

SELF-DETERMINATION IN THE CANADIAN LEGAL ORDER: THE RULE OF LAW RULED OUT ?

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Introduction

Since Confederation, the relationship between Canada and Quebec has been ambivalent. Notwithstanding certain guarantees in the Constitution to safeguard French language and culture, Quebec has continually maintained a desire to protect its cultural identity.¹

In 1982, Prime Minister Pierre Elliott Trudeau² attempted to resolve Quebec's uncertain status in Canada through an amendment to the Canadian Constitution. Although much of Canada applauded this repatriation of the Constitution, which included the entrenchment of the *Charter of Human Rights and Freedoms*, Quebec did not participate in the negotiation procedures. Quebec subsequently refused to sign the repatriated Constitution.

Since then, there were two more attempts by the Canadian federal government to resolve the Quebec question.³ After the failure of both attempts, the Quebec secession movement gathered momentum.⁴ On 30 October 1995, a referendum was held on the issue of whether Quebec should secede from Canada.⁵ In an extremely close result, 50.6% of the Quebec population voted against secession.⁶ After the referendum, there was little in the way of serious political discussion about the Quebec-Canada impasse.

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¹ This is exemplified by the allocation of education and property jurisdiction to provinces under sections 91 and 92 of the Constitution. *The Constitution Act, 1867* 30 & 31 Victoria, c. 3. (U.K.).

² Pierre-Elliott Trudeau (1919-2000) was Prime Minister of Canada from 1968 to 1979 and from 1980 to 1984.

³ The first negotiation took place in 1990 in Meech Lake. This negotiation failed to produce an agreement and led to another round of negotiations in 1992 in Charlottetown. The proposed agreement from this negotiation, known as the Charlottetown Accord, was put before a nationwide referendum. Unfortunately, the Charlottetown Accord was rejected by the Canadian population.

⁴ This is evidenced by the election of the Parti Quebecois in September 1994. Its election promise was to hold a referendum on sovereignty.

⁵ The question put before the Quebec people was: "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 of the agreement signed on June 12, 1995." Canadian Broadcast Corporation, "The Campaign" (1999), online: CBC Newsworld <http://www.newsworld.cbc.ca/flashback/1995/quebec2.html>> (date accessed: 24 November 2003).

⁶ Canadian Broadcast Corporation, "The Results" (1999), online: CBC Newsworld <http://www.newsworld.cbc.ca/flashback/1995/quebec3.html>> (date accessed: 24 November 2003).

I. The Quebec Secession Case

In 1998, the Governor in Council of Canada asked the Supreme Court of Canada to provide an advisory opinion about whether Quebec has a legal right to unilaterally secede from Canada. The following issues were referred to the Supreme Court:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?⁷

In a dense judgment, the Supreme Court thoroughly reviewed the history of constitutionalism and the underlying principles which must be used to interpret it. Within the Canadian constitutional order, the secession of a province can only be legal if it takes place within a framework inspired by those principles. In its discussion about the interpretative pillars of the Constitution (i.e. federalism; democracy; constitutionalism and the rule of law; and the protection of minorities), the court ultimately found that neither the Constitution nor international law can provide for a legal right to unilaterally secede from Canada.

The democratic principle can be understood as the rule of the majority.⁸ Thus, the court concluded that Canada "cannot remain indifferent" to a democratic expression by Quebec of its discontent of the status quo.⁹ However, democracy must be interpreted in conjunction with federalism, constitutionalism and the rule of law, and respect for the rights of minorities. These principles qualify the initial democratic legitimacy.

Federalism supposes the existence of intimate links between the members of the federation. Constitutionalism and the rule of law require that legality be the determining constituent of legitimacy, fostering a "stable, predictable and ordered society"¹⁰ that fulfills societal expectations and "embodies the more general principle of normative order".¹¹ The principle of protection of minorities ensures

⁷ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 2.

⁸ *Ibid.* at para. 63.

⁹ *Ibid.* at para. 92.

¹⁰ *Ibid.* at para. 70.

¹¹ *Ibid.* at para. 71.

that any interpretation of the Constitution does not undermine or depreciate the existing minority rights.

