

## **Drift, Strategy and Happenstance: Towards Political Reconciliation in Canada?**

Selected Proceedings of a Symposium  
held at Queen's University,  
May 28th and 29th, 1998

### **INTRODUCTION**

Each year the Institute of Intergovernmental Relations hosts a symposium on current developments in the area of Canadian federalism which is held in conjunction with the Institute's annual meeting of its Advisory Council. The 1998 symposium was entitled *Drift, Strategy and Happenstance: Towards Political Reconciliation in Canada?* and was held on May 28th and 29th at the Queen's School of Policy Studies. The commentaries included in this collection are drawn from remarks delivered by a number of the invited participants.

The symposium's title reflected the IIGR's sense that there were a number of developments and scenarios that, although they were occurring simultaneously, were not necessarily coordinated and could, but need not be, conflictual. Furthermore, these developments reflected, on the one hand, the reluctance of governments to discuss large-scale constitutional renewal in recent years (i.e. drift) as well as the need, on the other hand, to respond to the narrow federalist victory in the 1995 Quebec referendum. These events are reflected in the Calgary Declaration and the federal government's reference to the Supreme Court (i.e. strategy). As always, though, there are the unforeseen political events, such as Jean Charest's move from federal to provincial politics, that must also be accommodated in any analysis (i.e. happenstance).

In addition to the four commentaries from the day-long symposium itself, the IIGR was privileged to have the Honourable Stéphane Dion, Minister of Intergovernmental Affairs for the

federal government, as the event's key-note speaker. M. Dion's address, entitled *My Praxis of Federalism*, provides an intriguing look at the challenges faced by an academic who is suddenly thrust into the middle of the political and policy debates of which he was a student.

Dion's address outlines not only his understanding of Quebec nationalism and separatism, but also a set of "solid principles of action" which should guide the process of reconciliation. The commitment to these principles, Dion argues, must go hand in hand with an understanding of the complex manner in which these principles interact with each other.

The complexity of that interaction and the difficulty of accounting for the elements of drift, of strategy and of political happenstance is reflected in the commentaries that emerged from the symposium. Each of the authors was asked to assess different elements of the reconciliation process and to comment on what they saw as the likely developments.

The first two contributors provide overviews that not only outline recent developments in the reconciliation process, but also provide insight on how that process can and should perhaps be viewed. The final two authors look at specific elements of the process with an eye to assessing their political, legal and social import. Taken together the commentaries provide an important snap-shot of the state of federal-provincial relations with its complexity and contradictions clearly outlined, if not resolved.

At the outset, David Cameron provides readers with a much needed change in perspective when it comes to analyzing the intricacies of federal-provincial dynamics. By making a methodological virtue of his inability to predict the future, Cameron presents a cogent argument in favour of a different approach to Canada's perpetual state of constitutional crisis.

Though not post-modern in any real sense, Cameron's argument is grounded in a critique of

an essentially modernist approach to political problem-solving. For Cameron, the persistence of our national unity "crisis" may rest in part in our commitment to "a deeply liberal, progressive civilization" in which all problems *must* have solutions. Cameron then asks us to consider the proposition that Canadians may have to accept that the "crisis" cannot be resolved, only avoided.

He concludes that by continually exposing the intractability of the national unity problem, Canadians may indeed be putting the nation at risk. Rather than search for a solution, Cameron proposes that we may be better off searching for a way to accommodate (but not resolve) the nation's deep divisions.

Richard Dicerni provides an overview of the federal government's strategy on national unity in the post-referendum era. In doing so, Dicerni serves also to highlight the complexity and depth of the problems noted by Cameron. What is most interesting in Dicerni's analysis is that, contrary to some viewpoints, the federal government has not been "fiddling while Rome burned".

In the months and years since the 1995 referendum there has been, he argues, a three-pronged federal strategy toward Quebec -- the accommodation of specific Quebec demands (e.g. a distinct society clause); an overall commitment to creating a more efficient federation through federal-provincial collaboration; and, a "law and order" approach towards separatist assertions on the process of secession (e.g. the court reference).

What is troubling in Dicerni's analysis is not the apparent contradictions between elements of the federal strategy. After all each element addresses specific parts of the problem as the federal government understands it. Rather, it is the assertion that this multi-front strategy is failing to pierce what he calls "the wall of indifference" many Quebecers feel toward Canada that is somewhat troubling.

Dicerni's comments conclude with the proposition that the federal government's strategy

may help win the day for the federalists in the next Quebec referendum, but it may not help overcome the wall of indifference. Like Cameron, Dicerni highlights the profound complexity of Canada's unity dilemma, but unlike Cameron, he sees the federal strategies on this issue as a sort of first step toward the rearticulation of an overarching national vision. It remains to be seen, as Dicerni admits himself, whether any government in this country is yet capable of articulating such a vision in light of the kinds of barriers he identifies.

Where both Cameron and Dicerni present more macro level analyses of reconciliation process, Daniel Soberman and John Courtney look in more detail at particular elements of the federal strategy with an eye to its legal and political implications.

His protestations to the contrary, Soberman's ability to discern clear images in what he terms a "very clouded" crystal ball would make Nostradamus proud. At the time of the symposium the Supreme Court of Canada had not yet indicated when it would hand down a decision on the federal government's referral to it of several questions regarding the right of Quebec to unilaterally secede from the federation. In the intervening months, as we all know, the Court has rendered its decision. Soberman's prediction of what the Court was most likely to say shows remarkable prescience.

What makes Soberman's analysis important, however, is not just that he got it right, but the chain of reasoning that led him to his conclusions. Beginning with the 1981 constitutional reference (which effectively sent the First Ministers back to the negotiating table) and through the era of the Charter, the Supreme Court has played an increasingly important role in Canada's political and public life.

What becomes apparent from Soberman's comments is that regardless of any judicial reluctance to involve itself directly in the political process, the Court has shown remarkable political dexterity. It has managed to balance its duty to

render judgement on the cases before it while at the same time preserving the political prerogatives of elected governments, especially in the controversial area of constitutional renewal. By doing so the Court has maintained its distance from the direct involvement in day to day political struggles and thus preserved much of its legitimacy. That legitimacy as an arbiter of constitutional debates may, Soberman hints, be needed again in the near future.

Thus, the August 1998 decision regarding Quebec's right to secede further illustrates the political acumen of the nine justices. Quebec has no unilateral right of secession under either Canadian or international law. However, the "clear" expression of a desire to secede in response to a "clear" question on the part of Quebecers, would behoove the federal and provincial governments to negotiate an acceptable secession agreement. What is striking about the decision itself is that the Court has appeared to satisfy both the federal and Quebec governments with its answers.

Of course, it can be argued that the evidence presented to the Court pointed clearly in the direction that Soberman suggested. Thus, the eventual decision is not all that surprising given the situation in which the Court found itself. But there is an element raised in Soberman's comments on which the Court was silent and which has profound political consequences for the nation. What if, after a clear majority in a clearly worded referendum, negotiations between Quebec and other governments break down?

Soberman was right that the Court would side-stepped the issue, and with good reason. But for students of federalism it raises difficult questions. Such a scenario, as Soberman points out, puts governments and Canadians into a constitutional void whereby the existing constitutional order offers no guidance. Once again, the federal government may turn to the Supreme Court for direction and affirmation of its strategy. This could prove to be the most

important challenge to the Court's political acumen to date. It is worth noting that with each such display of constitutional dexterity (first with the patriation reference in 1981 and now with the secession reference of 1998) the Court may be setting the stage for its further involvement in the process.

Having received the answers from the Supreme Court that it wanted, the federal government is still left with selling its reconciliation strategy to the rest of the country. Where Richard Dicerni focussed on how that strategy is perceived in Quebec, John Courtney examines the impact of the federal strategy in Western Canada.

As Courtney rightly points out, the western provinces (and especially Alberta and Saskatchewan) have to some degree supplanted the traditional role played by Ontario in the unity/reconciliation debate. Thus, both Alberta's Klein and Saskatchewan's Romanow have emerged as the key provincial leaders outside of Quebec. This, couple with the profound impact of the Reform Party on the nation's constitutional discourse, mean that the question of how the federal strategy is perceived in the west is increasingly important to its eventual success or failure.

