Ruling tells politicians to solve it themselves

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BY TOM FLANAGAN

For more than thirty years, ever since Quebec's Quiet Revolution gathered momentum, Canada has been living with the threat of separation. The first reaction of Canadians, who are surely the the world's most polite people, was one of guilt and generosity.

"You're not happy? It must be our fault. What can we give you to make you stay in Canada?"

Giving things to Quebec became the first principle of Canadian politics. Canadians gave until it hurt, and then gave again. They gave bilingualism, equalization payments and half the national market for industrial milk. Following Pierre Trudeau, who claimed to know what would make Quebec happy, they gave a new Constitution in 1982, even though nothing was wrong with the old one.

When the new Constitution proved to be the wrong constitution for Quebec, some Canadians started to question the giving game. But many still followed Brian Mulroney, who also claimed to know what would make Quebec happy. Thus we got the Meech Lake and Charlottetown Accords, along the CF-18 maintenance contract for Montreal instead of Winnipeg.

But the giving slowed down markedly in the 1990s. Soaring deficits made it impossible to keep scattering financial largesse. Canadians rejected the Meech and Charlottetown Accords.

Meanwhile, national political coalitions changed dramatically. The Progressive Conservatives became a barrel tapped at both ends, with support draining off to the Bloc Québécois in Quebec and the Reform Party in the West. The Liberals lost their traditional hold on the French vote in Quebec but emerged with renewed strength in the other provinces and are now the only true national party.

Then came the near-death experience of the 1995 referendum, when Quebec almost voted in favour of separation. It started to dawn on Canadians that all the giving had not bought loyalty, and that Canada's leaders had shamefully neglected to protect Canada's interests in the face of an attempt at separation.

The Reform Party was the first to see the need to clarify the rules governing separation. Then, to his credit, Prime Minister Jean Chrétien, whose government did not depend on Quebec votes to stay in power, made his *virage*.

Chrétien and his new unity minister, Stéphane Dion, laid down four principles amounting to a fundamental departure in dealing with the separatist threat:

- Rule of law. Separation would have to take place through constitutional amendment. A unilateral declaration of independence was inadmissible.
- Clarity. There would be no more trick referendum questions. Ottawa would reserve the right to approve any future question.
- Supermajority. Canada would not be divided by a 50-per-cent-plus-one-vote in Quebec. A "Yes" vote would have to be bigger than a simple majority, though how much bigger remains undefined.
- Partition. Quebec could not count on keeping its present borders. If Canada is divisible, so is Quebec.

To support its emphasis on the rule of law, the federal cabinet referred the question of separation to the Supreme Court of Canada, asking whether a unilateral declaration of independence was acceptable under either the Canadian constitution or international law.

This week we learned that the Court's response to both queries is a resounding "No," thus giving the government the answer it wanted. The legal separation of a province is possible only through a constitutional amendment negotiated with all the Confederation partners, namely the federal government and the other provinces.

The government also got some indirect support on the other aspects of its new policy. The Supreme Court's decision speaks repeatedly of the need for a "clear majority" on a "clear question" in any future referendum.

Although these terms were not precisely defined, they arguably reinforce the government's demand for a supermajority and federal approval of any referendum question. And while there was no comment on partition as such, the possibility of partition is implied by the court's statement that, in negotiations over separation, "there would be no conclusions pre-determined by law on any issue."

Although the federal government has good reason to be satisfied with this ruling, it should not become complacent; for the court also answered some questions the government had not asked.

In particular, it held that a clear majority on a clear question in a future referendum would make it legitimate for Quebec to "pursue secession" and would confer upon the rest of the country a constitutional obligation to enter into good-faith negotiations on all the difficult issues surrounding separation.

I would not cavil if the court had spoken of a moral or even political obligation to negotiate; but a legal obligation is a pure invention, conjured up by the court from its intuition of underlying principles rather than a reading of constitutional texts. Showing the weakness of this newly discovered obligation, the court went on to say that it would not attempt to enforce it.

So now we have a constitutional — but judicially unenforceable — obligation for Canada to negotiate separation under certain circumstances. Not surprisingly, many separatists in Quebec are already claiming victory on this point.

It would have been better if the court had pointed out the obvious practical necessity of entering into negotiations without turning it into an (unenforceable) constitutional right.

That's in effect how the court did proceed when it pointed out that a separatist government of Quebec might attempt to issue a unilateral declaration of independence. Even though such a declaration would be unconstitutional, it could become effective in practice if other states recognized the sovereignty of Quebec; and that would be more likely to happen if the international community perceived that Canada was not negotiating in good faith.

This was a none-too-subtle warning to the government that a policy of keeping Quebec in Canada by any and all means would very likely backfire.

The court also served notice that it would like to avoid being drawn further into these political issues. It emphasized that negotiations must be left to politicians without judicial supervision. It also warned that, even on some matters of constitutional law, it might be up to the other branches of government, not the courts, to enforce the law. Sensible advice for separation crises, which usually move much too fast for the judicial process (remember that it took two years for the Supreme Court to produce this decision).

All in all, though I am critical on certain matters, I see this as a good decision for both Canada and Quebec. By emphasizing the constitution and the rule of law, it should help to deter excesses of separatist adventurism that would end up harming the people of Quebec more than anyone else. And by calling attention to the importance of democratic consent to government, it reminds Canada that Quebec should not be kept in Confederation against the will of a clear majority of its people.

Some may find parts of this decision frustratingly vague. What is a "clear question" and a "clear majority?" The court did not even attempt to decide which of our many amending formulas would be used to enact the separation of a province. Nor did it tackle the controversial question of aboriginal rights in Quebec. But this vagueness reflects the limits of the law.

The court has done what it can in identifying and explaining the implications of the relevant constitutional principles: democracy, federalism, the rule of law, and minority rights; but if the dire necessity of separation ever comes to pass, politics rather than law will drive the most important decisions.

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