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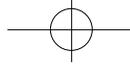
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# Droit constitutionnel

## The Secession Reference: A Ruling in Search of a Nation\*

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*With respect to the demands of legality other than promulgation, then, the most we can expect of constitutions and courts is that they save us from the abyss; they cannot be expected to lay out very many compulsory steps toward truly significant accomplishment.*

Lon L. FULLER<sup>1</sup>

This short article will address the two following issues: the new vision of the Canadian constitutional order entertained by the Supreme Court in the *Reference re Secession of Quebec* (I) and the impact of this new vision upon the fate of Canada (II)<sup>2</sup>.

\* This paper was initially delivered at the Canada Watch Conference held in Toronto in November 1998; excerpts of this paper were afterwards published in (1999) 7 *Canada Watch* 22 and 36.

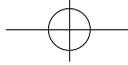
<sup>1</sup> L.L. FULLER, *The Morality of Law*, Revised Edition, p. 44 (1969).

<sup>2</sup> For a more thorough examination of the *Reference re Secession of Quebec*, (1998) 161 D.L.R. (4th) 385 (S.C.C.) (hereinafter the *Secession Reference*), see: Jean LECLAIR, "Impoverishment of the Law by the Law: A Critique of the Attorney General's Vision of the Rule of Law and

### I. The Rejection of the Attorney General's Positivist Approach

First and foremost, the Court rejected the Attorney General's positivist approach to the Constitution, one shared by Chief Justice Laskin in the *Patriation Reference*<sup>3</sup>, a vision in which the validity of a legal rule is based on a purely formal process of recognition supposedly neutral and impervious to any ethical or political influences. In this perspective, a rule is considered valid if its adoption is authorised by a rule superior to itself. At the apex of the hierarchy stands the Constitution, a law

the Federal Principle", (1998) 10 *Constitutional Forum/Forum constitutionnel* 1. <sup>3</sup> *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 762-809 (Chief Justice Laskin and Dickson J., Beetz J., Chouinard J. and Lamer J. speaking on the constitutional *legality* issue); read in particular pp. 784, 799, 802, 806, 807 and 808 (hereinafter the *Patriation Reference*).



whose open textured norms can be the object, it is argued, of a strictly rational and logical interpretation.

This vision's claim to objectivity rests on the fact that by applying a purely formalistic approach, a judge never passes judgement on the content of the law. Furthermore, any attempt to introduce elements, such as historical evidence, which cannot be characterized as formal sources of law, and more particularly as State authorized sources of law, is seen with great scepticism<sup>4</sup>. According to this approach, justice would supposedly follow from strict adherence to the letter of the law.

This cannot be, for voluntary compliance with law requires that citizens be convinced of the rightness of the rules they are called upon to obey. The purpose of a rule will be the determining factor of its rightness, not its formal conformity to a superior norm.

In the words of Lon Fuller, *when rules are no longer treated in abstraction from their purposes, they cease to produce those neat antinomies which the lawyer delights to discuss with his colleagues, and the problem which seemed an intriguing test of juristic*

*ingenuity dissolves into a prosaic question of choosing between competing ethical desiderata.*<sup>5</sup>

Obviously the positivist approach does indeed pursue an objective. But it seems that the ideal pursued is one of order rather than justice. The internal unity of the State's legal system requires certainty whereas the acknowledgement of influences external to the official law would undoubtedly introduce uncertainty and a frightening interrogation as to the *locus* of sovereignty.

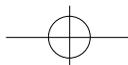
Unfortunately, justice requires more than blind adherence to the letter of the law. Justice requires the recognition that law serves purposes other than reinforcing the State's authority, and that the ideas serving as basis for these purposes are historically contingent. Law must not be equated with a strict exercise of willpower. Rather it must be conceived as a system of rules whose object is to facilitate human relations. If it fails in that task, it will eventually cease to be obeyed for lack of legitimacy<sup>6</sup>.

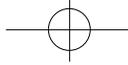
Finally, when law is seen as a means to facilitate human relations, it begins to make sense not only as the imposition of negative duties, but also as the embodiment of aspirational principles inviting us to invest our energies in more purposive directions<sup>7</sup>. Nevertheless,

<sup>4</sup> See Justice Laskin's treatment of history in the *Patriation Reference*, *supra*, note 3, 803 and 804. That such an approach is as much ideologically loaded as any other will be obvious to anyone reading Laskin's interpretation of the concept of federalism (871-873). Ignorance of 124 years of constitutional history enables him to conclude that the federal principle does not constitute an obstacle to the federal government's unilateral intervention, but actually justifies it.

