A MOST POLITIC JUDGEMENT

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INTRODUCTION

By throwing before the Supreme Court a set of questions about Quebec secession, the Minister of Justice of Canada and his government could have profoundly disturbed the Canadian political system. In posing and answering questions about Quebecers' right to attain sovereignty and the modalities of achieving Quebec secession, the Minister and the Court risked igniting in Quebec a nationalist firestorm that could have sent support for sovereignty soaring. But the justices of the Court avoided this eventuality. They produced a compact judgement, one that has three important consequences. First and foremost, the Court managed to preserve its own legitimacy, despite having been dragged onto a hotly contested political terrain. Second, while positing an exhaustive constitution and claiming unparalleled scope for judges to interpret it, the Court managed to preserve a great deal of political space; that is, an area in which contending arguments about Quebec secession can be debated, with the political process determining the outcomes. Third, while explicitly preserving this political space, the Court also managed to narrow it constructively, by eliminating two radical positions about secession from the set of arguments about Quebec sovereignty that are decent, respectable, and legitimate.[1]

As well, the Court tidied up a couple of issues about self-determination and secession, in a way that has attracted little attention from commentators but that will help ensure that it attracts a wide readership throughout the world. Finally, the judgement in *Reference re Secession of Quebec* left many matters unsettled, and justifiably so, but the Court might have clarified the difference between the constitutional rearrangements necessary for Quebec to become sovereign and the substantive matters that Quebec and Canada would have to settle in a secession. This, however, is a minor blemish on an astute response to hard questions in a tough political context.

LEGITIMACY

Both when the reference case was launched and when it was heard, sovereignist and nationalist politicians in Quebec attacked the federal government's move. Minister Rock's tone in the House of Commons was moderate; more significantly, by asking the court to address the issue of how Quebec secession *should* occur, the federal government admitted clearly for the first time that it *could* occur. Nevertheless, the sovereignists decried the federal strategy as one of intimidation and oppression, and one that should be rejected outright. As Mr. Bouchard argued, "there is only one tribunal to settle Quebec's political future and that's the Quebec people."[2] Even moderate Quebec nationalists and those politicians like Mr. Johnson and Mr. Charest who would have to appeal to them in elections declared that the reference was ill-advised. It was preferable to move forward on the "Plan A" side (accommodating Quebecers' legitimate desire for change) rather than the "Plan B" front (clarifying the process of secession and making its costs more obvious to the electorate.)[3]

But these criticisms are the normal stuff of secessionist politics. Much more serious was the threat that the Court as an institution might lose its credibility among Quebecers. The sovereignists certainly laid the groundwork for denouncing the institution and ignoring any decision it might produce. As the hearing approached, for example, Jacques Brassard, minister of intergovernmental affairs, flatly stated that "no decree, no federal law, no decision from any court whatsoever can call into question or discredit this right of Quebecers

[1] *Quebec Secession Reference* (1998) 161 D.L.R. (4th) 385. Bracketed numbers in this paper's text refer to paragraph numbers in the opinion.

[2] *London Free Press* (27 September 1996).

[3] *Globe and Mail* (3 and 18 February 1998).

to decide their future."[4] At a large sovereignist rally just after the hearings, Mr. Bouchard noted that most Quebecers believed they had the right to democratically determine their future, while Mr. Parizeau declared that "the judges can decide what they want. It has no importance. We will never live under the threat of decisions taken by others."[5] Taking up a line attributed to Maurice Duplessis, the Deputy Premier (Bernard Landry) claimed that like the leaning tower of Pisa, the Supreme Court of Canada always tilts the same way.[6] This *bon mot* was used in newspaper advertisements taken out by the Parti québécois to protest the reference. Among nationalists, some headway —perhaps a lot of headway — could be made using the argument that the court ruling, emanating from judges appointed by Ottawa, would put Quebecers into a straightjacket tailored in English Canada.[7]

In ROC (the Rest of Canada), there was no publicly discernible counterpart to this barrage on the Court, though a decision favourable to some aspects of the sovereignist position — such as that the required majority was 50 percent plus one — could have produced one. The real danger was in Quebec, where the hard-line sovereignists insisted that the Court's purview did not extend to the political decisions taken by *le peuple québécois*. And this is the threat that was removed by the Court's logical dexterity.

