THE QUEBEC SECESSION REFERENCE: THE CONSTITUTIONAL OBLIGATION TO NEGOTIATE

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[Terminology can be confusing when a country might break up. For the sake of clarity, I often use "old Canada" for the present reality and "new Canada" for the smaller, residual Canada that would survive should Quebec secede. Bracketed figures in the text refer to the paragraph numbering of the Reference re: Secession of Quebec.[1]]

The *Globe and Mail* headline "The Quebec ruling: Canada must negotiate after Yes vote"[2] correctly identified the most innovative aspect of the Court's ruling. According to Conservative senator and constitutional law professor Gerald Beaudoin, "[t]he constitutional obligation to negotiate that's new in the jurisprudence ... I am very impressed — that's quite something."[3] Premier Bouchard loudly proclaimed the obligation to negotiate as a victory for the sovereignists. It blunted the federalist assertion that Ottawa could not or would not negotiate following a Yes vote.[4] "The obligation to negotiate," asserted Bouchard, "has a constitutional status. This is of the utmost importance. There is no way the federal government could escape it."[5] Subsequently, extracting even more positive results from the decision, he asserted that Canada will have "no choice but to negotiate a new economic relationship with Quebec."[6]

The Court's finding of an obligation to negotiate, the linchpin of its analysis once it had decided that neither domestic constitutional law nor international law authorized the unilateral secession of Quebec from Canada, deserves intense scrutiny. While the Court's dictum on the obligation to negotiate has injected a welcome note of civility into our constitutional introspection, the analysis that supports it and the consequences that might flow from it have serious weaknesses. However, before elaborating on some deficiencies in the Court's reasoning, deficiencies that were largely products of the reference questions it was asked, it will be helpful to present the Court's position on the negotiation obligation. The shrewdness of the negotiation requirement, which was warmly received within Quebec, is that it nevertheless constrains the discretion of the Quebec government in the politics of the referendum process (a result dear to policy makers in Ottawa) and, as noted below, identifies a supportive role for the international community in monitoring the integrity of the negotiation process.

A Constitutional Obligation: The obligation to negotiate in good faith is a constitutional obligation. It is not a matter of choice or of the presence or absence of an electoral mandate for governments outside Quebec. That obligation, of course, applies equally to Quebec, the necessity for which was clearly indicated by the revelation that Parizeau planned a very hasty UDI if the Yes forces had won the 1995 referendum in spite of the contrary wording of the referendum question (paras. 69, 88).

Prior Criteria: The obligation to negotiate only comes into play if the referendum electorate has been asked a clear question and has responded with a clear majority Yes (paras. 93, 100). This prior requirement gives political actors outside Quebec a rationale for refusing to negotiate if the Court's criteria have not

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1 (1998) 161 D.L.R. (4th) 385.

2 Graham Fraser, "The Quebec ruling: Canada must negotiate after Yes vote" *The Globe and Mail* (21 August 1998).

3 *Ibid.*

4 In the closing days of the 1995 referendum campaign, Prime Minister Chrétien raised the possibility there would be no "other side" for Quebec to bargain with following a Yes vote. See Tu Thanh Ha, "Yes vote no picnic, Chrétien warns" *The Globe and Mail* (19 October 1995).

5 Rhéal Séguin, "Federalist cause 'poisoned' by ruling, Bouchard says" *The Globe and Mail* (22 August 1998).

6 Rhéal Séguin, "Bouchard says next referendum would put question more clearly" *The Globe and Mail* (21 August 1998). Deputy Premier Bernard Landry and former Premier Jacques Parizeau shared Bouchard's enthusiasm for this aspect of the Court's ruling. Rhéal Séguin, "Ruling legitimizes sovereignty drive, PQ leaders say" *The Globe And Mail* (21 August 1998) for Landry, and Jacques Parizeau, "Lettre ouverte aux juges de la cour suprême" *Le Devoir* (3 September 1998) for Parizeau.

been met. "A right and a corresponding duty to negotiate secession cannot be built on an alleged expression of democratic will if the expression of democratic will is itself fraught with ambiguities" (para. 100). The negotiation obligation, therefore, reaches back into the political process in Quebec and gives to governments outside Quebec an indirect influence on the leadup to the referendum within Quebec and its subsequent interpretation.

