "clear majority" in a referendum before secession negotiations can be triggered. He describes this as a political assessment that has been transformed into a legal rule, and one that is not likely to produce a legal solution to a process that is, at bottom, revolutionary in nature.

THE CONTINUING LEGACY OF 1982

André Joli-Coeur, the *amicus curiae* appointed by the Supreme Court to present arguments favouring Quebec's right of unilateral secession, conceded in his argument before the court that Quebeckers are not an oppressed people. Joli-Coeur noted the presence of senior Quebeckers in the highest echelons of the Canadian state, including the office of the prime minister as well as the Supreme Court itself. Nevertheless, Laval political scientist Guy LaForest maintains that the court was remiss in failing to consider whether Quebec's internal right to self-determination is *significantly* thwarted (as opposed to being totally denied) in the Canadian political system. LaForest challenges the legitimacy of a constitution that was imposed on Quebec in 1982 and that Quebec still refuses to sign. "Quebec, and all the provinces for that matter, are placed at the mercy of Ottawa," including "the judicial system, Senate, reservation and disallowance as well as its spending powers." Challenging the right of a Canadian national institution to define the terms upon which Quebec's right to self-determination could be exercised, Professor LaForest went so far as to label the Supreme Court the "new Judiciary Committee of the Privy Council," an institution, in his view, that cannot act impartially in assessing Quebec's claims to sovereignty.

For provincial rights advocates, the court's judgment muddied the constitutional waters in another fundamental way. It did not clarify what a clear question was, what a clear majority should be, or what constituted "good faith" bargaining if the country was on the verge of dividing in two. The fictitious "Manning memo" from "former Prime Minister Preston Manning" (but written by Alan

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Cairns) issued on March 15, 2010 complains that the court's judgment focused exclusively on the interests of the province of Quebec in the secession process. Thus the court must accept principal responsibility for failing to give voice to the interests of "New Canada" in the process whereby the latter was created.

PLAN A: TWO PROTOTYPICAL IDEAS

If Canadians are to move beyond the present impasse, the crucial challenge remains reconciling the competing nationalisms of Quebeckers, aboriginal peoples, and Canadian federalists across the country within a single-nation state. In the opinions of virtually all our participants, the court's judgment signalled the renewed importance of plan A — efforts aimed at renewing the federation — as opposed to plan B — preparations for secession. But it has never been easy to find a plan A that fits all. Shifting gears will, therefore, also require a fundamental shift in political strategy for all national political actors.

While the justices do not provide either a road map or a clearly articulated set of new constitutional principles for plan A, they do in fact create the political space needed for its preparation. In the days ahead, Canadians will have to consider new kinds of institutional arrangements for sharing power, renewing federalism, and identifying the first principles of union. From opposite ends of the political spectrum there are at least two prototypical schemes on offer.

For the Fraser Institute's Gordon Gibson, one vision of plan A is the rapid devolution of authority away from the federal government in favour of the provinces, local government, and the private sector. Gibson argues that decentralization based largely on market principles is consistent with the experience of countries around the world under the influence of technology and globalization. Gibson favours "amending the arrangements of federalism in such a way that the main goals of the sovereigntists could be achieved *within* the union." The Gibson approach is consistent with the social union proposals put forward by the premiers at their Saskatoon meeting in August 1998, in which new federal social programs would be subject to a provincial right to opt out.

In contrast, York University political scientist Barbara Cameron presents a very different vision of reconfederation based on the social market. If she is right that Canadians outside of Quebec do not favour further limits to federal authority — such as provincial control over the federal spending power — then we should take seriously her basic contention that there is a different plan A in the offing.

Her starting premise is that Canadians want a social union with a strong federal government, which will set national standards and redistribute resources between the rich and the poorer provinces. To meet this need, Cameron proposes that the federal government affirm its constitutional authority to exercise its spending power in areas of exclusive provincial jurisdiction, "accompanied by the announcement of major new initiatives to these areas of jurisdiction to mark the commencement of the post-deficit era and the dawn of the new millennium." Cameron also recognizes the right of a province to opt out of federal programs with full compensation, but only if the province holds a referendum and on the condition that the federal MPs from an opted-out province not vote on measures directly relating to the matters in question.

> **In our judgment it will not be possible for Mr. Bouchard to avoid a referendum during the current mandate. The "winning conditions" formula, then, should be seen primarily as his chosen strategy to allow Mr. Bouchard maximum flexibility to choose the date and circumstances of the referendum.**

AN UNCERTAIN FUTURE

Although the court was not expected to solve all of our problems, it has created a measure of common ground in the debate over the country's future. It is in this space where debate and dialogue can occur between sovereigntists and federalists, which is, in the end, no mean accomplishment.

The unexpected closeness of the Quebec election has put the issue of a sovereignty referendum on the political back burner for now. Yet, in our judgment it will not be possible for Mr. Bouchard to avoid a referendum during the current mandate. The "winning conditions" formula, then, should be seen primarily as his chosen strategy, allowing him maximum flexibility to choose the date and circumstances of the referendum. This cannot bode well for Canada. Despite polls that indicate that most Quebeckers would prefer to put off another referendum indefinitely and that a narrow majority would vote "No" if the 1995 question were posed again, English Canada is just not ready. It still does not have a plan A to renew federalism and without this foundation stone on the table, almost everything else is in doubt.

The duty to negotiate continued from page 1

sembly was empowered to proclaim Quebec as a sovereign state as soon as the negotiations for "a new economic and political partnership" were completed, or as soon as negotiations proved fruitless.

The terms of the proposed new economic and political partnership were set out in "the agreement signed on June 12, 1995" (which was an agreement between the leaders of Quebec's three separatist parties). These terms stipulated a partnership council, which would be a layer of government above the Parliament of Canada, in which Quebec and Canada would be equally represented, and in which the Quebec members would have a veto over Canadian policies on a wide range of matters including customs, mobility of persons, goods and services, monetary policy, and citizenship. Not a single person outside Quebec, let alone a government, would agree to any such arrangement. Therefore, it was certain that the negotiations would fail, and the National Assembly would unilaterally proclaim Quebec's independence.

The stunningly new element that the Supreme Court of Canada added to the constitutional law of Canada in its opinion in the *Secession Reference* was the existence of the obligation to negotiate.