What is the structure of the judgement, after all? There is a brief introduction (paras. 1-3) and a discussion of whether the three questions posed are justiciable (paras. 4-31). Then follows the bulk of the judgement, built around Question 1 (paras. 32-108). Here, the Court discusses Canadian history (paras. 32-48) and some of the constitutional principles that are relevant to the reference (paras. 49-82) before moving to the core of the judgement, "The Operation of the Constitutional Principles in the Secession Context" (paras. 83-105). A brief discussion of effectivity (paras. 106-8) concludes the section. Question 2 is treated at much less length (paras. 109-46, just about half the length of Question 1) and Question 3 is dispensed with in a single paragraph. A summary follows (paras. 148-56). So, almost one-half of the 116 substantive paragraphs is devoted to laying the historical and constitutional foundation for the core section.

Here is where the Court saved its own bacon. It argued that four constitutional principles were relevant in the reference: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. It rolled out a barrage of precedents to show how the constitution is infused with these principles (and how courts have the power and the duty to define them). And it declared at the outset that "these defining principles function in symbiosis. *No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other*" (para. 49, emphasis added). It was this dictate that allowed the "Secession Context" section to deliver something to each side in the political contest over secession. The federalists got the judgement that secession must occur according to the rule of law, constitutionally, and with regard for the interests of all Canadians and of minorities within Quebec. The Court ruled that a unilateral secession — through a Unilateral Declaration of Independence — does not meet this standard. The sovereignists in turn got satisfaction from the Court's treatment of the democratic principle in a secession. A Yes vote would carry weight, the Court said, "in that it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means" (para. 87). Such a vote "would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire," because "the corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table" (para. 88).

After a very brief period of hesitation, the sovereignists declared victory. Mr. Brassard claimed that the Court had "recognized the democratic legitimacy of both the option and the process leading up to the realization of the sovereignty project."[8] Mr. Parizeau said that the threat of a UDI had been necessary in the past to get ROC to the bargaining table after a Yes vote; now, however, the justices "say that the two sides have an obligation to negotiate in good faith. We say fine."[9] The next day, Mr. Bouchard called a news conference. He claimed that the judgement had destroyed five "federalist myths" and more generally that the Court "affirmed, from one end of its opinion to the other, the political nature of the process that would legitimately be set in motion by a Quebec referendum on sovereignty." In particular, the "federal judges upheld what sovereignists have been saying for 30

4 *London Free Press* (19 December 1997).
5 *Globe and Mail* (21 February 1998).
6 *Globe and Mail* (12 May 1998).
7 See the editorial by Lise Bissonnette, "Un an plus tard, la clarté" *Le Devoir* (17 September 1996). Ms. Bissonnette claimed that Quebec was now trapped in a "*carcan*" — an iron collar.

8 *Globe and Mail* (21 August 1998).
9 *Ibid.*

years: after a Yes vote, there will be negotiations."[10] The premier had nothing critical to say about the judgement; instead he used it to shore up the sovereignist interpretation of the process of secession.

All in all, the sovereignists accepted the judgement. Of course they dismissed or downplayed those aspects of it that comforted the federalists — the need for a clear question, a clear majority, and a lawful process. But they used the Court to substantiate their own position. In fact, one former Bloc MP predicted that "no one should be surprised to see the Supreme Court of Canada quoted in future campaign literature and on the posters of the Parti Québécois."[11] The judgement, in a sense, came to underpin and reinforce their arguments about secession. So rather than losing legitimacy, the Court found its political position substantially strengthened in Quebec. No doubt the sovereignists were prepared for a full scale attack on the Court and were ready to undermine its authority; indeed, some tried to do this in the wake of the judgement.[12] But this extreme position found no backers in the party leadership (or among editorialists). Instead, by using the judgement towards their own ends, the sovereignists strengthened the Court.

This is terribly important. Were there to be a Yes vote in the future, or even a referendum, the Court might be brought in to rule on highly contentious matters. The justices were undoubtedly aware of this possibility. Even as they tossed back into the political arena important issues like the clarity of the question and the required magnitude of a referendum vote for sovereignty, and circumscribed their own current role (paras. 98-105), they hinted at decisions that might come: "in accordance with the usual rule of prudence in constitutional cases, we refrain from pronouncing on the applicability of any particular constitutional procedure to effect secession unless and until sufficiently clear facts exist to squarely raise an issue for judicial determination" (para. 105).[13] In the course of an at tempted secession, the Court might be the only body able to decide procedural matters such as who participates in negotiations and how the constitution must be amended in order to effect secession, as well as substantive matters such as minority rights and citizenship. Because of its great prudence in the reference case, and the subtle balance it struck, the Court will take into any future secession a large enough stock of legitimacy to make authoritative decisions. This is the greatest success of the judgement.