International Community Role: The negotiation requirement also reaches forward, for negotiation takes place under the watchful eye of the international community. The international reception of a Quebec unilateral secession will be influenced by whether it is preceded by good faith bargaining by Quebec and intransigence by Canada, by the reverse, or by something in between (paras. 103, 142-43, 155).

Why Negotiation? Negotiation is necessary because a constitutional amendment is required for a legal secession, which necessarily requires consultation and agreements among the relevant actors, primarily defined as governments (paras. 84, 97).

Substance and Process: The Court, faithfully adhering to the wording of the reference questions, gave an explicit focus to the negotiation agenda by its reiterated use of the "secession" of Quebec as the object to be achieved by an amendment. This narrow and clear focus appeared to rule out any obligation for Canada to negotiate association or partnership. On the other hand, the Court, perhaps wisely, did not indicate which amending formula — unanimity, 7/50, or some other — would be applicable (para. 105). Had it supported unanimity as the appropriate rule, the resultant cries of outrage in Quebec would have overcome any positive features sovereignists found elsewhere in the decision. No mention was made of the federal government's unfortunate loan of its veto by parliamentary resolution in 1996 to the five regions of Canada, a serious constitutional *faux pas* that added an unwelcome rigidity to an amending process crying out for more flexibility.

Difficult Negotiations that Might Fail: The Court indicated that negotiations would be very difficult and that, among other subjects, the position of Aboriginal Peoples, especially in northern Quebec, and boundaries could be on the table. The justices admitted that negotiations might fail even if both sides undertook good faith negotiations (paras. 96-97, 139, 151). However, their only suggestion for a response to failure was that a unilateral secession would be more favourably received by the international community if the failure of negotiations could be attributed to the recalcitrance of parties other than Quebec (para. 103). Finally, the Court noted that law tends to follow fact, in that effective control of its territory and population by the Government of Quebec after a unilateral secession would contribute to international recognition (paras.142-43, 155).

The preceding points are important contributions to our constitutional self-understanding. While some scholars may disagree that "contributions" is the appropriate word in all cases, and politicians, as is their wont, will play fast and loose with their "real" meaning, the problems with the Court's analysis are more basic.

Problems with the Court's Analysis: The Court appears to propose two competing negotiating/ amending processes. On the one hand, much of its analysis presupposes the use of the basic amending formulae of the 1982 Constitution Act, which privilege governments and legislatures. The decision speaks of the legal necessity of "an amendment to the Constitution" (para. 84) and states that secession "must be undertaken pursuant to the Constitution of Canada" (para. 104). Elsewhere, however, the decision asserts that negotiations 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*" (para. 93, emphasis added). Are these two ways of describing the same process, with the latter being the Court's interpretation of the former? Or are these two different processes? Claude Ryan has interpreted these as two processes, although he castigated the Court for its lack of clarity on this key issue.[7] The two majorities are dissimilar, as one refers to population and the other refers to Canada as a whole. The meaning of "representatives of ... the clear majority of Canada as a whole" is unclear, as the Court intimated with its phrase "whatever that may be." Clear majority does, however, appear to rule out unanimity as a requirement, in which case the Court has eliminated one of the amending formulae that elsewhere it had said were not up for judicial determination at this time (para. 105). On the other hand, "clear majority" is not a particularly helpful way to describe the 7/50 process that requires the approval of eight of the eleven governments — the federal government and seven provinces with 50 percent of the population. It is even less appropriate as a description of the degree of agreement required to get over the hurdles of the

[7] Claude Ryan, "What if Quebeckers voted clearly for secession?" *The Globe and Mail* (27 August 1998).

federal government's 1996 loan of its veto to the five regions of Canada.