<sup>5</sup> L.L. FULLER, *The Law in Quest of Itself*, p. 14 (1940, reprint 1966).

<sup>6</sup> For a more thorough examination of these issues, see: J. LECLAIR, *loc. cit.*, note 2.





to provide a sense of belonging, these purposive principles must be in accordance with the attitudes and concepts of rightness of a given community.

The Supreme Court, recapturing the vision expressed by Justice Martland and Justice Ritchie, the dissenting judges in the *Patriation Reference*<sup>8</sup>, clearly embraced a concept of law which satisfies the requirements of the above mentioned definition<sup>9</sup>. Acknowledging the primacy of its explicit provisions, the Court nevertheless recognised that the Constitution also encompassed underlying principles that “inform and sustain the constitutional text”<sup>10</sup>. Federalism, democracy, constitutionalism and the rule of law, and respect for minority rights<sup>11</sup> all figure amongst these principles. None of them is absolute to the exclusion of the others<sup>12</sup>. In fact, these principles are said to function in symbiosis<sup>13</sup>. The rule of law, constitutionalism and the democratic principle are thus closely intertwined<sup>14</sup>.

Most importantly, backtrack-  
ing from the dubious reasoning it

expressed in the *Quebec Veto Reference*<sup>15</sup>, the Court also recognised the need to take into account Quebec’s specificity in Confederation:

*The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867.*<sup>16</sup>

Suddenly, history appeared relevant, in contrast with 1982, when it was felt that it was “not [...] necessary to look further in these matters”<sup>17</sup>, that is, Quebec’s particular place in Confederation. Resorting this time to constitutional principles, which could be identified with recourse to constitutional history, and not to constitutional conventions, which require proof of

<sup>7</sup> L.L. FULLER, *op. cit.*, note 1, p. 42.

<sup>8</sup> *Supra*, note 3.

<sup>9</sup> In the *Patriation Reference*, *supra*, note 3, Martland J. and Ritchie J., the two dissenting judges on the constitutional legality issue, emphasised the importance of determining the “basic principles” or “constitutional values” underlying a particular rule or convention (841 and 880).

<sup>10</sup> *Secession Reference*, *supra*, note 2, par. 49.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, par. 93.

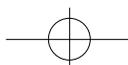
<sup>13</sup> *Id.*, par. 49.

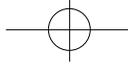
<sup>14</sup> *Id.*, par. 67.

<sup>15</sup> *Re: Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793 (hereinafter the *Quebec Veto Reference*); for a devastating critique of the Court’s reasoning, read Mark E. GOLD’s aptly entitled article “The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada”, (1985) *Supreme Court L.R.* 455.

<sup>16</sup> *Secession Reference*, *supra*, note 2, par. 59.

<sup>17</sup> *Quebec Veto Reference*, *supra*, note 15, 814.





explicit recognition by all political actors, the Court made it a constitutional imperative to take into account Quebec's specificity in Confederation when interpreting the federal principle. In other words, in the eyes of the Court, the federal principle is not an ethereal concept universally applicable in all federations; it is historically contextualized.

## II. The Impact of the Court's New Constitutional Vision on the Fate of Canada

What could be the impact of this more historically informed vision of our constitutional order? It can be wondered if, in the long run, it will have any. This is, perhaps, a ruling in search of a nation.

First of all, it comes too late; sixteen years too late to be exact. The reasoning adopted in the *Secession Reference*<sup>18</sup> could and should have been adopted in the *Quebec Veto Reference*<sup>19</sup>. Quebec's specificity in Confederation would then have been considered an essential element of a proper understanding of the federal principle in Canada. In consequence, the Court could have concluded that patriation without Quebec's consent contravened the law of the Constitution, Ottawa having failed to respect the underlying federal principle that informs and sustains our Constitution. Nevertheless, the Court would have been at liberty to conclude that this breach of constitutional legality could only be sanctioned at the political level and

not at the judicial level<sup>20</sup>. Instead, the Court took the risk of ignoring what history made so patent. And now it is forced to back-pedal; it does it with elegance, no doubt; but still, it is back-peddaling.

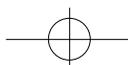
Secondly, the impact of the Court's ruling might be insignificant because the Court did not provide any means for a provincial federalist government in Quebec to ensure the recognition, in the Constitution, of legitimate Quebec demands. Outside an obligation to negotiate in good faith, the ruling provides no answer on this issue. Faced with an impasse, such a government would be condemned to eternal negotiations. From this, we can only conclude that the failure of the Federal government to embrace and promote the new concept of federalism propounded in the Reference will play a determinate role in the eventual success or failure of the secessionist movement in Quebec.