There is, it appears, substantial support in the west for the federal government's strategy and especially for those elements that seem to "get tough" with Quebec separatists. Likewise, this is further reflected in Minister Dion's own popularity with westerners -- a popularity that is reminiscent of that of Pierre Trudeau in 1968 according to Courtney.

Yet this raises some important problems. First, the popularity of the federal strategy in the west is mirrored by its unpopularity within the province of Quebec. Second, and just as important, the western support that Courtney identifies is profoundly fragile. In the end, Courtney, like his fellow contributors, highlights

I believed that you don't save a country by relying on such a logic of internal separatism -- especially not when the country is already, in many ways, a decentralized federation in comparison with others in the world. Transfers of power cannot allay separatism if they are made for that purpose alone. Every new transfer would lead Quebecers to withdraw ever further into their territory, to define themselves by an exclusive "us", to see other Canadians increasingly only from afar, and to reject the Canadian government and common Canadian institutions as a threat to their nation, a foreign body.

And given the lack of support for a special status for one of Canada's provinces -- a phenomenon that can also be seen in other comparable federations, such as the U.S., Switzerland, Belgium and Germany -- the same concessions would have to be offered to the other provinces, to avoid regional jealousies. This spiral of concessions could lead to a sort of balkanization. And yet if the federal government refused to grant the other provinces the same powers as Quebec, it might give rise to a powerful backlash, from Western Canada and other regions as well, which would inevitably be interpreted as a rejection of Quebecers. A federation is living on borrowed time when its only logic for change is to reward separatist blackmail.

I maintained that it was identity, rather than the division of powers, that is at the source of our unity problem. Francophone Quebecers want the assurance that their language and culture can flourish with the support of other Canadians. They want to feel that their language and culture are seen by other Canadians as an important asset, rather than a burden. They want the assurance that they can be both Quebecers and Canadians, and that they don't have to choose between Quebec and Canada.

When I met with people in my riding and elsewhere in Quebec, my conviction was strengthened that the most fundamental issue is related to identity, rather than the division of

powers. When I ask those who call for more powers for Quebec to specify which ones they want, they are quite often unable to come up with an answer.

I told myself that if the defenders of Canadian federalism don't explain to these citizens just how much Canada is a principle of sharing, rather than endless constitutional bickering, no rejigging of powers can win them over to supporting Canadian unity in a lasting way.

Especially not a rejigging ill-conceived in terms of quality of service to the public, which would create new inconveniences for these citizens. Because then the separatist leaders would have a field day showing them how, even with the best will in the world, Canada doesn't work.

This is what we must succeed in doing: showing that Canada is a principle of caring, a country where Quebecers have the opportunity to express their culture and their identity, both for themselves and to better help other Canadians, while accepting their help in turn. In other words, everyone needs to realize just how much this Canadian sharing is taking place each and every day, not just during ice storms.

Canada is not an emergency cord to be pulled only one week every 15 years, just before a referendum vote. There are universal values tied to the Canadian ideal; we must be able to express them and show how much Quebec society is a part of this ideal. And at the same time as we express those values, and highlight the reasons to be strongly attached to Canada, we also show that breaking that ideal, to which so many people are so deeply attached, breaking Canadian unity, would be a very sensitive operation. It would be one for which many precautions would have to be taken: a mutually agreed on, rather than unilateral, procedure; clarity, rather than confusion; legality, rather than anarchy.

So there's no contradiction between the so-called Plans A and B; rather, they are part of

the same process of clarifying what Canada is all about.

### **Putting federal-provincial relations into principles**

And where does improving the federation fit into all this? Well, if we succeed in making this federation more harmonious and more efficient, the improvement in governments' ability to work together will enhance Canadians' image of their country -- just as putting public finances in order and revitalizing the economy increased their confidence in Canada.

You know as well as I do that, apart from all of us here today, the machinery of federal-provincial relations is of interest to few people in this country; similar disinterest can be seen in other federations as well. With the possible -- but by no means certain -- exception of the job training agreements, it would be presumptuous to say that the changes we have made to this federation in the past two years have had an immediate positive effect on public opinion.

In fact, things work in the very opposite way: a series of failed negotiations with the provinces would definitely have sapped support for Canadian unity. If the federal-provincial negotiations on the pension plan, environmental harmonization, extending the infrastructure program, liberalizing internal trade, the constitutional amendments affecting certain school boards or the national child benefit had all failed, or had generated the same divisions as the agreement on hepatitis C, there is no doubt that Canadian unity would be weaker today.

It is very frustrating for all governments to see how many success stories go almost unnoticed, while a few failures get all the headlines. It's like the Calgary Declaration, which proceeded apace without any fuss, and yet a snag in even one province would have produced a great hue and cry.

The question that specialists like yourselves need to answer is whether the changes we have made in the past two and a half years, as well as those we are currently working on with the provinces, will have long-term benefits in terms of the effectiveness of the federation. Will we have better social policies, better health policies, better environmental policies, a more dynamic internal market, a better trained workforce? Will all these pragmatic changes enable us to draw the greatest potential from the federal and provincial governments and to improve the synergy between the two orders of government?

In the latest volume of the *State of the Federation*, some of you have judged the trend that is emerging in the Canadian federation in a rather positive light. The editor of this work, Harvey Lazar, sees a promising new balance arising, marked by greater cooperation among governments. Similarly, Robert Howse sees 'a new way of doing federalism' which strengthens the feeling of coexistence.

I hope that these academics are right, and I share their optimism. The main reason for my optimism is that, while working pragmatically one step at a time, on a case-by-case basis, we have always been guided by solid principles of action, which we must always strive to respect more fully. Those principles are as follows:

- 1) *The Constitution must be respected.* We must do away with the all-too-convenient excuse that a given governmental initiative responds to a need that is too urgent to be stymied by issues of "jurisdiction." Infringement of jurisdiction creates confusion which damages the quality of public policy.
- 2) *Close cooperation must be established where it is needed.* And it must be done often, because government jurisdictions touch on each other in almost all sectors. I used to say that my responsibilities required me to support my colleagues in almost every area but the military. But ever since the ice storm that hit three provinces, I now have to give a

hand to the Minister of National Defence as well. There are few policies that the Government can accomplish alone without the active cooperation of the provinces. It's all very well for the federal government to negotiate wonderful international agreements on the environment, but they'll get absolutely nowhere without the provinces' cooperation. And everyone knows that a national home care policy is just not going to happen without the agreement of the provinces. The federal government simply does not have the capacity to act alone in this sector, nor in the vast majority of social policies. That is why the new Ministerial Council on Social Policy Renewal is an excellent innovation. Through the Council and its task forces, governments are coordinating their activities more effectively on issues such as child poverty and programs for youth and persons with disabilities.

- 3) *Governments' ability to act must be preserved.* We mustn't let our quest for cooperation leave us with a federation where no government can do anything without asking the permission of the ten others, not to mention the territorial governments and First Nations representatives. Autonomous spheres of activity are important in our federation; they must not be needlessly whittled away so that we fall into what the Europeans call the 'joint decision trap.' For example, the Environmental Harmonization Accord signed on January 29, 1998, commits the federal and provincial governments to work together to harmonize their standards and regulations, while preserving the ultimate right of each if a consensus is not possible, to make its own laws. This means that citizens and businesses will normally face a single set of standards, for example on toxic emissions, and will only have to deal with one inspector. Another example is the agreement concluded on February 20 by industry ministers, which will further liberalize government contracting.

This agreement has been approved by all ministers but British Columbia's. Rather than waiting for unanimity, which is not yet forthcoming, the ministers wisely decided to proceed with the agreement, hoping that B.C. would join later.