Thus, a democratically expressed will to secede must take into account the intimate links existing within the federation. The result of a secession would also have to be in conformity with the protection of minorities principle. The rule of law would entail important consequences with respect to the process of secession. The Constitution would not permit an act of secession to occur without the realm of legality.

In light of these principles, the court held that any resolution to the current Quebec-Canada impasse should be resolved through negotiations conducted by political actors. It expressly removed the issue from the grasp of judicial review and thus entirely deferred the debate to politicians. It recognized, however, that negotiations would likely be uneasy.

The court also contemplated a possible attempt by Quebec to unilaterally secede through effectivity, the ultimate success of Quebec sovereignty resting on international recognition. However, the court was very adamant in declaring that any *post-facto* recognition of sovereignty would not make the unilateral act constitutional.

The Court also analyzed whether an international right to self-determination would provide a positive legal right for Quebec to unilaterally secede. Under customary international law, the right to self-determination of peoples "is normally fulfilled through *internal* self-determination"¹², that which can be achieved through the legal order of the state. External self-determination exists in extreme cases – such as colonialism or oppression. The Court found that the situation in Quebec does not qualify as such:

The population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions.¹³

Therefore, the principle of self-determination under international law does not provide a distinct right for Quebec to unilaterally secede from Canada.

¹² *Ibid.* at para 126 [emphasis added].

¹³ *Ibid.* at para. 136.

II. The Effects of the Quebec Secession Case

The following part of the article focuses on the legal and practical effects of the Quebec Secession Case over a theory of secession in the Canadian internal legal order. In other words, the question we ask is whether the Court's opinion was efficient in tracing the legal framework within which secession should occur. We shall argue that the path of mixed interpretative responsibility followed by the Court "de-legalizes" the issue of secession and that the rule of law is in effect left out of the solution.

As was noted above, the issue of Quebec's separatism is not one of *external* self-determination. The population of Quebec is not oppressed nor colonized and it can be said that the secessionist movement is about aspirations rather than emancipation. The issue then becomes one of *internal* self-determination, the principle that reflects the democratic prerogative of peoples to use the means within the state's internal legal order to achieve self-determination..

An interesting question (which was not addressed by the Court) is precisely whether this principle of internal self-determination covers different levels of aspiration - including independent statehood¹⁴ - or rather a *de minimis* set of privileges that and ensure the social, economic and cultural survival of a people within an existing state¹⁵. The answer to that question cannot ignore the characteristics of national legal orders since the concept of internal self-determination supposes recourse to internal mechanisms. We will argue that the opinion of the Court not only denies the existence of a *right* to secession in the Canadian constitutional order¹⁶ but also limits the prospect of a settlement through legality in the event of a successful secession referendum.

First, it must be noted that the Court did not explicitly reject the possibility of a legal secession of Quebec. Rather, it held that self-determination should be the subject of negotiations occurring within a normative framework:

The conduct of the parties in such negotiations 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.¹⁷

In other words, the Court assumed a *substantive* interpretative role: it declared which principles were to shape a theory of secession under the Canadian constitution.

¹⁴ See generally K. Nielsen, "Liberal Nationalism, Liberal Democracies, and Secession", [1998] 48 U. of T.L.J. 253.

¹⁵ See generally C. Gans, "National Self-Determination: A Sub- and Inter-Statist Conception", [2000] 13 Can. J.L. & Juris. 185.

¹⁶ *Supra* note 7 at para. 97.

¹⁷ *Supra* note 7 at para. 90.

What it failed to do, however, was to translate this substantive framework into procedure.¹⁸ A proceduralist theory of secession would have determined the minimal threshold of legitimacy required to trigger negotiations and the rules applicable to the process of secession.¹⁹ Such theory would also have embraced the relevant constitutional principles. By adopting a mainly substantive approach, the Court left to politics the crucial task of applying theory in practice. By further refusing substantive or procedural enforcement through judicial review,²⁰ the Court effectively denied the existence of a *legal* claim, at least on a positivist account. It abandoned to political discretion the power of defining self-determination.