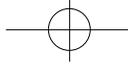
Unfortunately, the secession obsessed members of the Federal Cabinet do not share the Court's new vision. No one in Ottawa wishes to take the result of the 1995 referendum for what it is: an undeniable dissatisfaction with the present state of the federation. In truth, no political party appears interested in understanding the reasons that lie behind the ambivalence of the Quebec electorate<sup>21</sup>. But, as for the members of the

<sup>18</sup> *Secession Reference*, *supra*, note 2.

<sup>19</sup> *Supra*, note 15.

<sup>20</sup> *Supra*, note 2, par. 98 and 102.





Federal Cabinet, sooner or later, they will have to recognise that a quarter of Quebecers who voted no in the 1995 referendum, the “sovereignist ‘No’s’” as they are called, prefer that Quebec remain in Canada, but only on condition of a renewal of federalism which would include a true recognition of Quebec’s difference<sup>22</sup>. They must cease to confuse legitimate autonomist claims with separatism and separatism with treachery. Finally, they must stop dwarfing Quebec’s highly complex social and political fabric by reducing it to a perpetual caricature.

How did they lately promote the ideal of discussion underlying the federal principle? By a flippant response to the Saskatoon Agreement to which all provinces and territories had acquiesced. How did they lately promote Quebec’s difference? First, by going against the very letter and spirit of the resolution recognising Quebec as a distinct society with the Millennium Fund project<sup>23</sup>; second, by failing to see, in the *Secession Reference*<sup>24</sup>, anything more than arguments enabling them to bludgeon their

opponents into submission to the “rule of law”<sup>25</sup>.

In their eyes, the only solution to the Quebec issue lied in the election of Jean Charest as Premier of Quebec. Not only was this pathetic hope in a Messiah dashed on November 30th 1998, but it demonstrated an unbelievable inability to understand the seriousness and complexity of the issue. Not all Quebecers agree with the demands of the PQ government in terms of political autonomy but, most certainly, the great majority wish that the Federal government and the ROC would finally understand that the Quebec issue is not an ephemeral one confined to language. Quebec is a multicultural society where 85,3% of all French speaking Canadians reside; a society living its public life in French, just as much as English Canada is a multicultural society living its public life in English. Quebecers share a great deal with their fellow English Canadians. Any theory making us different in every respect is absurd. Nonetheless, Quebecers want Ottawa to understand and explain to the rest of Canada that such a difference does entail political consequences that would not threaten the existence of

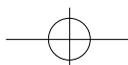
<sup>21</sup> See: Christian DUFOUR, *La Déclaration de Calgary*, mémoire présenté à la Commission des institutions, Québec, Assemblée nationale du Québec, juin 1988.

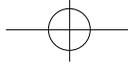
<sup>22</sup> Maurice PINARD, “The Political Universe of Ambivalent Francophone Voters”, (1998) 6, no. 4, *Opinion Canada* 1, 4-6.

<sup>23</sup> John E. TRENT, *Témoignage à propos du projet de loi C-36*, Fondation canadienne des bourses d’Études du millénaire, Ottawa, Comité permanent des finances de la Chambre des Communes, May 4th 1998.

<sup>24</sup> *Supra*, note 2.

<sup>25</sup> *Déclaration de l’Honorable Stéphane Dion en réaction à l’avis de la Cour suprême*, press release, August 20th 1998 et *Le Ministre Dion rappelle la nécessité de respecter l’avis de la Cour suprême dans son entièreté*, press release, August 26th 1998. On the other hand, it must be acknowledged that Lucien Bouchard’s reading of the decision was more than dubious.





our nation, but that would actually enhance it. It must be acknowledged though that the ever-changing content of the PQ's definition of the "traditional demands" of Quebec is liable to exasperate even the most patient.

Still, the blindness of the Federal Government remains bewildering for a federalist like me. Although I do not share the desire of the separatists, I must admit that the division between the respective collective memories of Quebec and the rest of Canada grows consis-

tently wider as time passes. And I fear that the inability of the Federal government to grasp the extent of the problem, let alone make itself the advocate of a new understanding, will accelerate the tearing asunder of this country. Because no matter how black and diabolical the depiction of the separatists will be, still, some, not all, but some of their demands will continue to appear legitimate to a majority of Quebecers.