THE 1995 REFERENDUM

The 1995 referendum proceeded on the assumption that a unilateral declaration of independence would be legally effective in removing Quebec, with its present boundaries, from Canada without the need for any amendment of the constitution of Canada and regardless of whether the terms of separation were agreed to by Canada. This extraordinary claim was not challenged by the federal government of Prime Minister Chrétien before or during the referendum campaign. The claim was challenged by a private citizen, Mr. Guy Bertrand, who obtained a declaration from the Quebec Superior Court that Quebec had no power to proclaim itself independent in disregard of the amending procedures of the constitution (*Bertrand v. Quebec* (1995), 127 DLR (4th) 408 (Que. SC)). However, the court refused to issue an injunction to prohibit the holding of the referendum, and the referendum proceeded as scheduled, yielding the narrow "No" majority that has already been described.

The attorney general of Canada had refused to participate in the *Bertrand* proceedings, leaving to a private citizen the role of protecting the territorial integrity of the nation. Eventually, after nearly losing the referendum, and facing the prospect that another referendum on secession would eventually be held in Quebec, the federal government did come to appreciate the merit of securing a legal ruling on the validity of a unilateral declaration of independence. That appreciation led to the *Secession Reference*. The federal government directed a reference to the Supreme Court of Canada asking whether Quebec could secede unilaterally from Canada.

Three questions were put to the court. The first asked what was the position under the constitution of Canada, to which the court replied that unilateral secession was not permitted. The second question asked what was the position under international law, to which the court gave the same answer. The third question, which asked what was the position if the constitution of Canada and international law were in conflict, did not have to be answered.

THE THREE QUESTIONS

The Supreme Court of Canada in the *Secession Reference* held that the secession from Canada of a province could not be undertaken in defiance of the terms of the constitution of Canada. The principle of the rule of law or constitutionalism requires that a government, even one mandated by a popular majority in a referendum, still obey the rules of the constitution. A secession would be an amendment of the constitution of Canada, and would have to be accomplished in accordance with the constitution's amending procedures. The court was not asked to determine which of the amending procedures was the correct one, and it expressly refrained from doing so. However, the procedure would involve the participation of the federal government and the other provinces. It followed that Quebec's secession would need to be negotiated with the federal government and the other provinces, and could not be accomplished unilaterally.

This is straightforward constitutional law (although it had always been denied by the Parti québécois government of Premier Bouchard), but the court did not stop there. The court said (at paragraph 88) that a referendum in Quebec that yielded a "clear" majority on a "clear" question in favour of secession, while ineffective by itself to accomplish a secession, "would confer legitimacy on demands for secession" and "would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire." The court found this obligation to negotiate in the "unwritten" principles of the constitution, in particular, the fundamental principles of "democracy" and "federalism."

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The actual negotiations would have to proceed in accordance with these two principles, along with the equally fundamental principles of "constitutionalism and the rule of law, and the protection of minorities." The way in which these vague principles would govern negotiations was not made clear, but they seemed to add up, in the view of the court, to an obligation on each side to negotiate in good faith. The court acknowledged that the complications of a secession were such that "even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse," but the court reaffirmed that the constitution required an amendment, which required a negotiated agreement, and the court (at paragraph 97) refused to "speculate" about what would transpire if an agreement was not achieved.

"GOOD FAITH" NO EASY ANSWERS

What was to happen if one side refused to negotiate or did not do so in good faith? Or, to pose the question differently, how is the constitutional obligation to negotiate to be enforced? The court acknowledged (at paragraphs 97-102) that "where there are legal rights there are remedies," but went on to suggest that in these circumstances the only remedies might be "political." The court said that it "has no supervisory role over the political aspects of negotiations." These political aspects included the question of whether the referendum had yielded "a clear majority on a clear question" (which is the fact that gives rise to the obligation to negotiate) and the question of whether the different parties were negotiating in good faith (that is, adopting negotiating positions that were in accord with the underlying constitutional principles). What were the "political" sanctions for a failure to negotiate or to negotiate in good faith? The court did not say, except to note (at paragraph 103) that any such failure might have "important ramifications at the international level," undermining the defaulting government's legitimacy in the eyes of the international community.

Even without the court's ruling, the political reality is that the federal government would have to negotiate with Quebec after a majority of Quebec voters had clearly voted in favour of secession.

The court did not close its eyes to the possibility that a *de facto* secession might take place without the required agreement or the required amendment. Such a secession would be unconstitutional. However, an unconstitutional secession could become successful if the seceding government achieved effective control of a territory and recognition by the international community. In that case, the constitutional law of Canada would eventually have to recognize the reality. This was the principle of effectiveness (the court coined the word "effectivity"). In that way, a unilateral secession might ultimately become the successful root of a new state. The principle of effectiveness was only briefly discussed by the court (at paragraphs 106-108 and 140-146), but it would, of course, become of great importance in the event of a failure of negotiations.

A STUNNING NEW ELEMENT

The stunningly new element that the Supreme Court of Canada added to the constitutional law of Canada in its opinion in the *Secession Reference* was the existence of the obligation to negotiate — an obligation on the part of all parties to the amending procedures to use their best efforts to negotiate an agreed-upon amendment in the event that the people of Quebec voted to secede by a clear majority on a clear question. As a matter of strict law, however, it is not easy to see where the obligation comes from. The vague principles of democracy and federalism, which were relied upon by the court, hardly seem sufficient to require a federal government to negotiate the dismemberment of the country that it was elected to protect.

In the United States, the attempt by the southern states to secede in 1861 was opposed by the federal government and crushed by war. In Canada and Australia, more cautious attempts to secede by Nova Scotia in 1868 and by Western Australia in 1934 were successfully opposed by the federal government (Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997), 136). Although the secession of the southern United States was complicated by the slavery issue, there is no doubt that the secessionist movements in the Confederacy, Nova Scotia, and Western Australia enjoyed the support of a majority of the people in those regions. Yet this fact was not regarded as sufficient to justify federal cooperation or even acquiescence. If the Supreme Court's new rule had applied to these earlier precedents, presumably the Confederacy, Nova Scotia, and Western Australia would have become new nation states.

There is no historical basis for the proposition that a referendum in the province that desires to secede should impose an obligation of cooperation on the other parties to the amending procedures. However, this is now the law of Canada. Is that a bad thing? Even without the court's ruling, the political reality is that the federal government would have to negotiate with Quebec after a majority

of Quebec voters had clearly voted in favour of secession. It is safe to say that there would be little political support for a policy of attempted resistance to the wish of the Quebec voters. The court's decision simply converts political reality into a legal rule. Indeed, it is not entirely clear why it is a *legal* rule, since it appears to have no legal sanctions.