POLITICAL SPACE

Having defined the constitutional principles relevant to secession, the Court preserved a large political arena for debate. It left open some very important questions:

- What would be the amending formula necessary to effect secession?
- What constitutes a "clear majority"?
- What constitutes a "clear question"?
- What would be the content of negotiations after a Yes vote?
- What parties would be involved in the negotiations?
- What are the rights of linguistic and cultural minorities, including Aboriginals?
- What would happen in the case of an impasse in negotiations?

Not surprisingly, intense political debate began immediately around these issues, as well as the ambiguities in the judgement itself. Stéphane Dion was especially quick to reply to Mr. Bouchard's interpretation of the Court's position.[14] This was perfectly appropriate in the view of the justices, as they had merely defined the broad constitutional framework within which such debate would occur, both before and after any future referendum on secession. "Having established the legal framework," they wrote, "it would be for the democratically elected leadership of the various participants to resolve their differences" (para. 101). The Court spent some time justifying the maintenance of this political space (paras. 98-102), on the grounds of precedent and practicality, and this restraint along with the Court's even-handedness undoubtedly helped preserve its legitimacy.

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[10] Quebec, Office of the Premier, "Notes for a preliminary statement by the Prime Minister of Quebec, Mr. Lucien Bouchard, the day following the opinion of the Supreme Court of Canada on the reference by the federal government," Quebec City, 21 August 1998. See http://www.premier.gouv.qc.ca /discours/a980821.htm.

[11] Jean Lapierre, "How to design a 'winnable' referendum" *Globe and Mail* (25 August 1998).

[12] See Josée Legault, "How to deny Quebec's right to self-determination" *Globe and Mail* (21 August 1998). (A longer version of this piece was published in *Le Devoir*.) Ms. Legault denounced the justices as "political mercenaries working to reinforce the Canadian state" and "tools used by Ottawa to combat Quebec's affirmation."

[13] Of course the issue of what amending formula would be necessary to effect secession is far more clear-cut than many of the issues dealt with in the reference case — though it is harder to handle politically. For a hint that the Court might pronounce on some of the substantive matters under negotiation in a secession, see paras. 102 and 153.

[14] Canada, Privy Council Office, letter from Stéphane Dion to Mr. Lucien Bouchard, 25 August 1998. The full text of the letter can be found at http://www.pco-bcp.gc.ca/aia/ro/doc/eaug2698.htm.

Nevertheless, the justices did make one powerful foray to constrain the realm of political debate. In a manoeuvre that lies right at the heart of the judgement (paras. 90-93), they eliminated extremists from the legitimate political arena. Here, the Court rejected two "absolutist propositions" (para. 90). Against radical sovereignists, it held that "Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to other parties" (para. 91). In other words, the principle of democracy cannot override the obligation to respect the other three principles and to negotiate within the broad constitutional framework. This would strip of legitimacy a hard-nosed Quebec bargaining posture backed up by the threat of a UDI. At the other extreme, the Court rejected the view that a clear Yes vote could be ignored, because "this would amount to the assertion that other constitutional principles necessarily trump the clearly expressed democratic will of the people of Quebec" (para. 92). This undercuts the ten or fifteen per cent of citizens in ROC who would prefer to ignore or repress a move by Quebecers towards sovereignty. Taken together, these central paragraphs constitute a ringing blow for moderation. While the justices left a great deal of room for political argument, they tossed the extremists out of the game and tilted the political playing field on both sides towards moderation and civility rather than polarization.

Minor Points

The serenity and balance of the judgement will ensure for it a wide international readership. There has never been a secession in an advanced industrial state, and Canada's Supreme Court now has provided a set of principles that should underpin such a process. While the sovereignists argue that this confers legitimacy on their project, the Court also insisted that negotiations would be difficult and that they "might not lead to an agreement." Notably, "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" (paras. 96-97). Along with the declaration that breaching the duty to negotiate responsibly would affect the perceptions of the international community about legitimacy and recognition (para. 103), and the treatment (quite standard) of the Quebec case for self-determination in international law (paras. 111-39), this balanced and sanguine view will find a global audience.