- 4) *The federation must be flexible.* In striving for joint action, we must also take into account the diversity of the country. The provinces have their own specific characteristics and sometimes adopt differing policies. So, for example, the job training agreements allow the provinces to choose between a co-management formula with the federal government or greater autonomy. In the same way, federal funding for the new child benefit comes with budgetary flexibility that allows the provinces to use the funding in accordance with their own child and family poverty policies. The objective here is to reconcile joint action with the provinces' capacity to innovate and establish a healthy emulation among themselves. This would not be possible if the federal government tied its assistance to painstakingly detailed national standards. This federal flexibility is even more necessary in this period of economic globalization, where each province must be able to choose its strategies in facing its own expanding external market.
- 5) *The federation must be fair.* Canada will have succeeded in bringing down the \$62 billion deficit of all its governments in less than five years. It is extraordinary that this feat has been accomplished without creating more friction between the federal government and the provinces or more jealousy among the provinces. Nevertheless, occasions for conflict will not diminish now that the surpluses around the corner are attracting envious glances. The Premier of this province is particularly active on that front at the moment. The federal government is aware of the difficulties the provinces are having after all these years of cuts: 38% of the new

spending initiatives (that is, additional spending or rescinded cuts) set out in the last Martin budget will go directly to the provinces.

- 6) *We must exchange information.*  
Unilateralism and upstaging must be avoided. Governments must be notified in advance of any new initiatives that could have a significant effect on their activities. Exchanging information also allows governments to compare their performance, assess their respective initiatives and establish among themselves the healthy emulation I mentioned earlier.
- 7) *The public must be aware of the respective contributions of the different governments.*  
That's right, the famous visibility. While it would be very bad if visibility were the main motivation driving our actions, citizens have the right to know what their governments are there for. They must be able to assess the performance of each one; it's a question of transparency. And governments will agree more readily to work together if they have the assurance that credit for their initiatives will not be claimed by others. I can assure you that my job as Intergovernmental Affairs Minister would be much easier if I could guarantee my Cabinet colleagues that cooperation with the provinces will not make the Government of Canada invisible to Canadians. My provincial counterparts say the same thing about their colleagues. For example, if the new National Child Benefit Agreement was negotiated successfully, it was in part due to its

guarantee that each government will clearly receive credit for its own actions and, at the same time, be held accountable for them to citizens.

## Conclusion

These are the main principles guiding us. One question we must answer is whether to formalize them in frameworks or within new structures such as the Ministerial Council on Social Policy Renewal. What is important, however, is that these principles be respected in a way that increases cooperation between governments and makes it possible to manage conflicts better. Because those conflicts will always, always be with us. We've got to stop seeing every single conflict as proof that the country doesn't work.

Incidentally, those conflicts don't always have negative consequences. One of the advantages of the federative form of government is that solutions can be found more easily when disagreements take place out in the open, among constitutional partners, rather than in the ivory towers of huge centralized bureaucracies that weigh down unitary countries.

The principles I have set out constitute our praxis of federal-provincial relations. A praxis which, nevertheless, is not at all revolutionary. There won't be any 'now or never' ratifications of huge package deals that will solve everything. Instead, we'll see an approach, à la Jean Chrétien, step by step, solid and determined.





## NATIONAL UNITY AND PARADIGM SHIFTS

by  
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*Author's Note: The text presented below has been moderately revised from the presentation made at the IIGR Symposium, though its essential points remain the same.*

My modest goal in this paper is to explore whether Canada and Quebec may be on the cusp of a paradigm shift in French-English relations. What I am asking is whether we are on the verge of something big in our history, a shift from one historical era to another.

Let me give you the short answer to that question first: - I don't know.

Now for the long answer, which is necessarily speculative. It will proceed in the following stages.

- First, I will turn ignorance into a methodological virtue, using its existence to help us open our minds to the possibility that there are new worlds and shiny new paradigms out there, waiting to be discovered.
- Second, I will examine features of our present world for hints or intimations of potential change and possible transformation. The idea here is to see whether the seeds of a new era are embedded in the old.
- Third, assuming that there is the potential for transformation, I will consider how that potential might be actualized. Here it will be a question of identifying actors or historical agents which might bring about the birth of this potential new era.
- Finally, I will reflect on the possibility that our earnest efforts to address our national-unity problem over the last three decades is in fact what has kept the problem in existence. If

I am successful in making a case here, it will give the phrase "Just say no" new meaning.

Before I begin, I should sketch briefly what a new era or a new national-unity paradigm might look like.

I am not talking just about the possibility -- with Jean Charest at the helm of the provincial Liberals -- of defeating the PQ in the next provincial election, or of winning the next referendum if the PQ is not electorally defeated. I am not thinking about the kind of momentary lull in our national-unity storm that we have known from time to time in the last 30 years.

I am asking you to consider whether there might be grounds for believing that a radical reconstruction of political discourse in Quebec concerning the national question is imaginable, whether it may be possible for us to shift the focus away from our debilitating concentration on constitutional disunity, grievance politics, partition, the terms of secession, Plan B and French-English tension.

I am talking about reaching an enduring, stable accommodation between the French-speaking and English-speaking communities in this country, the kind of allegedly sunny pasture we always hoped was waiting for us around the next constitutional corner, but which we never found.

If you think of the Quiet Revolution as opening a bracket at the beginning of a period in which deep, existential questions of identity, community and national purpose have been in play, both within Quebec and within Canada as a whole, then the paradigm shift of which I speak can be thought of as closing the bracket at the end of that turbulent historical period, and heralding the commencement of a new and discernibly different era in our evolving political experience.

Now you know what I mean by a new paradigm. Let's try to see whether we are on the cusp of it.

Canadians - inside and outside Quebec - find themselves.

### Actualizing the Potential

Well, let us suppose that there is in fact the potential for major change. That doesn't necessarily mean that it will be realized. Many of the factors I have identified have been in existence for some time, and that hasn't led to any astonishing *virage*. Why should we think it might happen now?

It is obviously true that what is potential is not actual. There needs to be a catalyst to secure the release of the potential. The dynamite needs an igniter. Someone needs to throw the switch on the power grid. The skids have to be pulled out from under the new ship for it to be launched. Maurice Duplessis had to die before the Quiet Revolution could commence.

What plausible catalytic agents are on the horizon in the situation I have described? As possible agents of transformation, I would offer you a person and a generation.

The person, of course, is Jean Charest. He assumes his role as a political leader in Quebec at an auspicious moment; he is presented with a wider range of policy choices than is customarily the case in politics, and a greater potential than normal to effect political change. Don't get me wrong: he is no miracle worker. A large-dimension opportunity is there, that is all; whether he will be willing and able to seize it is another matter.

He brings considerable personal assets to the task.

- His authentic Quebec roots.
- His rhetorical skill and his talent for reaching people emotionally.
- His youth.
- His forthright commitment to Canada and to Quebec within Canada.

Quebec has not had in living memory a prominent provincial politician prepared to make an unvarnished case in favour of Canada and Quebec's place within it. Jean Charest's willingness to do so opens up a new line of debate in the province, and holds the possibility of releasing sentiments and preferences long stopped up in that society.

Mr. Charest can present himself as a leader from the new political generation in Quebec which is prepared to offer Quebecers politics in a new style. He can underline the contrast between himself and the older generation of Mr. Bouchard and Mr. Chr tien, drawing a distinction between his egalitarian, post-modern way of doing politics and the stiffer, more formal, top-down, old-fashioned manner in which Mr. Bouchard conducts himself. He can remain relentlessly positive, confident and up-beat, demonstrating his refusal to play the negative politics of grievance, complaint and humiliation that has fed so much of the sovereignty movement.

In policy terms, he can oppose Plan B, the holding of another referendum, and any discussion of the constitution. He can commit himself and his government, if elected, to active participation in the common life and intergovernmental affairs of the country. Much of this Jean Charest is already doing.

Until now, the politics of hope has been the politics of sovereignty. Jean Charest has an opportunity to wrestle hope from the grasp of the sovereignists and attach it to the rejection of sovereignty and the forthright acceptance of Canada.

What I am advancing here is far from being an argument for the *status quo*, although the *status quo* has its merits. It is rather an argument against trying to do what you cannot do, and in favour of applying your creative and transformative energies to those areas of our common life where they can really make a difference.

What of the other catalytic agent? Here I am speaking even more speculatively, but I am thinking of the political impact a new and younger generation may have on Quebec politics as its leaders assume positions of power. I am thinking of those who may not have fully absorbed the world view and traditional nationalist ideology from their elders, of the people whose future will be unequivocally shaped by globalization, the new communications technologies and the post-industrial economy. Which way will these people jump, on the national question? What will the new Quebec politics look like as the Lucien Bouchards and the Bernard Landrys and the Jacques Parizeaus pass from the scene?