The Court's description of one of the two negotiating parties as "Canada as a whole" raises more complicated problems. Canada as a whole necessarily includes Quebec. Accordingly, Quebec participates twice — once on its own behalf as a secession-seeking government and also as part of "the clear majority of Canada as a whole," which necessarily includes the federal government representing all Canadians, including Quebecers. By contrast, there is no mention of the Rest of Canada — the prospective new Canada — in the judgement, even by inference. The premise appears to be that Quebec is cleanly excised, and "Canada" continues. However, new Canada with Quebec gone is a new country, in a way that Canada without P.E.I. would not be. It is not simply a slightly modified version of the old Canada. To suggest that it is, is to argue that Quebec's presence has had only minimal influence on Canada's evolution as a people, on the federal system, on our foreign policy, etc. Accordingly, a negotiating process and the reaching of a constitutionalized secession agreement needs to accommodate a successor new Canada that will no longer be a whole, but a smaller Canada with a gaping hole in the middle. This Canada is the second, new country that will emerge should Quebec leave and the country to which all the arrangements struck with Quebec will apply.

The Court unavoidably and unsurprisingly advocates a lead role for the Canadian government in the negotiation process. Such a lead role for the federal government is justified by the gravity of the issue, the threatened dismemberment of the country; by the fact that the federal government has moral obligations to Quebecers who do not wish to leave Canada and/or are concerned with their position in an independent Quebec; by its fiduciary obligations to native peoples; and by the fact that implementing secession will require an incredibly complex devolution of federal responsibilities in Quebec to the new seceding government — including offices, hundreds of thousands of files and records, the proffering of policy advice to the new administrative class, and the movement of civil service personnel in both directions — all of which, without federal government support, will degenerate into chaos. A lead role for the federal government is further required because Canada continues to exist, and it remains the government of all Canadians until Quebec's exit is formalized by a constitutional amendment or by a successful unilateral secession. Further, negotiations may fail, an unconstitutional secession may not be attempted, and Canada may continue. Or, in the post-Yes negotiations, the federal government, supported by provincial governments, may manage to keep Canada together by an acceptable offer of renewed federalism at one minute to midnight. Whether Quebec goes or stays, all of the preceding scenarios necessitate a prominent, leading role for the federal government in the post-Yes negotiations. Further, whatever amending formula is required, the legislative approval of the federal government is necessary. These are heavy responsibilities that reasonably belong to the federal government (with, of course, significant input from provincial governments and probably from nongovernmental actors). They are the daunting tidying-up problems of disentanglement, moral obligations that properly pertain to the federal government, and a possible last ditch effort to keep the country together and preserve the federal government's coast-to-coast role. The responsibility to represent the interests of new Canada, however, or even of its future central government does not logically apply to the federal government of old Canada, even in combination with provincial governments.

Given a clear question, a clear Quebec majority, the constitutional obligations on both sides to negotiate, the possibility that negotiations might be successful, or the possibility of unilateral secession should negotiations fail, old Canada might not survive. If and when that happens, a process directed to the secession of Quebec will have produced two new countries, not one. At this point, Canada as a whole, in the language of the Supreme Court, ceases to exist. The federal government of old Canada also ceases to exist. The agreement it has struck, assuming a constitutional exit, applies not to itself but to its successor, a shrunken survivor, the retreating central government of a fragmented, different country, probably still called Canada. Whether new Canada survives as a united country or experiences further fragmentation is debatable.[8] In any case, the answer to that question may not immediately emerge. As is argued elsewhere, new Canada will emerge as a separate state with virtually no preparation, either of governments or of citizens, for its new status. Given that lack of preparation, the rational course of action is for the new, smaller Canada to continue with its existing constitutional arrangements — modified only by the excision of Quebec — while it works out its own future.[9]

The difficulties confronting the new Canada will be compounded if the Supreme Court's interpretation of the negotiating task is accepted, for the agreements

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[8] See Alan C. Cairns, "Looking into the Abyss: The Need For a Plan C" C.D. Howe Institute Commentary No. 96, *The Secession Papers* (September 1997) for a discussion.