Moreover, by crafting a decision that was pronounced acceptable by the government of Quebec, the court seems to have caused a public renunciation of the theory, so frequently and dogmatically asserted by the premier of Quebec before the decision, that no constitutional law could stand in the way of the wish of a majority of Quebeckers. It is not easy to see how Quebec could repeat the 1995 assertion of a right of unilateral secession from Canada. Given the potential for chaos and disorder in a secession that has not been accomplished in compliance with the law, the court has conferred a benefit on the nation by causing the leaders of the Parti québécois to rule out that course of action. ❖

A court for all seasons continued from page 23

statements in the history of the Quebec Liberal Party. The *Pepin-Robarts Report* was ahead of its time in this regard as well. Most proposals from English Canada, such as those of the *Group of 22* have been more modest, though my *Thirty Million Musketeers* sets out a more ambitious agenda. The European Union concept of *subsidiarity* is a common touchstone.

The usual concerns about plan A, once the dialogue gets beyond annoyance at Quebec for forcing us to think about such things, are the "slippery slope" or "critical mass" arguments. "With significant devolution," goes the concern, "will there be enough left at the centre to continue a robust entity called Canada?"

GETTING ON WITH IT

So, in operational terms, what to do? In reverse order, the plan A activity in the federal legislature will be restricted to the official opposition, which is currently the Reform Party. Should the so-called united alternative come into being with significant non-Reform support and adopt Reform policies on this file, it would be an important message to and option for the Canadian people. However, in the short term, the federal government still relies on plan B, and need not call an election for three and a half years.

The provinces are showing interesting activity in developing a new vision of the federation, above all in the social union area. Equally fascinating, the Quebec government of Lucien Bouchard has become an active player in this game, risking (in a sense) proving that the federation can work. Can any student of federalism fail to have noted that, while Mr. Bouchard talks of sovereignty and a new referendum, he also talks of an amendment to the existing constitution of Canada re: opting out? Mixed messages indeed.

Through the smoke, one thing is very clear. The provinces are working together in a way that is absolutely unprecedented in the history of this country. They remain tentative and even fearful about developing their own vision of the federation — their own plan A — but they are moving inexorably in that direction.

The missing ingredient in all of this is the leadership of ideas that should be coming from the remaining prime mover, the academic community. It is always easier for politicians to watch reactions to the ideas of others, rather than take the risk of advancing their own. With some honourable exceptions, that sort of leadership on a plan A has been lacking.

CONCLUSION

The court has cut away the foundations of plan B, and with the Parti québécois victory in the Quebec election at the end of November, there is an urgent need for a plan A. Even had the Quebec Liberal Party won, we would have quickly come to understand that they too would have settled for nothing less.

But to look at things in a constructive way, Quebec is only the engine on this journey, not the driver. Are we up to the imagination, the flexibility, the successful adaptation required to preserve this country? In its ruling, the Supreme Court explicitly left all such questions — rightly — as political issues. That is the court's real challenge to the rest of us. ❖

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1 "Plan B" has become the shorthand for the stonewall, scorched earth, "You can't do it" stance, which argues that the separation of Quebec would be politically, economically, and legally very unwise, and virtually impossible to achieve. "Plan A" (or "plan C" in some formulations) addresses a different agenda — namely, "What acceptable amendments to the Canadian federal structure, if any, would reduce sovereigntist support and secure the union?"

2 The ability to effect a UDI is an essential ingredient in the sovereigntist strategy, in response to a plan B stonewall. If there is no "or else," there will be no bargaining in such a situation. For a secessionist, bargaining without a UDI option would be like a trade unionist bargaining without a strike option.

3 Stated by the court to be federalism, democracy, the rule of law, and respect for minorities.

4 Powers to prohibit provincial restraint of interprovincial trade are a common theme, for example.

A ruling in search of a nation continued from page 22

ism, which would include a true recognition of Quebec's difference.

In the federal government's eyes, the only solution to the Quebec issue lies in the election of Jean Charest. This hope demonstrates an unbelievable inability to understand the seriousness and complexity of the situation. Not all Quebeckers agree with the demands of the PQ government in terms of political autonomy, but the great majority wish that the federal government and the ROC would finally understand that the Quebec issue is not an ephemeral one confined to language. Quebec is a multicultural society where 85.3 percent of all French-speaking Canadians reside; a society living its public life in French, just as much as English Canada is a multicultural society living its public life in English. Nonetheless, Quebeckers want Ottawa to understand and explain to the rest of Canada that such a difference does entail political consequences that would not threaten the existence of our nation, but that would actually enhance it.

The blindness of the federal government remains bewildering to a federalist such as myself. Although I do not share the desire of the separatists, I can see that the divide between the respective collective memories of Quebec and the rest of Canada grows consistently wider as time passes. I fear that the inability of the federal government to grasp the extent of the problem, let alone be an advocate of a new understanding, will accelerate the disintegration of this country.

A partnership proposal continued from page 25

This declaration would be accompanied by the announcement of major new initiatives in these areas of jurisdiction to mark the commencement of the post-deficit era and the dawn of the new millennium.

2. An offer to any province to opt out of federal programs with compensation in the area of social programs, post-secondary education, and labour market policy on two conditions:
   a. the government receives a mandate from the electorate of the province in the form of a majority referendum vote to opt out; and
   b. members of Parliament from a province that has opted out will not vote on measures that directly relate to these areas of jurisdiction. (This condition would have to be contained in the referendum).

> **To win support outside Quebec, a partnership proposal would need to link recognition of the national rights of Quebeckers and aboriginal peoples to the protection and expansion of the social and democratic rights of Canadians in English-speaking Canada.**

THE CHALLENGE TO PROVINCIAL GOVERNMENTS

Such a scenario is possible within the framework of existing federal arrangements and is even consistent with the notion of "provincial equality." However, at the same time, it requires any provincial government demanding the provincialization of federal responsibilities to demonstrate that it has a popular mandate for its claims. It also prevents the electorate of an opted-out province from having a say over federal programs affecting citizens of the non-opted-out provinces.

My expectation is that the likely outcome of such a proposal would be that only the electorate of Quebec would vote by a majority of 50 percent plus one to opt out of federal programs. Even here, though, the combination of a federal commitment to expand social rights and the reduction in representation in the federal Parliament would give Quebeckers an interesting choice. If they did vote to opt out, then the federal Parliament would represent English-speaking Canada with respect to federal involvement in the areas of social programs, post-secondary education, and labour market policy. This form of asymmetry might be transitional to the development of other institutional arrangements reflecting an explicit partnership between Quebeckers and Canadians in English-speaking Canada.

It is possible that Canadians in provinces other than Quebec would vote to opt out of federal programs with compensation, thereby losing representation with respect to these matters in the federal Parliament. This would be undesirable but much preferable to the current situation where provinces are reaching a hodge-podge of different arrangements with the federal government through administrative agreements of which the average Canadian has no knowledge. Canadians in English-speaking Canada would at least have been given the chance to debate and choose democratically the institutional arrangements under which they wish to live instead of having the decisions made for them by unaccountable elites working through irresponsible institutions of executive federalism.