If the rising generation responds positively to the style of politics and the reorientation of public policies that Jean Charest and a remodelled Liberal Party might put on offer, there could be the catalytic force required to bring forth the new era I am talking about.

### Thinking About Things Differently

Let me turn now to the fourth and final stage in my presentation, namely, a few concluding reflections on the possibility that our earnest efforts to address the national question over the last three decades is part of what has kept the problem in existence.

A great deal of our collective energies in the last few decades has been devoted to activities and initiatives that have their roots in one of two assumptions:

- That there is a problem and intelligent efforts at reform may fix it.
- That there is a problem, but reform may not fix it, and Quebec may depart.

Is this the most helpful way of framing the matter that confronts Canada? There is, after all, a third possible assumption, namely, that there is a 'problem', that it cannot be fixed, and that Quebec will not depart.

We are all of us embedded in a deeply liberal, progressive civilization in which it seems that everything we find amiss is a 'problem,' and every problem must have a 'solution.' For more than 30 years we have sought to define the problem, to make it explicit, to frame as precisely as possible what the issue of contention is, and then to make policies, take initiatives and amend the constitution to resolve the matter. A problem solved is a problem gone away, a problem gotten rid of, and we have cried out for finality, for an end to the crisis.

Perhaps one of the reasons we have been unable to obtain satisfaction in this matter lies in the activist, rationalistic methodology we have implicitly utilized in seeking to address it. Maybe we have unwittingly paid too little heed to the merits of prudence, restraint, circumspection and, yes, avoidance. What if it is the case that what we are confronting is not a problem to be solved, but a tension to be accommodated, an arrangement to be lived with, a practical situation which is not perfect, but eminently tolerable? Thinking about our national-unity 'problem' in this way points us in an unconventional direction.

It alerts us to the possibility that in every decently functioning constitutional order, as in other human relationships, there may be no-go zones, radically divisive areas of political life which contain issues that cannot be resolved, but only avoided. Indeed, it appears that many successful constitutional regimes manage their affairs, in part, by burying or covering over these vertiginous cleavages.

As it happens, there is a constitutional scholar who speaks directly to this point. Michael Foley in *The Silence of the Constitution*<sup>1</sup> writes, not about Canada, but about two of the most successful and sophisticated constitutional regimes in the world - the United Kingdom and the United States. He refers to these dangerously unmanageable elements buried in the foundations of these and many other societies as 'abeyances,' and contends that a mature and prudent political order will

implicitly attend to them by indirection, by encouraging the potentially warring parties to engage in mutually complicit acts of restraint and avoidance - a kind of whistling past the graveyard.<sup>2</sup> A failure to do so, a willingness to uncover and expose these abeyances, will often be the prelude to acute civil upheaval, and, once unburied, it will be very difficult to get them back under ground again.

In Canada, the noxious dialectic played out in recent years between the principle of the equality of the provinces and the principle of Quebec as a distinct society points to just such an elemental force. It can be argued that during the last three decades we Canadians — true children of the age of reason, believing that every 'problem' has a 'solution' — have been busily digging up and exposing this constitutional abeyance. Having got it up and out in the open, we don't know what to do with it.

### Conclusion

Perhaps we are at a moment in our national development when an abeyance-burying strategy, very different from what we have been doing, is feasible. Is it not possible to believe that there is the potential in Quebec and Canada for a profound shift in the manner in which we address the national question?

The historical role I have assigned to the unwitting Mr. Charest in these remarks is to help us all begin to get this unruly force safely buried under ground again. His assignment, should he choose to accept it, is to become Canada's Supreme Abeyance Interment Officer. I say, let the (re)burial begin.

Let us suppose that the future is indeed as murky and as unfathomable as I have described it. In that case, it would, at the very least, be unwise to rule this kind of paradigm shift out as a possibility. After more than 30 years of storm and ferment - who knows? - Canada and Quebec may want some quiet. It looks as if it is there for the taking.

### NOTES

1. Michael Foley, *The Silence of the Constitution: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government*. (London: Routledge, 1989). Foley speaks of "the continuing flaws, half-answers and partial truths that are endemic in the sub-structure of constitutional forms. Abeyances refer to those parts of the constitution that remain unwritten and even unspoken not only by convention, but also of necessity. More precisely, abeyances represent a way of accommodating the absence of a definitive constitutional settlement and of providing the means of adjusting to the issues left unresolved in the fabric of the constitution. Sometimes ... the issues can be crucial; the only satisfactory way of defusing them is to inhibit their development and to place them in abeyance as a condoned anomaly...." (P. 10.)
2. This phrase is the title of David Thomas' book, which applies the abeyance theory to Canada: *Whistling Past the Graveyard: Constitutional Abeyances, Quebec, and the Future of Canada* (Toronto: Oxford University Press, 1997).

## FEDERAL STRATEGY AND ITS IMPLICATIONS

by  
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Ontario Hydro

### Introduction

When approached to participate in this symposium, the theme and the other speakers had not yet been finalized. When I saw the final program I was both humbled and heartened. I was humbled by the fact that Minister Dion, a former political scientist and now Minister of Intergovernmental Affairs, would be speaking before me. Of course, the odds were that he would be talking on the same topic, namely the federal strategy, thereby rendering my commentary either redundant, repetitive or more likely demonstrably off the mark.

I was also somewhat taken aback when I realized that most of the other participants were still very much active, and practicing members of the unity/renewal of the federation/la question nationale circle. For those of you who have read Robert Reich's memoirs about his time in Washington, I was anticipating an "out of the loop" syndrome.

I was heartened on the other hand, because the theme of the symposium — Drift, Strategy and Happenstance — I find most *a propos*. It encapsulates quite well the major characteristics of most governmental policy making exercises. And when I say this I don't mean to be critical of government. This simply reflects the reality of policy making in today's atomized political world in which the ability to plan, to control events and shape outcomes is somewhat less than it was some years ago. Lindbloom's theory about muddling through appears to be making a determined and forceful comeback.

When preparing for this symposium, I was reminded of what Zbigniew Brzezinski said during an interview in the periodical *Encounter* upon leaving the White House. As you will recall, Brzezinski was a professor at Columbia who served for four years as President Carter's

National Security Advisor. When he was asked what he had learned in his 4 years in government he said:

"...history is neither the product of design nor of conspiracy but is rather the reflection of continuing chaos. Seen from the outside, decisions may often seem clear and consciously formulated; interrelations between governments may seem to be the products of deliberately crafted, even if often conflicting, policies.

But one learns, in fact that so much of what happens...is the product of chaotic conditions and a great deal of personal struggle and ambiguity. Sometimes you will find agreement on means but fundamental disagreement on ends; sometimes agreement on ends but disagreement on means. All this reinforces the impression of contingency and uncertainty which is inherent in the human condition and which is only magnified by the scale and intensity of the power one wields."

Strategy, at the best of times, is a challenge for the policy maker. Implementation of the strategy is an even more daunting task. Over the last 20 years, since Brzezinski's time in government, it has become more so. Why? There are many reasons. One of them is the proliferation of media and television networks like Newsworld and RDI which have forced policy making to often happen in real time. With the speed and flexibility of modern communications, news agencies have the ability to take statements from a proponent on one side of an issue and immediately provoke a response from a Minister on the other side of the issue. This promotes an action-reaction dynamic that results in issues being broken down into sub-components and worked out on the fly. This is not intended as a criticism of the media. It is simply a reflection of the current reality. It is something that political leaders need to be aware of and take into account when developing and implementing policies. The emergence of public interest groups as major credible participants in the public policy process adds an additional layer of complexity. I will speak more on this later.

Notwithstanding on Brzezinski's admonition about strategies, I will now turn to the subject

matter that I have been asked to speak on namely the federal strategy.

My presentation is divided into two parts. The first will describe what the federal government has done on the national unity file since the 1995 referendum. The second part will provide some commentary on how it's working and the implications. I would note also that this presentation, given the time limitation, is mostly Quebec centric.