This idea is also supported by the fact that the Court had to rely upon a rather pluralist conception to recognize a democratic claim for secession. Interestingly, it suggested that the furtherance of the rule of law would be assured by the need for legitimacy:

Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish.²¹

This illustrates the Court's optimism with respect to the political process. In the political sphere, legitimacy can be attained through other means. Demagogy, leverage and brinksmanship are but a few weapons of the political discourse. The rule of law can be perverted when appreciated through the lenses of politics. Outside the reach of judicial review, legality may become a secondary concern. Interests and ideologies would more likely define the framework within which secession occurs, and not the rule of law. This weakens the prospect of a "principled" settlement and favours a political struggle for legitimacy.

The procedural vacuum left by the Supreme Court could thus ultimately lead to unilateral actions on both sides. It does nothing to prevent the rise of "political entrepreneurship" within a secessionist government, which can profit from the

¹⁸ See S. Choudry and R. Howse, (2000) 13 Can. J.L. & Juris. 143 at para. 35.

¹⁹ See D. M. Weinstock, "Secession: Toward a Proceduralist Theory of Secession," [2000] 13 Can. J.L. & Juris. 251.

²⁰ *Supra* note 7 at para. 100.

²¹ *Supra* note 7 at para. 95 [emphasis added].

lack of legal means by exacting concessions over the threat of secession.²² It indeed encourages unconcerted action with respect to the elaboration of the process itself. Finally, should the negotiations fail, the Supreme Court does not offer any legal guidance to the resolution of the issue.

History has already shown at least some of these concerns to be well founded. In 2000, the Federal government adopted the *Clarity Act*,²³ which sets forth a procedure by which the legitimacy of a claim to secession is to be appreciated, prior to the start of negotiations. Articles 1(1)²⁴ and 2(1)²⁵ of this statute grant the federal government the prerogative to unilaterally and arbitrarily decide whether the support for secession is clear enough to trigger the negotiations envisaged by the Reference Case. There is little hope that a secessionist Quebec government would recognize the legitimacy of such a procedure since it effectively grants the Federal government the reviewing power that was waived by the judiciary. A doubt still remains whether negotiations would actually take place at all in such circumstances. A referendum could still be held despite a resolution by Parliament that the question asked is too vague. There is no answer about what would happen should a majority of Quebecois vote in favour of secession. Even if negotiations do occur, nothing is said about what would happen if no consensus was attained.

Assuming that there is a requisite expression by the people of Quebec to leave Canada, the Supreme Court opines that both parties have a duty to negotiate. However, in the event of a breakdown of negotiations the Supreme Court envisages a possible attempt for Quebec to unilaterally declare secession.²⁶ The ultimate success of this attempt, as articulated by the court, would rest upon international recognition. However, the court states firmly that any *post facto* recognition of a sovereign Quebec does not mean that the prior unilateral actions were constitutionally

²² See *supra* note 7 at para. 38.

²³ *An Act to give effect to the requirement of clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, S.C. 2000, c. C-26.

²⁴ Article 1(1): "The House of Commons shall, within thirty days after the government of a province tables in its legislative assembly or otherwise officially releases the question that it intends to submit to its voters in a referendum relating to the proposed secession of the province from Canada, consider the question and, by resolution, set out its determination on whether the question is clear" [emphasis added].

²⁵ Article 2(1): "Where the government of a province, following a referendum relating to the secession of the province from Canada, seeks to enter into negotiations on the terms on which that province might cease to be part of Canada, the House of Commons shall, except where it has determined pursuant to section 1 that a referendum question is not clear, consider and, by resolution, set out its determination on whether, in the circumstances, there has been a clear expression of a will by a clear majority of the population of that province that the province cease to be part of Canada" [emphasis added].

²⁶ *Supra* note 7 at para.106.

founded and therefore *legal*.²⁷ The Court maintains that "a distinction must be drawn between the right of a people to act, and their power to do so".²⁸ The idea of an effective secession was envisaged by the Court, which also noted that effectivity outside the rule of law could not bear the seal of legality.