What can small provinces do? continued from page 24

straightforward manner? Of course, the court could not forsake outright the principle of equality of the provinces without overtly rejecting s. 41 of the *Constitution Act, 1982*, which it does not do. I have argued elsewhere (see "The *Quebec Secession Reference*: Goodbye to Part V?" (1998), 10 *Constitutional Forum* 19) that, in the secession context, the court's opinion softens considerably the application of the part V amending rules, including s. 41. However, politicians need clear statements to influence public discourse quickly, not complex arguments based on implications and inferences. From that perspective, the opinion is unhelpful. It does not categorically reject the principle of equality of the provinces, nor explicitly support or reject a multinational conception of federalism, whether two nations or more.

[P]rovinces need to ponder now what they hope to achieve. They will not be able to rely on their legal rights to command attention.

At best, the court offers meagre words and tacit references on which to pin a political argument that it has diluted the principle of equality of the provinces. In narrating Confederation history, the court quotes approvingly from Cartier's articulation of the new political nationality that would emerge from the federation of "different races" — today we would say "different nations" — and describes federalism as the "political mechanism by which diversity could be reconciled with unity" (paragraph 43). Later, in discussing the federalism principle, the court states that federalism "recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction" (paragraph 58). While this passage appreciates that Canada was not composed of homogeneous units, it does not accord any *distinctive* place to Quebec.

The court also states that federalism "facilitates the pursuit of collective goals by cultural and linguistic minorities that form the majority of the population within a particular province. This is the case in Quebec, where the majority of the population is French speaking, and which possesses a distinct culture" (paragraph 59). While this passage, standing alone, could contribute to a multinational conception of Canada, in the very next paragraph the court explains that other provinces welcomed federalism for the same reason, implying that all provinces had identical motivations and hence lending support to an equality of provinces view. The court does say that Quebec has a "distinct culture" (paragraph 59) while Nova Scotia and New Brunswick welcomed federalism to protect their "individual cultures" (paragraph 60), and it mentions the French language only in reference to Quebec. Overall, the opinion does not help politicians prepare the soil for public acceptance of an agreement that recognizes, in one way or another, the unique place of Quebec.

GETTING READY

If plan A and plan B both fail, and a Quebec referendum triggers the duty to negotiate in the secession context, small provinces will find themselves at the secession negotiating table. These negotiations will be difficult and controversial. They may begin with efforts to negotiate new federal arrangements, and they will likely be accompanied, at some stage, by plan C negotiations to establish a new country, Canada without Quebec.

Small provinces should immediately start preparing for all forms of negotiations. Once the negotiations begin, they will likely proceed very quickly. Time will be short, and provinces need to ponder now what they hope to achieve. They will not be able to rely on their legal rights to command attention. Their influence will depend on their creativity, wisdom, nimbleness, and overall persuasiveness, all of which are enhanced by good preparation.

Their power will also depend on their allegiances. One small dissenting province may be easily labelled as breaching its constitutional duty to abide by principles, but it is harder to dismiss two or three small provinces who unanimously complain about a particular position. Perhaps if small provinces begin the hard work of moving away from the political rhetoric of the principle of equality of the provinces, and at the same time prepare for secession and plan C negotiations, other provinces will wisely follow suit.

Anglophone media continued from page 26

its balance — should prevent Lucien Bouchard from playing the humiliation card to electoral effect. At the same time, the prospect of tough negotiations with their Canadian partners will force sovereigntists to discuss the costs of separation realistically with the Quebec electorate.

Canadians have good reason to be proud of the passionate yet lucid and extraordinarily peaceful manner in which the debate over separatism has been waged for four decades. Such pride should be enhanced by this new chapter in the long-running Quebec–Canada saga that, however wearying we sometimes find it, has defined our country in our time.

« L'arroseur arrosé »

PAR CLAUDE EMERI

Claude Emeri, Professeur à Paris I et à l'Université des Antilles-Guyanne

Lu en Guadeloupe, le renvoi relatif à la sécession du Québec aurait pu rappeler une inquiétante vérité première exprimée il y a quelquess années par un militaire haïtien : « Konstitisyon, sé papyé! » (« Les constitutions sont en papier, mais les baïonnettes sont en acier »). Une version antérieure inspirait le constituant français de 1793 : « Un peuple a toujours le droit de revoir, de réformer et de changer sa Constitution. Une génération ne peut assujettir à ses lois les générations futures » (DDHC, art. 28). Réinsérer ces vérités premières dans l'histoire récente des relations tumultueuses entre le Canada et le Québec, c'est poser la question qui, aux yeux d'un Français, est la seule vraie et politiquement adéquate : le référendum de 1995 a mobilisé plus de 94% des électeurs québécois; peu importe qu'ils aient voté pour ou contre la proposition qui leur était soumise, la vérité est qu'ils ont considéré que la réponse qu'ils donnaient eux-mêmes était la seule légitime.

J'imagine le renvoi articulé par le gouvernement fédéral comme une politique préventive indispensable pour la sauvegarde de l'unité canadienne : délégitimer le référendum provincial comme mode d'accès à l'indépendance, en lui opposant la rigidité constitutionnelle et la force du droit: en d'autres termes, déplacer le débat du terrain des urnes vers celui des codes. L'idée n'est pas sotte dans un système fédéral où les conflits de lois sont l'aboutissement naturel de divergences irrémédiables d'interprétation de l'étendue des compétences normatives. Où le juge est appelé en fin de compte à dire le dernier mot, comme « bouche de la Constitution ».

Judicieuse précaution, mais dont les effets prévisibles ne pouvaient être que calamiteux pour les agencements institutionnels d'un système politique dont les observateurs les plus indulgents reconnaissent l'immense fragilité — que sanctionne depuis quelques années l'implosion d'un système de partis fédéraux devenu littéralement ubuesque : « Le Canada est-il gouvernable? » interroge Julien Bauer; « existe-t-il? » demandions-nous dès 1984. Pour le moins, on peut craindre que toute atteinte portée à un château de cartes en perpétuelle quête de consensus minimal n'aboutisse à la crise majeure; et, de même que l'intrusion du référendum dans une construction représentative ébranle tout l'ensemble, l'appel à la Cour suprême était d'une grande témérité. Car l'amalgame droit/politique, inévitable en matière constitutionnelle, ne gagne rien à être tisonné sans précaution. Et si la légitimité de la Cour sort renforcée de ses arrêts en matière de protection des droits de la personne et/ou des minorités, elle risque de s'effilocher quand il lui est demandé d'adopter la posture d'un constituant de raccroc. D'autant que c'est un véritable droit de veto que lui délivrait le gouvernement fédéral. Fort heureusement, elle a contourné le champ miné sur lequel le renvoi la dirigeait en rendant un avis astucieux, particulièrement sympathique pour le lecteur étranger dont le coeur balance entre les arguments de Québec et d'Ottawa.