The first part will be a description of the federal strategy. In the absence of having access to a Mike Kirby type of memorandum which clearly laid out the context, the strategic goals and the tactics for the federal government, I have chosen to focus on three statements which the Prime Minister made towards the end of October and early November, 1995. These were his Verdun speech, his address to the nation and his speech in Toronto on November 1<sup>st</sup>. In these statements, he laid out what I would submit, became the triangular base for the federal government's strategy.

These 3 points are:

- Addressing Quebec's specific needs, more specifically, by advocating a recognition clause and the veto.
- Getting the house in order, more specifically, by moving on high profile federal provincial overlap issues.
- Addressing the "what if" question, more specifically, by seeking to clarify the legal implications of separation.

### **Track 1: The Quebec Bookends.**

On October 24, 1995, less than a week before the referendum, the Prime Minister made a speech in Verdun. In that speech the Prime Minister said that Quebecers "want to see Quebec recognized as a distinct society within Canada by virtue of its language, culture and institutions...I agree." He went on to say: "A NO does not mean giving up any position whatsoever with regard to Canada's constitution. We will be keeping open all the other paths for change, including the administrative and constitutional paths. Any

changes in constitutional jurisdiction for Quebec will only be made with the consent of Quebecers."

The next day, in his address to the nation, he restated his commitment saying: "And I repeat tonight what I said yesterday in Verdun. We must recognize that Quebec's language, its culture and institutions make it a distinct society. And no constitutional change that affects the powers of Quebec should ever be made without the consent of Quebecers".

The federal government's initiatives in this area could be divided into two phases:

- The immediate high profile post-referendum proposals which resulted in the resolution in the House on distinct society and the passage of Bill C-110, and;
- Its support, endorsement, and participation in the process which led to the Calgary declaration.

According to Tony Wilson-Smith and Eddie Greenspoon, in the book *Double Vision*, the Prime Minister, when he came to Toronto on November 1<sup>st</sup>, wanted to move aggressively on putting his Verdun commitments into constitutional law and sought Premier Harris' support for engaging down that track. According to the same journalists, the Premier demurred and urged caution before moving on this track. In light of this advice and similar counsel from other sources, the government put aside the constitutional track and moved rather with C-110 which put in statute the regional veto, and with a resolution in the House of Commons on distinct society.

Somewhat later, the government having perhaps noted some of the divisive after effects of their unity proposal, decided on a more behind-the-scenes approach and let the provincial premiers carry the public initiative. This resulted in the Calgary declaration which has now been endorsed by 8 provinces.

Looking back over the past two and a half years, the question that arises is whether the federal government, in concert with the other provinces, moved the yardsticks in regards to the recognition clause and the veto issue? Or, to put this another way, using an expression that is

gaining currency here in Ontario, is this a case where one can say, "Promises made, promises kept"? I believe that answer is obvious. It is a definite kinda, maybe, sort of.

It does depend in part on the measure that one uses to make the judgment; if one uses the Meech benchmark, it falls short. If on the other hand one is looking at the combination of C-110, the distinct society resolution and the Calgary declaration as directional indicators of where the federal government and the rest of the provinces are going, it meets the mark. Lastly, if one is looking at these initiatives as the seminal event that will permit Quebecers to feel a sense of appartenance and security, well....maybe not yet.

### **Track 2: Home Improvement or Making the Federation Work Better**

In his October 24th Verdun speech the Prime Minister said: "All levels of government must find the means to bring decision-making closer to citizens. This desire by the people for greater decentralization is a challenge that our federal and provincial governments must address." The Prime Minister went on emphasize "the need to work on eliminating overlap and duplication in our services." In his address to the nation, the next day he said: "...all governments — federal and provincial — must respond to the desire of Canadians — everywhere — for greater decentralization."

There are a number of schools of thought regarding the federal government's activities on this front. Some would argue that this represents a determined and definitive attempt to disentangle accountabilities in order to achieve more efficient and more accountable government. The proponents of this school point to the ongoing efforts by the federal government since the early nineties to cut down on overlap and duplication. They also single out a number of high profile sectors such as Training and Environmental Harmonization where the federal government has shown clear leadership.

There is another school of thought which argues that most of the federal government's activities in this area have been primarily driven by expenditure reduction and that the rebalancing

of the federation is only a thinly disguised strategy to achieve the true goal of balancing the books. They point to such areas as social housing and transfer payments reduction as evidence for their case.

There is finally a third school of thought that argues that all of the above is just temporary window dressing. They argue that the recent announcement of the scholarship fund is indicative of the federal government's perpetual yearning to enter areas of provincial competencies when and where there is a societal or perhaps political need for it. They would argue that there is no firm guiding political philosophy of disentangling but that it is somewhat more situational.

The question is which school truly represents the federal strategy and what can we expect in the future. The answer is obviously all of the above. The federal government is not a monolithic entity. At different points in time, different schools of thought have paramountcy. Having been in the room when the Prime Minister discussed some of these matters with Premiers, I am of the view that he was quite sincere in his determination to provide as much rebalancing and clearing up as he could. On the other hand I am reminded of what Robert Bourassa once said about the chances of significant rearrangements within the federation given the power of caucus and middle-to-senior officials in the bureaucracies. He presented the view that these two institutions, notwithstanding the party in power, would always have a bias towards the status quo and would tilt the pendulum of change towards the centre.

On balance and notwithstanding the motives, I believe there has been tangible progress on more clearly delineating who does what; moreover, the federal government deserves some measure of credit for political leadership in some areas. Is there the possibility of backsliding? Of course! The essence of federalism coupled with modern bureaucracies and active public interest groups tends to preclude a definitive, once and for all solution.

### **Track 3: Law and Order : Defining the Rules**

On November 1<sup>st</sup>, in a speech in Toronto, the Prime Minister said: "Canadians must never again

be held hostage by Quebec separatists who are bent on destroying Canada. We cannot play that game that there will be a referendum every six months or year or two years. It is not the way that I will play the game."

In that speech, the Prime Minister did not provide any details on how he would attempt to set the rules. But over the subsequent months, this strategic goal took shape through a variety of initiatives. These included:

- The reference to the Supreme Court by the then Minister of Justice Allan Rock.
- Minister Dion's appointment and public speaking schedule.
- The overt engagement in public debate by Minister Dion of Premier Bouchard and Minister Landry over such issues as: unilateral declaration of independence, partition, and the 50% plus one threshold. Since these initiatives, as people in this room know more than anyone else, have not yielded in Quebec a broad societal consensus, the question is why did the federal government proceed down this path. Again, I would submit, there are at least 3 schools of thought.

First are those that would argue that the federal government wanted to deimmunize Quebecers from the perception that sovereignty was going to be a gentle, hurdle-free walk which was simply in keeping with their destiny as a people. They would say that these initiatives were seeking to replace the often used economic impact argument as the primary *pensez-deux fois* vehicle for encouraging sober second thought about voting Yes.

Second are those that would argue that these initiatives flowed from an understandable need to move off the sidelines and on to the playing field. This school of thought is premised on the theory that the government could no longer be a passive spectator. It had to inject some strategic markers in order to level the playing field and regain some control over developments.

Finally, there are those who opine that these measures were in response to a genuinely felt sense of bewilderment and concern in the rest of Canada. There was for example, on the eve of the

last referendum a meeting between a dozen representatives of the private sector and some government officials to discuss the "what if" scenarios. The opinions expressed were quite varied on most topics. However, there was a general consensus on the unfortunate lack of preparation regarding the legal parameters and the sequencing of the next steps. There was in the view of the private sector a need for some clarity.

Without wanting to sound like a broken record, it is fair to assume that all of the above factors were at play in varying degrees, at various times in determining the federal agenda.

### The Reaction in Quebec

I would now like to turn to the second part of my presentation which is: what impact have these various strategic thrusts had in Quebec. The implicit assumption here is that the primary goal of the federal government is to rid the Quebec political scene of the separatist plague either via an electoral victory by Monsieur Charest or via a somewhat stronger margin of victory in the next referendum.

There is some indication in looking at the polling data that the last two and a half years have been good years for the federalist side in Quebec. Of course many events are influencing Quebecers' responses in these polls besides the federal government's unity strategy. However, the fact remains that polling by CROP, Léger & Léger and SOM all tend to indicate a softening of support for sovereignty, based on the 1995 referendum question.