So will the very decisive and neat treatment of the principle of effectivity. As argued by the *amicus curiae* (and as held by the realist school of international relations), if a seceding state can effectively control its territory, then the secession can come eventually to be recognized by the international community. Mr. Brassard, for example, argued against partitionists and others that a Quebec becoming sovereign would "exercise effective control over all its territory."[15] The Bélanger-Campeau commission had reached rather similar conclusions about what might happen were negotiations to break down.[16]

But here the Court was terribly firm. It distinguished between the right to pursue secession unilaterally (and to achieve effective control) and the power to do so (para. 106). Then it rejected the notion that the principle of effectivity could provide a justification, *ex ante*, for an unconstitutional and illegal secession. As an assertion of law, the principle of effectivity "simply amounts to the contention that the law may be broken as long as it can be broken successfully. Such a notion is contrary to the rule of law, and must be rejected" (para. 108). Further on, in the context of international law, the Court was even sharper. A secession might be "successful in the streets" and attract international recognition (para. 142), but this "empirical fact" cannot justify unilateral secession; there is no ground, ruled the Court, "to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place" (para. 146). This is an important closure of another avenue towards a non-constitutional secession, and the governments of other countries will surely note the reaffirmation of rights over power, both as they may contemplate their own secessionist movements and as they may contemplate an early recognition of a seceding Quebec.

One final aspect of the judgement deserves some brief attention, in my view. This is the content of the term "negotiations" in the context of secession. The Court is very clear that a Yes vote on Quebec sovereignty must draw parties from Canada into negotiations. At the outset of the treatment of this issue, the Court holds that negotiations are required because a Yes vote would indicate a desire by Quebecers to change their constitutional status. Just as when the government of a province proposes a constitutional amendment, other actors must come to the table: they have an obligation "to negotiate constitutional changes to respond to that desire" (para. 88).

The Court then slides to broaden the content of "negotiations." The judgement mentions several non-

[15] *Globe and Mail* (30 January 1997).

[16] See R. Young, *The Secession of Quebec and the Future of Canada* (Montreal: McGill-Queen's University Press, 1995) at 106.

constitutional matters that would be addressed by the parties in the context of a secession, including the national economy, the debt, boundaries, and minorities (para. 97). In so doing, the Court conflates two quite separate classes of matter: (1) the reconstitution of Canada, with amendments to the Constitution Acts that excise Quebec and effect its secession, and (2) the substantive terms and conditions of secession, including the debt, the armed forces, assets, mobility and transit rights, economic treaties, environmental matters, and so on. These two classes of matter are quite distinct.[17] In principle, negotiations about the constitutional changes necessary to create a sovereign Quebec (and to reconstitute Canada) are separate from negotiations about the terms of secession. In reality, the chances of keeping them separate may seem low, especially after the shock of the 1995 referendum caused provincial governments and other actors to calculate their interests and establish bargaining positions. Some provincial governments, for example, might try to hold up constitutional amendments in order to get their way on trade agreements or the allocation of the national debt. With many issues on the table in negotiations and many participants aware of their interests, this linkage would make a quick, clean secession very unlikely.

The Court might have eased this problem and clarified the situation by distinguishing between the two kinds of negotiation rather than lumping them together. This would have been no empty, legalistic gesture confronting the powerful forces of post-Yes *realpolitik*. It would have established, first, that an overwhelming Yes would put upon Canada the onus of amending the constitution to create a sovereign Quebec, but not to negotiate any particular terms and conditions of the separation. Second, the distinction would clarify the rights of various actors, especially concerning participation. Aboriginal peoples and the provincial governments, for instance, could have clear rights to participate in negotiating amendments to the Constitution Acts. But they may have no right to be at the table when Canada and Quebec are dividing debt and assets, or negotiating the framework of monetary policy, or setting out environmental treaties. Some precision about this could have dampened some of the expectations that the judgement has raised.

In the end, though, this is a small blemish on an ingenious and constructive judgement. It is most politic indeed.❑

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[17] *Ibid.*, chapters 13 and 14.