Fort heureusement, elle a contourné le champ miné sur lequel le renvoi la dirigeait en rendant un avis astucieux, particulièrement sympathique pour le lecteur étranger dont le coeur balance entre les arguments de Québec et d'Ottawa.

La Cour accepte son implication dans la politique institutionnelle par la réponse qu'elle donne à la question de compétence soulevée par l'*amicus curiae*; un Français s'en inquiète avant d'en repérer les limites implicites.

Chez nous, l'hostilité séculaire au contrôle de constitutionnalité est à ce point forte qu'il est entré presque frauduleusement dans la Constitution à travers un organisme hybride, le Conseil constitutionnel, de nature juridictionnelle en matière de contentieux électoral ou référendaire, mais à fonction normative dans l'élaboration de la loi où il dispose d'un droit de veto exercé sur la base d'un « bloc de constitutionnalité » dont il a tracé lui-même les contours. On n'imagine pas alors doubler ce droit de veto d'une fonction consultative qui placerait le Conseil à l'entrée et à la sortie de la chaîne normative, mettant ainsi en place « le gouvernement » non pas des juges, mais « de sages » politiquement labellisés exerçant une fonction consultative non explicitement exclue par les textes fondateurs, mais spontanément refusée par le Conseil quand elle lui fut proposée en 1961.

Au Canada, on conçoit qu'une juridiction coloniale subordonnée à Westminster ait pu être appelée opportunément à éclairer le Comité judiciaire du Conseil privé en exprimant des attentes locales éloignées. Depuis 1982, à nos yeux, dans le silence de la

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Vers un droit international public canadien

PAR OLIVIER CORTEN

Olivier Corten, Maître de conférences à l'Université Libre de Bruxelles, Centre de droit international et de sociologie appliquée au droit international

En affirmant que le droit international renvoie au droit interne pour apprécier la légalité de la sécession, la Cour écarte le principe même de la possibilité d'une contradiction entre les ordres juridiques international et canadien, et ce au profit du second. C'est du moins une lecture possible de l'avis, que je voudrais présenter brièvement dans le cadre limité de cette contribution.

Théoriquement, la réponse à la question deux était presque aussi simple que celle à apporter à la question un Dans son état actuel, le droit international positif reste neutre par rapport aux situations de sécession ou de guerres civiles quelconques. Il n'accorde une légitimité aux luttes pour l'indépendance que si elles relèvent du processus de la décolonisation, processus qui vise essentiellement des « territoires non autonomes » par définition géographiquement séparées de la métropole. Le Québec n'entre assurément pas dans cette catégorie, ne fut-ce que parce que son territoire est contigu ou selon le point de vue, géographiquement inclus au territoire canadien. Le peuple québécois n'a donc aucun droit à l'autodétermination, compris comme impliquant celui à la création d'un nouvel État. Mais la sécession n'est pas non plus interdite dans son principe, les règles protégeant les droits de la personne encadrant les modalités de la lutte.

La Cour ne s'est pas engagée dans cette voie. Elle a préféré suivre un raisonnement bien plus compliqué et, surtout, contestable juridiquement sur plusieurs points particuliers. Selon elle, la sécession serait implicitement prohibée par le droit international, dans la mesure où celui-ci consacre le principe de l'intégrité territoriale des États et où parallèlement, il renverrait au droit interne pertinent comme juge de sa légalité. La Cour évoque cependant certaines exceptions à cette interdiction, dont celle, avancée à titre d'hypothèse, qui donnerait un droit à un peuple, non colonial mais opprimé par le gouvernement de l'État sur le territoire duquel il se situe, le droit de s'en émanciper pour fonder un nouvel État sur une partie de ce territoire. Mais le Québec n'est pas un peuple opprimé, puisqu'il n'est pas victime d'atteintes à son existence, à son intégrité physique ou à ses droits fondamentaux, et que ses membres ont occupé et occupent des postes importants de gouvernement et de gestion dans le cadre de l'État canadien. Il n'a donc pas le droit à la sécession unilatérale.

Le raisonnement de la plus haute juridiction canadienne ne peut manquer de surprendre le spécialiste de droit international. La Cour transforme un régime de neutralité : la sécession n'est ni interdite, ni permise, en un régime légitimant le pouvoir exclusif de l'État : la sécession est implicitement interdite. Elle transforme ensuite la règle, stricte, du droit à l'autodétermination au profit des peuples coloniaux en une exception élargie qui englobe, à tout le moins au titre d'hypothèse, le droit à la sécession pour tous les peuples opprimés.

En réalité, la Cour n'a pas véritablement traité les problèmes qui étaient soulevés par le traitement de la deuxième question. L'extension éventuelle du droit des peuples à l'autodétermination (compris comme un droit à l'indépendance) en dehors des situations liées à la décolonisation n'a été évoquée qu'à titre d'hypothèse, sans qu'aucune conclusion ne puisse être tirée sur le fond. En tout état de cause, la haute juridiction s'est contentée de procéder par affirmation, en suivant un syllogisme aux prémisses erronées, qui n'a pu mener qu'à une conclusion finalement mal assurée parce que détachée de ses bases légales établies. Comment peut-on comprendre pareille stratégie rhétorique, étant entendu que, en tout état de cause, la Cour ne pouvait, ni politiquement ni juridiquement, répondre par l'affirmative à la question qui lui était soumise? À mon sens, la Cour a, dans le cadre de la première comme de la deuxième question, tenu à affirmer la primauté et validité du droit constitutionnel canadien. Toute l'analyse de droit international revient en effet, en définitive, à renvoyer à l'ordre juridique canadien comme cadre de référence pertinent et approprié, un renvoi d'ailleurs explicite, lorsque la Cour croit pouvoir indiquer que « le droit international renvoie au droit interne de l'État [. . .] pour la détermination de la légalité de la sécession, et [. . .] le droit de cet état considère inconstitutionnelle la sécession unilatérale » (par. 143). L'affirmation ne repose sur absolument aucune base juridique en droit international positif, et est opérée sur la base d'un extrait dans lequel un internationaliste constate que le droit international « laisse » le droit interne régir la question, ce qui est tout différent et est parfaitement conforme au principe de neutralité. Ce renvoi explique les gesticulations intellectuelles auxquelles la Cour se livre dans une autre partie de l'avis. L'affirmation de l'interdiction implicite de la sécession, la référence à une nouvelle exception à cette supposée interdiction, la définition prétorienne d'un nouveau concept de « peuples opprimés » : tous ces mécanismes ne servent en définitive qu'à affirmer que le peuple québécois dispose de tous ses droits, mais unique-

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Réponse paradoxale pour une question absurde

PAR PHILIPPE DE BRUYKER

Philippe de Bruyker, Directeur du Centre de droit public de l'Université Libre de Bruxelles

On comprend mal le sens d'une obligation de négocier s'il est acquis que l'une des parties est juridiquement fondée à refuser d'accéder aux prétentions de l'autre.