Of course, there is considerable fluctuation in these figures over the period and between the different polling firms. Overall though, the polls in March show the lowest Yes results since the 1995 referendum. The April polls are back up a few percent. The latest polls for March and April show support for sovereignty has dropped to the high-30 or low-40 percent range.

This indicates that federalists appear to be gaining some ground and are certainly not losing ground since the referendum. There are two issues we need to consider to put this polling data in perspective.



First, there is no way to know whether this falling support for sovereignty is a direct result of the federal government's three-track activity as outlined above. It could be a response to many factors. It could be partly due to dissatisfaction with the provincial government over health cuts in Quebec. It could be a response to a stronger economy. Or perhaps it is partly a reaction to the federal government eliminating its deficit.

Second, we also need to consider how quickly such leads in the polls can vanish during campaigns. In the 1995 referendum, the NO side started out with a comfortable 10-percentage-point lead in the polls only to watch it evaporate in the last few weeks. Events during the campaign had major impacts. Let it be the increased profile of Lucien Bouchard or the unity rally in the last days of the campaign.

Clearly, campaigns can make a difference. If you pardon a brief metaphoric excursion in the field of sport. It is somewhat akin to a round of golf. You can have great booming drives off the tee and great approaches, but your score ultimately is determined by your putting. It is the short strokes on the green that can make or break the game. Campaigns do matter.

In other words, one could say that the strategy is working but that it's "majority roots" are tender and could still be easily eroded. Indeed the sovereignty side still commands a very healthy 40% and could easily make up the difference.

I would submit that the federal strategists face three challenges in the coming months and years.

First, they have to deal with what I would describe as a unique sociological phenomenon. Going back to the late seventies, I recall reading and analyzing surveys that indicated a perplexing situation. A significant number of Quebecers who were thinking of voting YES believed that after a YES victory, they would still be electing federal Members of Parliament, that Quebec would still be a province of Canada, that they would still have a Canadian passport.

A recent poll by C.R.I.C. of Quebecers on the same subject yielded the following results. When asked whether, under sovereignty-partnership, Quebec would leave Canada and become an independent country, 37% said NO; when asked

whether Quebec would still elect MPs in Ottawa, 29% said YES; when asked whether Quebecers would still be citizens of Canada, 39% said YES; and, when asked whether Quebec would still be a province of Canada, 36% said YES.

This I submit to you is a unique sociological phenomenon. Indeed, notwithstanding the many statements and speeches by various federalist leaders of diverse political affiliations, the fact remains that a significant group of Quebecers to the great despair of federal strategists just don't seem to get it. I use the term sociological because these can't be the same people that were polled in 1978 - some must have passed away.

My mother recently provided me with perhaps a partial explanation of this political/communications conundrum. My mother who is an avid reader and student of the political scene in Montreal was recounting a discussion on an open line in Montreal. The subject matter was the Calgary declaration. The opinions she reported were mixed. Some were against it because it would obviously give an unfair advantage to the Calgary Flames over the Montreal Canadians in terms of the NHL schedule; others expressed support because it obviously would lead to lower oil and gas prices.

Piercing this wall of indifference which has stood the test of time represents for federal strategists a critical challenge. This is not just a communications problem. The inability of a significant number of Quebecers to "answer correctly" the questions dealing with the impacts of sovereignty is a symptom of a much broader problem. There is a fundamental issue of a lack of appertenance, a lack of caring about the country. I am not sure that the current federal strategy will significantly impact on this group.

The second issue that makes me question whether it is possible for the federalist side to significantly prevail relates to the atomization of the policy and political process. As I mentioned earlier, the proliferation of media outlets since the late 1970s, puts everything that governments do under a microscope. It has atomized the process by breaking it down into constituent components on a daily basis. Policy is scrutinized and often criticized in real time. Every move that a government makes is followed, questioned and

ultimately reduced to a simple thumbs-up or thumbs-down judgment ranging from a bumper sticker clip to a sound bite. Ministers are constantly facing a microphone. A scorecard of their successes and failures is kept on a daily basis.

As Brzezinski said " ...I had an insufficient appreciation of the extent to which policy-making is chaotic in the extreme, an almost hopeless attempt to catch up with events that seem for ever to outpace you...that policy judgments have to be made on inadequate knowledge, that...involves the resolution of irrelevant personal and institutional diversions."

The ability of governments to build and sustain coalitions for change is increasingly difficult. The empowerment of interest groups and citizens which has flowed in part due to the Charter makes this task even more daunting. This represents, I submit a second strategic challenge for the federal strategists.

The third challenge and the most formidable is to offer an overarching vision. There is a unique window of opportunity as governments redefine themselves as a result of their loss of

sovereignty to the global economy, as they emerge from the straight jackets of deficit reduction, as new technologies change the communications landscape. The Quebec socio-economic profile has dramatically changed as Monique Forget noted recently: "There is now a French-speaking corporate elite in Quebec. Francophone Quebecers have acquired an openness to the world and self-confidence they used to lack."

There is an opportunity to present a view of a country and its values. Fixing the plumbing of the federation is important to improve efficiency and avoid irritations. Clarifying the rules of a possible secession is also extremely important in order to minimize unfortunate incidents. These and other like-minded initiatives may indeed be enough to go over the top in the next referendum, which in turn may lead to a break-up of the Parti Quebecois into 2 factions. But it may not be enough to build a commitment to a country. It may not be able to pierce the wall of indifference.

In conclusion, is the strategy, with all of Brzezinski's caveats, working? The answer in regards to the battle is in part Yes. In regards to the broader goal, it remains to be seen.

## QUEBEC SECESSION REFERENCE

by  
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I have been asked to discuss the following:

- the substantive content of what various parties have been arguing in front of the court; and
- the broad judicial/political choices that are available to the court. In other words, what is the court's room for manoeuvre? What are the political/judicial pitfalls that it must avoid?

Speaking as one who was out of the country during the week of the hearing, February 16th to the 20th, such a request seemed a daunting task – and even more so when I examined the avalanche of material that was produced before, during and after that special week in February.

To try to present a summary of the substantive content of the submissions by the various parties would take hours if not days. I hope you will forgive me for not trying to summarize the substantive content. I decided instead to attempt some amateur sleuthing – to speculate about the Court's concerns, by giving a brief summary of the federal government's questions to the Court – and the apparent answers that might be found in the Court's own questions asked of the principal parties. I shall deal in part with the response to these questions by the Attorney General of Canada.

To begin, let me read Question 1 of the Reference itself:

Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect secession of Quebec from Canada *unilaterally*? [with emphasis on *unilaterally*]

We must remember that in 1981, the Supreme Court held that the Government of Canada of its own volition, *could* patriate our constitution by going to Westminster one last time, without requiring provincial consent. The reasoning of the Court was based on what we lawyers call "legal positivism", a formalist approach to *legal rules*. I confess that at the time, I was very critical of this approach – and I still am

The Court went on to say, in the second half of its opinion, that by *constitutional convention* – not by legal rules – the Government of Canada had in the past requested amendments from Westminster *only* with the substantial consent of the provinces and, that *as a matter of constitutional convention*, the Government ought not to proceed without first obtaining "substantial consent". However, the Court gave no further explanation of what the phrase, "substantial consent" was supposed to mean; it was left remarkably vague. At the time, I argued that the phrase was, to all constitutional intents and purposes, meaningless. I still think that is so, in terms of empirical evidence and logic.

You will all recall that subsequently at the November 1981 constitutional convention in Ottawa, proposals for substantial amendments to the BNA Act were agreed upon by the federal government and all the provinces *except* Quebec. Soon afterwards in the 1982 *Quebec Veto* case, the phrase "substantial consent" was put to the test and we learned something about the Supreme Court's interpretation. The Court held that the requirement was met when, at the very least, any nine of the ten provinces were in favour of an amendment.

It came to this conclusion despite the fact that the one dissenting province was Quebec, with its 25% of the population of Canada, and with a large majority of its citizens being francophone. By contrast, we must also recall that only a decade earlier, Canada did *not* proceed to request a constitutional amendment from Westminster that

would have entrenched the Victoria formula – and at that time, Quebec alone dissented.