[9] *Ibid.*

it will be expected to assume will have been bargained by others in its absence. It will be the recipient of decisions made by an entity — Canada as a whole — that will have disappeared from the scene. Canada as a whole, for example, may agree to reciprocal regimes of official minority language rights far more generous than would be voluntarily assumed by the successor, new Canada.

The emergence of a new country — the new Canada — is of no concern to the Court. The Court's task was to examine the legalities of unilateral secession by Quebec. However, the secession of Quebec creates not one, but two new states — new Canada and Quebec — a reality the Court could not address or even perceive, given the questions it was asked. Only one of those prospective states is present at the bargaining table that leads to its creation; new Canada emerges as a by-product of negotiations by old Canada to work out the terms for the secession of Quebec. Quebec will automatically be a player in its own emergence. However, in the Court's interpretation of the post-Yes negotiation scenario, no one speaks for the new Canada. It is not there.

Overcoming the discrepancy between the bargaining objectives of old Canada and a prospective new Canada requires the explicit recognition that the secession of Quebec will create two new states, not one, and that a process designed only to work out the secession of Quebec is unacceptable. Further, any idea that the federal government of old Canada can speak and bargain for its successor, the central government of a different successor country, should be rejected. Indeed, the Court's decision makes it clear that the federal government speaks for all Canadians inside and outside Quebec until secession is an accomplished fact; it cannot simultaneously be a proxy for new Canada, for Canada without Quebec, particularly if, as may be the case, it is tempted to make last-ditch efforts to placate Quebec by explicit major proposals for renewed federalism. The idea that the governments of the provinces in negotiations focussing on the secession of Quebec can be trusted to represent the interests of a prospective Canada without Quebec is also implausible, unless that future country is to be thought of as an aggregation of particularisms.

Canada without Quebec (new Canada) and Canada as a whole with Quebec (old Canada) are clearly different constellations of interests. They would strike somewhat dissimilar deals with Quebec. Accordingly, a deal struck by Canada as a whole may subsequently be unacceptable to the shrunken new Canada, the former ROC. Given this fact, the Supreme Court either seriously misunderstood or ignored the complexity of the negotiation process it was recommending. Its proposals were directed to the emergence of one new state. It overlooked the simultaneous emergence of a second state — a smaller, new Canada — and thus left the latter in the audience, absent at its own creation. It addressed itself to the task of establishing guidelines for the conciliation of the concerns of "the clear majority of the population of Quebec, and the clear majority of Canada as a whole," but not to the concerns of any kind of majority from the emerging second state.

This point requires emphasis. Although the Court asserts that "the content and process of the negotiations will be for the political actors to settle" (para. 153), it does, in fact, set an agenda. It asserts that negotiations would be necessary to address the interests of the federal government, of Quebec, of the other provinces, "and other participants," and the rights of all Canadians within and without Quebec, "and specifically the rights of minorities" (paras.92, 151). The negotiators are governments. The sovereign people, "acting through their various governments duly elected and recognized under the Constitution [have the power] to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada" (para. 85). The justices agree that the amendments necessary for legal secession "could be radical and extensive" and that the changes to "current constitutional arrangements ... would be profound" (para. 84), but they nevertheless must be treated as "amendments to the Constitution of Canada" (para. 84).

The Court, as the preceding paragraph indicates, does not include the interests of new Canada (without Quebec) among those to be addressed. It does not include at the bargaining table spokespersons for the second country that will emerge if Canada breaks up, for there is no government "duly elected and recognized under the Constitution" that can speak for the interests of the new Canada that will emerge if Quebec leaves. The Court appropriately observes that "aboriginal interests would be taken into account" if negotiations are undertaken (para. 139), but no similar observation is addressed to the interests of the new Canada waiting in the wings.