La Cour commence par considérer que la sécession du Québec n'est qu'une modification de la Constitution et que, malgré sa radicalité, celle-ci est autorisée si des négociations menées conformément à la Constitution débouchaient sur un accord en ce sens entre toutes les parties intéressées. Après tout, une telle réponse n'était pas aussi évidente que cela. Des juristes en chambre discutent parfois de l'existence de dispositions constitutionnelles non révisables. De plus, il y avait fort à parier que les gardiens de la Constitution canadienne se contentent de relever lapidairement que, dans le silence des textes, la sécession est purement et simplement interdite. La Cour affirme au contraire qu'un rejet par le Québec de l'ordre constitutionnel existant au terme d'un référendum conférerait légitimité aux revendications sécessionnistes et imposerait aux autres provinces et au gouvernement fédéral l'obligation de prendre en considération cette aspiration en engageant des négociations. Elle condamne ainsi fermement les positions de ceux parmi les fédéralistes qui considèrent que l'éventualité d'une sécession à la demande du Québec est une question qui n'a même pas à être discutée.

Il est fondamental de relever que la Cour apprécie ensuite le caractère unilatéral de l'acte de sécession par rapport à l'obligation de négocier préalablement cette éventualité, alors que l'unilatéralité renvoie plus fondamentalement à l'idée d'une prérogative pouvant être mise en oeuvre sans l'accord d'une autre partie concernée. Si la sécession unilatérale n'était interdite qu'au sens procédural du terme que la Cour paraît privilégier, on devrait logiquement pouvoir en déduire qu'une demande de sécession qui ne serait plus unilatérale parce qu'introduite par le Québec à la suite de négociations, serait légale, même en cas d'échec des négociations. Or, même si la Cour a évité de formuler sa réponse négative en droit canadien à la première question de manière aussi brutale qu'elle le fait à la seconde question relative au droit international, il ressort indubitablement de l'avis que le Québec n'a pas le droit de faire sécession unilatéralement et que celle-ci est donc inconstitutionnelle si toutes les parties intéressées ne parviennent pas, selon les procédures prévues, à s'accorder sur une telle éventualité. On comprend mal le sens d'une obligation de négocier s'il est acquis que l'une des parties est juridiquement fondée à refuser d'accéder aux prétentions de l'autre.

La Cour fait certes le pari que les négociateurs s'accorderont, soit que le Québec renonce à ses prétentions devant les difficultés qui s'annoncent, soit que le reste du Canada accède à une demande de sécession parce que ses conséquences auraient précisément été négociées. Elle tente ainsi d'écarter l'idée qu'un désaccord pourrait subsister au terme des négociations. Dès lors que cette éventualité est pourtant plus que probable, l'obligation juridique de négocier imposée par la Cour risquerait de ne déboucher que sur un cirque dans lequel les représentants du Canada n'auraient comme seule obligation qu'à faire semblant de négocier pendant un moment les conditions d'une demande québécoise à propos de laquelle il serait probablement dès le départ acquis qu'elle est inacceptable en son principe même.

Les juges fédéraux ont manifestement voulu éviter de servir trop ostensiblement leur maître en lui fournissant la réponse attendue qui ne pouvait être que négative sans l'enrober de considérations juridiques formulées dans le souci de ne pas heurter de front le Québec. On doit espérer que le Canada, confronté au risque d'une sécession qui serait inévitable au terme d'un référendum positif, s'apprête à accepter enfin de substantiels aménagements constitutionnels de la fédération de nature à contenter le Québec. Qui sait si le Québec ne pourrait pas dans ces conditions renoncer à une demande certes plus susceptible de satisfaire ses ambitions les plus radicales?

Il reste que si de nouvelles négociations constitutionnelles n'étaient pas engagées avec le Québec et qu'une majorité favorable à la sécession se dégageait dans cette province, le cadre juridique imaginé par la Cour suprême ne parviendra pas à encadrer un proces-

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La difficile « juridicisation » des questions politiques

PAR PIERRE AVRIL

Pierre Avril, Professeur Université de Paris II
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En ce qui concerne la démarche de la Cour, on retiendra tout d'abord qu'elle joue sur le double clavier « légalité/légitimité » comme elle l'avait fait en 1981 dans l'avis sur le Rapatriement.

Ce double registre permet à la Cour de donner partiellement satisfaction aux prétentions antagonistes en ne rejetant totalement aucune de leurs thèses respectives. En 1981, elle constatait que, selon le « droit de la Constitution » (pour parler comme Dicey), Ottawa avait juridiquement le pouvoir de demander à la Reine l'amendement de l'Acte de 1867, mais elle ajoutait que l'exercice unilatéral de ce pouvoir était limité par convention et requérait le consentement des provinces. En 1998, elle accorde à Ottawa qu'il n'existe pas de droit de sécession unilatérale en vertu de la Constitution ou du droit international, mais elle ajoute qu'une sécession *de facto* réussie, c'est-à-dire démocratiquement opérée, s'imposerait au gouvernement fédéral comme aux autres provinces.

Les considérations d'opportunité politiques sont évidentes. Organe fédéral, ainsi que l'a souligné Andrée Lajoie, la Cour a pris soin de limiter la portée de la reconnaissance de la légitimité démocratique en ne consacrant pas, dans son avis de 1981, la thèse du consentement unanime au rapatriement (« bien que les précédents favorisent l'unanimité » concède-t-elle), et en exigeant dans l'avis de 1998 « une majorité claire en réponse à une question claire », elle encadre donc l'expression démocratique en posant des conditions à son exercice.

Mais on ne saurait réduire à la seule opportunité, pour ne pas dire l'opportunisme, la distinction entre le droit positif et ce que l'on pourrait appeler, à la suite de Dicey, la « moralité constitutionnelle ». L'intérêt qu'inspire cette distinction au constitutionnaliste tient précisément au fait que la Cour reconnaît ouvertement que le droit positif n'a pas réponse à tout.