What were the consequences of the Quebec veto decision in 1982? Well, Quebec was found to be *bound* by our Constitution despite the Quebec Government's express disapproval and attempted veto. Let us read subsections (1) and (3) of section 52 of the Constitution Act:

- (1) The Constitution of Canada is the *supreme law of Canada*, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. [italics added]
- (3) *Amendments* to the Constitution of Canada shall be made *only in accordance with the authority contained in the Constitution of Canada*. [italics added]

It follows that for Quebec to obtain *any* increase in its powers of government would require a constitutional amendment. Logically, it follows that for Quebec to acquire *all* governmental powers and gain complete independence could hardly require *less* in terms of constitutional amendment! On this basis, legally, Quebec could secede only by getting a constitutional amendment passed: unilateral acquisition of independence is not possible under the Canadian Constitution. This is certainly the legal positivist view. I doubt that the Court will reverse its earlier position on the basis that Quebec might ask for all powers of government instead of lesser changes.

There are some serious qualifications and contradictions that may nevertheless arise with question one, but before examining them, let's look briefly at question two:

Does international law give the National Assembly, legislature or government of Quebec the right to effect 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 secession of Quebec from Canada unilaterally?

It seems fairly clear that the Court considers this question a non-issue. Why? The legal literature is overwhelming that, except in two cases – conquered colonies ruled from outside, and regions where there is strong evidence that its citizens are suffering oppression and inequality in civil rights – there is virtually no support in international law for a right of self-determination for a region in a democratic state. This reasoning applies to Quebec within Canada. Please remember, I am doing my best to *predict* the Court's room for manoeuvre, as Harvey asked. I cannot imagine our Court disagreeing with this assertion.

Question three asks:

In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec the right to effect secession of Quebec from Canada unilaterally, which would take precedence in Canada?

If question two in itself does not raise a serious issue, then potential conflict between international law and domestic law seems a non-starter. We are left almost entirely with issues of Canadian law, as raised by question one.

You may well ask, what is all the fuss about in terms of our domestic constitutional law? After all, the Court will assert that Quebec has no right to secede unilaterally under our Constitution; it must arrange to have the Constitution amended in order gain independence. Second, Quebec's rights are not enlarged by recognized principles of international law. And third, there is no conflict between domestic and international law. Thus Quebec has no right to secede unilaterally. *Period*. So, what is different *here* from what happened 138 years ago to the Confederate States in the

American Civil War? I think we all know what is different.

The government of Canada has said – and I believe a large majority of Canadians outside Quebec agree – that *if Quebecers clearly express an unambiguous desire to leave Canada* ["clearly-expressed will"] *"they will not be held in this country against their will"*. Somehow their desire will be recognized. The two questions remaining are *what* is a clearly expressed will, and *how* would it be recognized? The answers are far from easy.

We have been given virtually no indication of what would amount to a "clearly expressed will" – does it mean a clear majority of Quebecers? I have found no clues as to what the court might say about this issue. Nor does it arise in the three questions put to the court, and the Attorney General of Canada has said nothing directly about it. Nor do I know of any discussion before the Court on this subject. I may simply have missed it in the welter of material. On the one hand, it could be argued that 50% plus 1 is a "clear majority" provided the question asked in a referendum is "clearly expressed". On the other hand, one might argue that the word "clear" is intended to mean *more* than the barest of majorities; rather it is a "satisfactory" or "substantial" majority because secession is a fundamental constitutional change. I cannot divine whether the Court will choose to say anything about this quantitative aspect, although it seems highly unlikely to do so, based on what I have read. The Court *might* say something about the wording of a referendum question being clear and unambiguous, but again, I hazard no prediction.

Suppose however, that a substantial majority of Quebec's citizens, say 2/3, voted, in a clearly stated referendum question, that they wished Quebec to secede from Canada, a vast majority of Canadians outside Quebec – and their governments – would not wish to use armed force to keep Quebec within Canada. We have known

this for decades and it is something of which we should be very proud.

The next question must be, "How would we deal with secession?" Here, we can get some clues about what the Supreme Court judges are pondering by examining some of the questions that they in turn have posed to the parties. Let's examine their question 3:

Does the position of the Attorney General mean that secession can only take place in compliance with the formal procedures set out in Part V of the Constitution [and in the preamble (as the Chief Justice subsequently modified the question)], or are there other ways in which a secession might also be carried out consistently with our constitutional law as a whole?

In her response, the Attorney General gave a lengthy answer arguing that general constitutional values – principles of federalism and of democracy generally – strongly support that the answer to the problem must be through the amending process as set out in Part V of the Constitution: that is the only way to go – to proceed under Part V. However, the second-last paragraph of the response, paragraph 31, opens a most sensitive alternative. It states:

Finally, it is necessary to distinguish unwritten constitutional principles [which support the government's position] such as those referred to above, from such an exceptional "saving" doctrine as necessity. That doctrine is discussed below in relation to the fourth question. Suffice it to say that *the doctrine of necessity is manifestly not a constitutional option that may be looked to in advance by governmental authorities or the courts in assessing – much less in seeking to avoid – the requirements of the Constitution of Canada.*

This leads directly to question 4 asked by the Court:

Assuming that Part V is the only legal means of effecting secession, *what would happen if Part V fails*, e.g., if after a clear

expression of Quebec's will to secede, Ottawa or one or more provinces refuses to negotiate in good faith towards separation? *What if good faith negotiations simply reached an impasse over an intractable issue like the division of territory?*

So, here we encounter the ultimate conundrum: as suggested earlier, suppose we were to avoid the first issue of a clearly-expressed majority because a large majority of Quebecers indeed favoured secession in a clearly worded referendum question. Then we would confront the second major issue – the process of negotiating separation. Of course, if agreement were reached by all the parties as required by our Constitution – then there would be an acceptable conclusion to the whole process in the sense that we would have avoided an impasse.

But suppose negotiations should fail to achieve whatever agreement is required under Part V of the Constitution. I admit this is my subjective view of impasse – but I feel that such negotiations are almost certain to fail. We need only look at the recent controversy regarding the mild Calgary Declaration – which nine premiers signed last October. All we need is another Clyde Wells, (or perhaps his current incarnation in Glen Clark) and unanimity is gone. I won't go into the details of Part V of our Constitution, but it is almost certain that unanimity would be required for secession.

Let's return to impasse – no deal is reached after a large majority of Quebecers have expressed a desire to secede. Yet, our government has said, unambiguously, that the rest of Canada has committed itself to respecting Quebec's choice. What happens next? Are there "other ways in which secession may be carried out"? An "exceptional 'saving' doctrine ...[of] 'necessity'" has been alluded to. It suggests that in case of impasse, the parties must look *outside* the constitution to overcome paralysis. We have noted that the position of the Attorney General of Canada, is that such extraordinary measures cannot be looked

to in advance. It is helpful here to quote further from her written response to question 4 posed by the Court:

37. ... it is wrong and unfounded in law to brandish the spectre of political impasse as a reason to dispense with or ignore applicable constitutional norms. The operation of constitutional requirements cannot simply be suspended or discarded out of fear for their impact on the very political environment they are intended to govern. To subject the Constitution's application to possible political eventualities is to turn the notion of constitutional governance on its head. In any case, the hypothesis of political impasse in the present context is simply that – a hypothesis.

Pleaes forgive me for quoting a bit more:

39. The "impasse" that has been hypothesized must be understood, not as a temporary failure to achieve support for a proposed set of amendments, but, at a minimum, as a manifest and persistent political deadlock. Assuming that such a scenario were to come about, the Attorney General of Canada submits that the Constitution of Canada would continue to govern and would provide the means for a solution. Any move towards secession would have to respect the Constitution's underlying principles and be carried out in accordance with its terms. To the extent that something less than full compliance with Part V might in the extreme be permitted by the courts, this would *only* be in circumstances of demonstrable exigency, and then, in furtherance of the Constitution's underlying principles – the first imperative being to preserve the rule of law and secure the Constitution's basic values.

40. This raises the issue of the doctrine of necessity, noted in the response

to the previous question. By definition, such a doctrine applies only in exceptional, unforeseeable circumstances, in order to avoid a legal vacuum. *The contours of its potential future application can therefore not be described or predicted in advance.* [italics added]

41. In any case, any possible resort to the doctrine of necessity is a remedial eventuality that might only be invoked by a court *in extremis*. It is manifestly not a constitutional option that may be looked to in advance by governmental authorities in assessing – much less in seeking to avoid – the requirements of the Constitution of Canada.