By focussing on old Canada bargaining with Quebec over the terms of secession, the Court neglects what will be left behind following Quebec's surgical removal. The magnitude of the change is minimized by the constant resort to "Canada" and by the failure or unwillingness to employ any label to distinguish new Canada (without Quebec) from old Canada (with Quebec). This exaggerates the continuity between the (old) Canada that precedes Quebec's secession and the

(new) Canada that follows it. This might be acceptable if the seceding province was small and on the geographic periphery. It is misleading when the seceding province is Quebec, whose location, numbers, and history made it central to the nature of old Canada, and whose departure would correspondingly be a major shock. New Canada, therefore, is not simply old Canada writ small.

Recommendation: The politics of the negotiating process must incorporate a voice for new Canada in the hard bargaining directed to the secession of Quebec. How that role is to be performed is beyond the capacity of this short essay to describe. There are no easy answers. Prior to its emergence, new Canada is institutionally formless. It is headless. No one speaks for it. It is an anticipation, not a historic, structured political community like Quebec. And yet, if Quebec secedes, it will overnight become a new state, doubtless sporting, at least for a transition period, the institutional and constitutional clothing of old Canada. New Canada's inchoate nature prior to its possible future emergence should not become an excuse for ignoring the fact that it and Quebec, assuming the latter's constitutional exit or a successful unilateral secession, will emerge into separate statehood simultaneously. Now, while the crisis of a possible Quebec referendum Yes is some distance away, is the time to think through the necessity and complexity of a negotiating process in which Quebec, old Canada, and new Canada are all present while the futures of all three are being worked out. It is irrational for a negotiating process that could lead to the breakup of Canada to give leading roles to the existing federal government and to a "Canada as a whole" that will not survive the secession of Quebec, and to have no presence of the interests of the new Canada of a lesser whole and of a central government of a smaller population and reduced territory that will survive Quebec's exit.

A possible solution might be to reduce the role of federal representatives from Quebec on issues that pertain to new Canada. Perhaps there should be a special monitoring committee within the bargaining team constantly assessing proposed agreements from a new Canada perspective. Old Canada or Canada as a whole must realize its limitations. It is biased towards the past. It cannot represent new Canada, which will be looking toward the future. Partnership arrangements struck by old Canada on behalf of new Canada are out of the question because, at this time, the future constitutional shape of new Canada is unknown, and it may not even survive as one country.

Conclusion: Apparently the Court thought that a negotiating response to a Quebec Yes was a question of "will," which could be resolved by underlining the constitutional obligation to negotiate secession terms in appropriate circumstances. It is also, however, a question of capacity, which becomes the question of how a negotiating process and an amending formula that assumes constitutional continuity can be employed to generate two new independent states — Quebec and new Canada. The Court's attention focussed exclusively on the former (Quebec) and completely neglected the latter (new Canada). The Court's negotiation proposal, therefore, is incomplete. It only does half the job.

It would be unfair to affix too much of the blame for this shortcoming on the Court itself. Its answers were structured by the questions it was asked. The justices focussed on the legality of the unilateral secession of Quebec as part of the Plan "B" strategy to inform Quebecers that secession was a high risk enterprise. By suggesting criteria that must be met in the referendum process — a clear question and a clear majority followed by a constitutionally obligatory negotiating process characterized by good faith on both sides — the Court has removed some of the risk, for all parties. The Court, however, doubtless unwittingly, has also structured the post-Yes negotiation process in such a way that a new set of risks has been visited on the second successor country that will emerge should Quebec leave. This appears as a classic example of the unintended consequence of purposive social action, one that the federal government did not foresee when it launched the reference, one the Court did not intend, one no provincial government publicly anticipated, and, at the time of writing, one that no post-decision commentator appears to have noted. It is not too late to supplement the Court's contributions by devising a negotiating process that is appropriate to the actual tasks that will confront the post-Yes negotiators.❑

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