Tout en retenant que la Cour intervient ici dans sa fonction consultative, qui lui laisse une plus grande latitude que sa fonction proprement juridictionnelle, on est tenté de comparer sa méthode à celle du Conseil constitutionnel français statuant sur des questions mettant en cause directement la souveraineté démocratique, comme ce fut le cas pour les traités de Maastricht et d'Amsterdam. Après avoir constaté que certaines clauses des traités européens portaient atteinte aux « conditions essentielles d'exercice de la souveraineté nationale », le Conseil admit qu'il suffisait alors d'inscrire dans la Constitution les dérogations correspondantes pour que le droit soit satisfait. Il se plaçait sur le terrain de la seule légalité formelle, en se refusant à toute considération relative à la légitimité, fût-ce sous la forme d'un *obiter dictum* y faisant allusion. Cette démarche, conforme à la tradition juridique française (qui contraste avec la conception « substantielle » de la doctrine allemande), se garde d'empiéter sur les prérogatives du pouvoir constituant, mais elle révèle les limites d'une approche strictement positiviste.

En sens contraire, demander à la juridiction constitutionnelle de prendre position, fût-ce indirectement, sur le fond, c'est à dire d'émettre une appréciation politique, l'expose au grief d'usurpation. Et c'est de ce point de vue que la démarche de la Cour suprême mérite aussi de retenir l'attention.

La Cour a contourné le risque que présentait son intervention dans une affaire politiquement sensible (risque d'autant plus grand en 1998 qu'elle avait admis une compétence qui n'allait pas de soi), en prenant soin de distinguer son office de la responsabilité inhérente aux acteurs politiques, auxquels elle n'entend pas se substituer. Les termes de 1998 font à cet égard écho à ceux de 1981 de manière frappante. « Les conventions s'élaborent dans l'arène politique et il revient aux acteurs politiques, et non à cette Cour, de fixer l'étendue du consentement provincial nécessaire », écrivait-elle en 1981. Et en 1998 : « La tâche de la Cour était de clarifier le cadre juridique dans lequel les décisions politiques doivent être prises en vertu de la Constitution, et non d'usurper les prérogatives des forces politiques qui agissent à l'intérieur de ce cadre (...). Il reviendra aux acteurs politiques de déterminer en quoi consiste « une majorité claire en réponse à une question claire » (§ 153).

La Cour restreint donc doublement la portée de sa compétence, en marquant les limites du droit, qu'elle se borne à rappeler, au regard de l'exercice de ce droit, dont elle invite les acteurs à négocier les conditions.

Le travail de délimitation du droit et de la politique opéré par la Cour suprême me paraît d'autant plus intéressant que le rôle qu'elle acceptait de jouer, en se reconnaissant compétente pour constater l'existence d'une convention constitutionnelle dans l'affaire du Rapatriement, et en admettant sa compétence sur une question qui, par définition, remettait le droit positif en cause dans l'affaire du référendum, l'exposait au risque d'avoir à trancher juridictionnellement un conflit de nature politique, c'est-à-dire un conflit portant sur la modification du droit et non sur son application. Il ne s'agissait, certes, que d'un « avis » et

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Le potentiel démocratique des référendums

PAR FRANCIS HAMON

Francis Hamon, Professeur à la Faculté Jean Monnet, Université de Paris XI

Le raisonnement de la Cour suprême du Canada présente une grande originalité.

Elle aurait pu s'abstenir de tout commentaire sur l'éventualité d'un référendum car aucune des trois questions qui lui étaient posées n'y faisait directement allusion. Elle aurait pu également s'en tenir à une interprétation purement littérale de la Constitution canadienne et déclarer que, n'étant pas prévu par celle-ci, le référendum n'avait aucune espèce d'existence juridique, de sorte que le Gouvernement fédéral et ceux des provinces seraient en droit de l'ignorer. Mais elle a fait prévaloir l'esprit sur la lettre, en considérant que le système politique canadien était fondé sur la combinaison de plusieurs principes écrits ou non écrits (la démocratie, le fédéralisme et la séparation des pouvoirs). Il en résulte deux conséquences importantes : d'une part, le droit pour la Province du Québec d'organiser un référendum sur une sécession éventuelle dérive directement du principe démocratique et n'a donc pas besoin d'être rattaché à une attribution de compétence particuliére; d'autre part, bien que la sécession ne puisse pas être unilatéralement décidée, un référendum exprimant une volonté non ambiguë sur cette question représente quelque chose de plus qu'un simple voeu : la Cour lui reconnaît en effet une portée quasi normative puisque, sous certaines conditions, son résultat peut obliger les autorités fédérales et les autres provinces à négocier.

Sur ce point, la décision du 20 août 1998 constitue, me semble-t-il, un précédent important, dont l'intérêt ne se limite pas au problème de la sécession du Québec car il pourrait, à l'avenir, être invoqué à l'appui d'autres revendications indépendantistes, éventuellement même en dehors du Canada. Mais si la Cour suprême a fait preuve de beaucoup d'audace en affirmant que le référendum, même lorsqu'il n'est pas expressément prévu par la Constitution, peut être à l'origine d'une obligation de négocier, elle s'est montrée en revanche très prudente en ce qui concerne les modalités d'application du principe ainsi posé.

Sur ce point, la décision du 20 août 1998 constitue, me semble-t-il, un précédent important, dont l'intérêt ne se limite pas au problème de la sécession du Québec car il pourrait, à l'avenir, être invoqué à l'appui d'autres revendications indépendantistes, éventuellement même en dehors du Canada.

Dans sa décision, il est spécifié que « pour être considérés comme l'expression de la volonté démocratique, les résultats d'un référendum doivent être dénués de toute ambiguïté en ce qui concerne tant la question posée que l'appui reçu ». Mais, alors que, dans l'ensemble, les juridictions constitutionnelles ont de plus en plus tendance à préciser la portée de leurs décisions, en multipliant les directives ou les réserves d'interprétation, la Cour suprême canadienne se refuse à donner des indications concrètes sur la démarche à suivre pour que ces conditions soient effectivement remplies. Plusieurs points risquent d'être litigieux.

En premier lieu, on peut se demander ce qu'il faut entendre par un « appui dénué de toute ambiguïté » : sans doute la Cour a-t-elle voulu dire que la majorité en faveur de l'indépendance devait être suffisamment importante pour qu'on ne puisse pas la considérer comme accidentelle ou aléatoire. Mais où se situe exactement le seuil?

En second lieu, pour que la question posée soit elle-même dépourvue de toute ambiguïté, il faudrait que, au moment du vote, les citoyens soient parfaitement informés des conséquences d'une éventuelle accession du Québec à l'indépendance. Mais ces conséquences constituent également l'un des enjeux de la négociation à venir : il faudra donc que la question soit présentée en des termes suffisamment précis pour ne pas être équivoques et suffisamment généraux pour ne pas préjuger du résultat de la négociation; l'équilibre entre ces deux exigences serait peut-être difficile à trouver.