The only clue we have as to where this debate might lead is given in question 6 by the Court itself:

Is the government of Canada required to oppose secession in order to protect the rights of Canadians affected by the secession *unless it obtains the approval of those affected or a mandate from the people of Canada* to effect secession?

The response of the Attorney General is very guarded, reaffirming the the strict admonition that the doctrine of necessity must not be examined in advance, but she does go on to say:

59. The latter part of the Court's question raises the issue of a "mandate from the people of Canada." The people of Canada depend upon the Government of Canada to ensure that the rules relating to any secession process are fair and the consequences are clear. As for the question of any requirement for a direct mandate from the people of Canada to effect secession, there is no constitutional requirement for the Government of Canada to hold a national referendum before proceeding with a constitutional amendment to effect the secession of a province from Canada under Part V of the

Constitution Act, 1982. The Referendum Act (S.C. 1992, c. 30) authorizes the Government of Canada to hold a referendum on any question relating to the Constitution of Canada, where the Government considers that it is in the public interest to obtain by referendum the opinion of the Canadian electorate. Thus, a referendum is but one option amongst a range of policy options the choice of which must be left to the consideration of the Government of Canada.

This statement is the closest we come to an admission that, if the amendment process under Part V of the Constitution should break down, the Government of Canada *might* wish to return to the Court – no doubt it would like to have the support, or at least the acquiescence, of a substantial number of provinces – with a proposal for a Canada-wide referendum to overcome the constitutional impasse. That is as far as the Attorney General would go – no doubt, with considerable trepidation.

### Conclusion

Where does this leave us? Here I can do no more than gaze into my very clouded crystal ball for a summary:

1. Based on its *Quebec Veto* decision, the Court will assert that Quebec was, and remains bound by, the Constitution of Canada, and in particular, by the amending processes set out in Part V. Quebec has no right to unilateral secession.
2. The Court will also agree that Quebec, as a federal unit in Canada that participated freely in its formation in 1867, is part of a democratic country that does not oppress any of its regions or provinces. Accordingly, there is no established principle of international law that recognizes Quebec's right to unilateral secession.

nonconformists. Will any student of Canada's constitutional history forget W.A.C. Bennett, equipped with maps appropriate to the televised conference at which he presented them, mounting a case for extending provincial boundaries northward to incorporate the Yukon and Northwest Territories? Or of William Vander Zalm proposing the recognition of ten "distinct societies" in Canada, one for each of the provinces?

What has changed, obviously, from those headier days of constitutional bargaining is the cast of characters - except, of course, for Roy Romanow who has moved from being a sous-chef in the 1981 kitchen to having a desk in the front office.

In the past, western Canadians, and their premiers in particular, typically found themselves responding to constitutional agendas that were set elsewhere - principally by Ottawa acting with the support of one or both of the large central Canadian provinces. The debate from 1980-81 over the patriation package speaks to that point.

A reminder of how far constitutional agenda-setting and the items included on the agenda have traveled since then is found in the Calgary Declaration. That statement is testimony to something new in Canadian constitutional history in at least two respects:

- it demonstrated the extent to which the Reform Party of Canada has had an impact on the constitutional discourse in this country; and
- it signaled a shift away from central to western Canada as the principal source of federalist leaders among provincial premiers.

In little more than 10 years since its creation, the Reform party has had an impact on Canada's constitutional debate that outweighs its position in either the parliamentary or party systems. Accepting equality of the provinces; making powers available to one province available to all; recognizing the role that the legislature and

government of Quebec have to play in protecting the unique character of Quebec society; and the guidelines for the process of public consultation: all of these elements of the Calgary Declaration Preston Manning could live with. He and his party were the driving force behind many of these ideas in the decade leading up to the Calgary accord. (Even the coincidental fact that the city in which the premiers' agreement was reached happened to be "Calgary" must have brought an ironic smile to his face.)

The terms had not been invented by Reform, but they were given legitimacy by it. Mr. Manning's quick endorsement of the Declaration assured that. The extent to which there had been behind-the-scenes negotiations about the content of the Declaration among federal and provincial officials and the degree to which Mr. Manning was informed and consulted along the way will not be known, at least publicly, for some time. In the absence of any plausible contradictory alternative, however, it is reasonable to assume that both took place and that the final product was at least nuanced with the prospects of Reform's support in the offing.

For Reform, the only key constitutional principle missing from Calgary was Senate Reform. That did not sit well with some Reform purists in Alberta, but for an increasingly pragmatic Preston Manning it was a trade-off he could live with given his larger political interest in devising ways of appealing to Ontario voters. What better way to try to accomplish that goal than by making accommodative overtures to Quebecers - not so much to win support in Quebec (as that could well be impossible for Reform) as to assuage Ontario voters that Reform has central Canada's interests at heart as well as those of western Canada?

This is a conventional inter-regional coalition-building strategy of Canadian politics and it is one that the Reform leadership has come to value, particularly since the last federal election. Preston Manning's vigorous appeal to his party for



support of a "united alternative" strategy (what Tom Flanagan has labeled the "depositioning" of the Reform party) is simply the latest of the Reform leader's entreaties to broaden his party's organizational and electoral support. If the Reform party continues to embrace classic inter-regional accommodative strategies in the future (as the Liberals and Tories have for over a century), one may be tempted some time soon to paraphrase James Thurber's *New Yorker* cartoon of the 1930s and to ask: "What ever became of the Reform party?"<sup>1</sup>

On the changing roles of the premiers, there was a time, until not many years ago, when the province of Ontario assumed the key leadership role among the provinces on the constitutional front. One need only recall the impetus behind the Confederation of Tomorrow Conference of 1967 to remember how critical Ontario's initiatives could be to deliberating constitutional change. The other provinces have not always spoken with one voice in support of Ontario's role, as was most notably demonstrated in the debate and maneuvering over the Trudeau patriation package in the early 1980s. But just imagine how much more powerful and persuasive the opponents would have been had Ontario been one of them - a gang of nine, as it were.

It is true that premiers Lougheed, Blakeney and Lyon, backed by officials who were the equal of any in the country at the time, represented their regional interests (and their understanding of the national interests) with skill and intellectual force. Yet with rare exceptions so did Ontario, which invariably meant that by virtue of its size and importance in the Canadian political equation Ontario emerged as the key player and the *de facto* leader among the provinces other than Quebec.

It is my view that in the present circumstances this has changed and that Alberta, in particular, has displaced Ontario as the principal actor among the provinces outside Quebec. The reasons are no doubt complex and interconnected, but principal

among them must be the current leadership in the various provinces. Ralph Klein, and to a lesser extent Roy Romanow, has emerged as a facilitator on the national unity front. This clearly ties in with the previous point about the agenda-setting that has shifted in the direction of Reform's (and therefore, by definition, the west's) espoused constitutional position. For whatever reasons, the leadership of the federalist forces among the provinces has shifted away from central to western Canada. Mike Harris, it would seem, is no John Robarts.

How have the federal initiatives played out in the West? To the extent that the Calgary Declaration itself is an important component of those initiatives they can be said to be finding a receptive and sympathetic audience. Even if there were a non-separatist government in Quebec, there is in the west neither interest in nor support for reopening the whole constitutional file and in trying to repeat in some way the mega-constitutional negotiations of Meech or Charlottetown. That would be as much a non-starter in the west as it would be in the rest of Canada, so the federal government, so far at least, has got it right on that front.

Although there are often issues and policies that play out differently in each of the four western provinces (Alberta being as different from Saskatchewan as Manitoba is from British Columbia), on one matter right now there is nonetheless widespread agreement among the provinces which is matched by high support levels from the public - that is, spelling out the consequences of separation. Judged by the praise heaped on Stéphane Dion by media commentators and on phone-in radio shows in western Canada, there is overwhelming public support for a hard line on Quebec and for making that province fully aware of the possible fall-out resulting from separation.

But equally, what makes Mr. Dion and his initiatives so popular in the west is exactly what explains his almost palpable unpopularity in his



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