However, any extra-legal action by Quebec would most likely be a consequence of the legal void left by the Supreme Court. The rule of law must impose itself to protect legitimate social values in order to protect the legitimacy of the legal institution. As J. Leclair puts it:

"Law must not be equated with a strict exercise of willpower. Rather it must be conceived as a system of rules whose object is to facilitate human relations. If it fails in that task, it will eventually cease to be obeyed for lack of legitimacy...these purposive principles must be in accordance with the attitudes and concepts of rightness of a given community."²⁹

The failure to recognize the people of Quebec's expression for change undermines the rule of law and consequently the Constitution itself. Although the Court stated it was prepared to recognize an obligation to negotiate, it explicitly refrained from translating that obligation into a legal right. The rule of law is used in constitutional interpretation to create predictability, and "embody the more general principles of normative order."³⁰ Therefore a clear expression by the people of Quebec requires some legal remedy that speaks to that effect.

By merely establishing a substantial framework of secession and recognizing a *political* remedy of self-determination, the Court failed to insure that the rule of law – and nothing else – shaped the legitimate steps to secession. By conferring upon politicians the delicate task to decide how the constitutional theory of secession should be interpreted and applied, the Court failed to recognize the inherent normative pluralism that underlies the political process.

Conclusion

Arguably, the Supreme Court was in an institutional position to dictate the requirements of legality. Our argument was that it could have done so by elaborating a proceduralist theory of secession. One then wonders why this was

²⁷The Court refers to this as the principle of effectivity. See *supra* note 7 at para. 106.

²⁸ *Supra* note 7 at para. 106.

²⁹ See J. Leclair, "The Secession Reference: A ruling in Search of a Nation" (2000) 34 R.J.T. 885-890 at para 7.

³⁰ *Supra* note 7 at para. 71.

not done. Clearly, the questions asked by the Federal government were not framed in a way that favoured such an approach. All that the Court had to decide was whether Quebec could unilaterally declare secession. It was not asked to establish how secession could be achieved. A proceduralist theory of secession would also have meant recognizing the existence of an aspirational right to self-determination under the democratic principle.³¹ It is doubtful whether this would have been in conformity with the Court's traditional vision of a centralized federalism. Nor would a more interventionist approach have been easy to justify under the current constitution. Some commentators have already criticized the Court's opinion for having read into the constitution unwritten principles.³² The elaboration of a proceduralist theory of secession would have been seen as a clear addition to the constitutional text and the interpretative function of the Court would have had to be surpassed. It is to be noted that no "exit" mechanism was entrenched in the centralizing 1982 constitution.

Perhaps the Secession Reference case will fall in legal history as having been nothing more than an inspired lecture on constitutional theory. Especially important is the withdrawal of the judiciary from the debate over secession in Canada. In the current political environment, it still remains doubtful whether the clash of ideologies can be avoided through negotiations, leaving the outcome to be decided through effectivity. In the end, one might argue that the failure of the Supreme Court to settle the issue of secession according to the rule of law was the result of a previous failure. Aware of Quebec's secessionist movements, the drafters of the 1982 constitution worked upon a centralized vision of Canada that was not shared by all participants.³³ The Trudeau government thought that Quebec separatism could then be checked whereas its roots were arguably deeper.³⁴ The failure of the Canadian constitution to account for the democratically expressed will of a province to achieve a higher degree of self-determination might eventually show to be a fundamental limit to the ambit of the Rule of Law in the Canadian legal order.

³¹ For a discussion on the importance of a people reaching their aspirational height of self-determination, See K. Nielsen, "Liberal Nationalism, Liberal Democracies, and Secession", [1998] 48 U. of T.L.J. 253. See also L.L. Fuller, *The Morality of Law*, Revised Edition, p.44 (1969). For a contrary view See Gans, *supra* note 15.

³² See Choudry and Howes, *supra* note 18.

³³ It is to be noted that Quebec was excluded from constitutional talks and refused to sign the constitution. The Province still has not recognized its legitimacy.

³⁴ See also Leclair, *supra* note 29 at para. 17: "the great majority [of Quebecers] wish that the Federal government [...] would finally understand that the Quebec issue is not an ephemeral one..."