Enfin, la Cour a précisé que l'obligation de négocier ne signifiait pas que les parties devaient nécessairement

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« L'arroseur arrosé » suite de la page 38

Constitution, c'est le modèle étasunien qui aurait dû être retenu, d'autant plus qu'en bonne logique juridique les compétences ne se présument pas.

À vrai dire, il importe peu : l'intelligence de la Cour consiste à utiliser ce double veto à des fins pédagogiques et non proprement politiques, plaçant alors le gouvernement fédéral, finalement mal inspiré, dans la position peu glorieuse de l'arroseur arrosé ... en exprimant des vérités — juridiques — premières sur la suprématie constitutionnelle telles qu'on les imagine dans un séminaire de faculté de droit habilement conduit: 1) La Constitution énonce clairement les conditions dans lesquelles son amendement est possible, excluant donc par principe toutes les autres, dont la sécession unilatérale. Nul n'en doutait. 2) Le droit international n'a autorité sur le droit national que pour autant que ce dernier en convient; État souverain, le Canada est seul gardien de sa Constitution. Qui oserait prétendre le contraire?

Une fois énoncées ces vérités "patriotardes" propres à réjouir les auteurs du renvoi, l'admonestation tombe de la plume des sages: 1) au nom du principe démocratique, les Québécois ne peuvent unilatéralement imposer leur propre loi à la Constitution canadienne. 2) Mais l'expression claire de leur préférence pour la sécession légitimerait celle-ci au point que les autorités dotées du pouvoir d'amendement constitutionnel seraient fort mal venues de ne pas en tenir compte. 3) C'est donc aux acteurs politiques qu'il incombre d'intégrer la revendication québécoise dans le processus de modernisation constitutionnelle. 4) Qu'ils y prennent garde! Si la communauté internationale n'a rien à voir dans cette affaire canadienne, elle pourrait, face à l'exaspération québécoise exprimée par une sécession *de facto*, accueillir dans ses institutions ouvertes aux États-nations un Québec à souveraineté contestée : à côté du droit mais au coeur de la pire des diatribes politiques imaginable pour le Canada tout entier. La « réponse claire à une question claire » mettrait la souveraineté du Québec, mais aussi par contrecoup du Canada, en situation d'enjeu politique international particulièrement déplaisante pour tous.

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ment *dans le cadre du droit canadien*. Une fois encore, c'est le droit canadien qui est établi en cadre de références, apte à évaluer la licéité de la sécession non seulement en tant que telle, mais aussi en tant qu'ordre juridique auquel renverrait (doublement) le droit international. Incontestablement, l'ensemble de la réponse apportée par la Cour à la question deux repose sur une présentation laudative du droit canadien, dans la droite ligne de la présentation idyllique qui en a été faite dans le cadre de la question un.

Dans cette mesure, on peut conclure que la Cour ne répond pas véritablement à la question deux, le droit international n'ayant été interprété qu'en vue de renvoyer au droit canadien.

Dans cette mesure, on peut conclure que la Cour ne répond pas véritablement à la question deux, le droit international n'ayant été interprété qu'en vue de renvoyer au droit canadien. En même temps, la Cour répond implicitement à la question trois. La Cour ne dit en effet pas seulement qu'il n'existe pas, en l'espèce, de contradiction entre les deux ordres juridiques. Elle affirme qu'il ne saurait, logiquement, en exister, à tout le moins sur une question de ce type. Ce qui est bien une manière d'y répondre, et en même temps d'écarter à l'avenir tout argument éventuel fondé sur le droit international pour échapper à l'emprise de l'ordre juridique étatique.

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sus qui relève au fond de la révolution. L'invention extravagante par la Cour d'une « majorité claire » présentée comme une exigence juridique alors qu'elle ne serait susceptible que d'une évaluation d'ordre politique et qu'il faut parfois prendre, selon un passage de la décision, dans un sens qualificatif plutôt que quantitatif (!) n'est certainement pas de nature à dégager une solution. On peut certes estimer déraisonnable de vouloir faire évoluer constamment la souveraineté d'un pays au gré de majorités d'autant plus variables qu'elles tiennent à moins d'un pour cent de l'électorat, mais on peut difficilement prétendre brider la majorité d'un peuple qui s'engage à respecter les minorités.

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non d'une décision imposant aux acteurs une obligation formelle, mais en fait la portée de cet avis allait bien au-delà d'une consultation juridique car elle était appelée à prescrire indirectement mais incontestablement la conduite que ces acteurs devaient adopter pour agir conformément au droit tel qu'elle l'énonçait. Elle risquait donc d'être amenée à prendre à leur place une décision qu'il leur appartenait d'assumer. Le renvoi à leur responsabilité propre que contiennent les avis de 1981 et de 1998 me paraît à cet égard non seulement prudent mais aussi satisfaisant aux yeux du constitutionnaliste.

La tendance contemporaine à transférer au juge la mission de trancher en la forme juridictionnelle des questions de conformité à la Constitution, qui sont par essence des questions politiques, et donc d'en « juridiciser » la solution au nom de l'État de droit, mérite en effet d'être appréciée de manière nuancée. Son intervention s'apparente à celle d'un arbitre entre les acteurs politiques et elle peut être un moyen utile de dépassionner les controverses, tout au moins lorsque cette intervention est acceptée, voire souhaitée, par les protagonistes qui s'en remettent à lui du soin de trouver une issue à un conflit dont ils ne parviennent pas à sortir.

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Mais cette tendance recèle un double péril. Pour la juridiction elle-même, exposée à la tentation de l'activisme, qui consiste à présenter comme une exigence juridique les solutions qu'elle considère opportunes. Pour la démocratie aussi, qui se trouve subordonnée à ce qui ne doit être que sa régulation formelle, selon la formule de Robert Badinter à propos du pouvoir constituant, « il peut tout faire, mais pas n'importe comment ».

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aboutir à un accord sur la sécession envisagée. Mais cette obligation implique tout de même un minimum de bonne foi dans la conduite des négociations, c'est-à-dire la volonté sincère d'aboutir à un accord. Que se passerait-il si l'une des parties avait le sentiment que, de l'autre côté, une telle volonté fait manifestement défaut?

Bien qu'on puisse comprendre que la Cour suprême n'ait pas voulu s'aventurer sur un terrain politiquement délicat, il est peut-être regrettable que sa décision ne fournisse pas davantage de précisions sur ces différents points.

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