

# Commentary at the Panel on the Secession Reference

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The papers presented by Professor Monahan and Professor Morin are decidedly critical of the judgment given by the Supreme Court of Canada in *Reference re the Secession of Quebec*.<sup>1</sup> I do not agree with these criticisms of the decision.

Let me begin by explaining my disagreement with Professor Monahan. The argument in his paper proceeds by reference to two spatial metaphors. The first instance takes the form of allegory. Professor Monahan maintains that when two neighbours have a boundary dispute they seek clarity about the law that governs such disputes but, if there is no such legal clarity, they would prefer to be left alone to work out their own solution. The second instance is the reference to a well-known (but, some would say, incoherent) theory of jurisprudence called “the gap theory” under which it is believed that the norms of law do not address every human conflict and, when they do not, courts should not assert their notions of a prudent resolution. The courts should say only that the law does not answer the issue presented in the dispute.

The critical idea behind both these spatial metaphors is that there was something simple to say in the *Secession Reference*: the law does not recognize unilateral secession by a province and, therefore, either it is not legal, or, alternatively, acts of unilateral secession are not subject to legal assessment. Professor Monahan does not state a preference for one of these two logical outcomes of the law’s silence on secession even though deciding whether law’s silence represents licence for action or a restriction on action must surely be a tremendously interesting question of law. Instead he devotes his attention to the wrongfulness of the Court’s setting forth a complex bundle of norms over provincial secession when, in his opinion, the action is not recognized in law.

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1. [1998] 2 S.C.R. 217.

It seems to me to be unfair to claim that the Court blundered by proceeding to describe a rule book on secession when it should have said that law has nothing to contribute. It is unfair because the Court reasonably decided that there was no “gap” in the law — there was, for the Court, no normative vacuum. The Court did not purport to constitute through edict a new constitutional regime. Instead it gave an answer to the question of unilateral provincial secession. Its answer was “perhaps” — perhaps it might be legal and perhaps it might not be. As it turns out, in law (as in life) “perhaps” is both a common, and a complex, answer. It needs explaining. It requires identification of what factors would legally legitimate unilateral secession and what conditions would make it illegal. Furthermore, in the Court’s opinion, it was an answer that expressed accurately the law of unilateral secession.

To explain where the answer was drawn from and to explain what such an answer means in future instances of application are what the Court decided to do. It chose to do this through exploring what our Constitution might actually say about dissolution of constitutional arrangements. What they found was not a gap — and no wonder. What kind of legal regime would it be if the most prevalent of social dynamics — the processes of joining and dissolving — did not capture law’s attention. All dissolution gives rise to entitlements in those who formed the union that has now become broken and we can well believe that law is prepared to name the interests that must be recognized and prescribe the processes that are needed to vindicate those interests. This is not an area of law marked by “a gap” but lies at the heart of marriage law, corporate law, contract law, the law of associations and constitutional law. The question in the *Secession Reference* is, “What does our constitutional order say about dissolution?”. The Court was not prescribing rules to fill in a previously empty legal landscape, but was drawing out legal meaning from a rich historical background of constitutionalism.

Now, there are two elements to judicial decision-making. The first is to have jurisdiction to decide (and, as I have said, I think that condition was met) and the second is to decide through fidelity to the legal (or constitutional) order. If the court were to have decided without fidelity to the whole of the text of Canadian constitutionalism, it would, indeed, just have been making things up.

In this judgment the Court identified and relied on a number of established constitutional precepts. Two stand out. The first precept that the Court speaks of (at the beginning, in the middle and at the end of its judgment) is that Canada is an organic state — that it is a state that has been formed through the constant compromise of interests and the constant construction of constitutional mechanisms for mediating inter-branch, inter-governmental and inter-societal conflicts. This fact gives rise to an essential constitutional process

for the vindication of those interests that have had to be compromised over the years. It is from this perspective that the Court begins to explain what it means by “perhaps”. It suggests that, perhaps, at some point, unilateral secession will have to be accepted but, in the meantime, there are interests for which accommodation must be sought, in the process of dissolution. For a time, at least, secession could not be unilateral but must follow processes for mediating competing interests.

A second precept that the Court draws from our constitutional arrangements is that our constitution pays more respect to historic communities than many constitutions. It recognizes historic communities — minority communities — and guarantees their continuation, particularly, but not only, their continuing cultural integrity. This is a fundamental requirement of our constitution. In light of this constitutional commitment, it may sometimes be necessary to accept dissolution — to allow the end of the current state arrangement even if no mutual agreement can be found about how best to accommodate the interests of the host state and the breakaway state. In my view, the Court is remarkably clear about recognizing this and this idea, too, helps us understand what is meant by the Court’s “perhaps”.

I do not agree that this judgment represents the in-filling of a gap. I do not agree that the Court was inventive. Rather it was prophetic in that it chose to capture the deepest elements of our constitutional tradition and to proclaim what fidelity to that tradition will require in the context of a crucial moment of Canadian constitutional reform. This intellectual function is hardly non-law. It is the essence of judge-made law.

With respect to Professor Morin’s paper and his clever presentation of the Court as ally to the sovereigntist movement in Quebec, I believe this element of his paper is not the least telling. It is at the very heart of constitutional order that the constitution will identify agencies and processes that are designed to forestall the collapse of the constitutional regime. As Professor Bruce Ackerman of Yale Law School has pointed out, a new constitution represents a revolutionary change (and I believe this as true for nineteenth century Canada as for eighteenth century America) and so it is alert to the need to forestall, or suppress, the next revolutionary moment. This would, in fact, be one of the major goals of constitutionalization. Therefore, it says little to claim that agencies acting under the constitution, like the Supreme Court of Canada, turn out to be allies of sovereigntists because they purport to delegitimize sub-state self-determination, or they articulate norms that will impede the break up of the existing constitutional order. Impeding break up of the existing constitutional order is what constitutionalism is designed to do and the more the Court articulates this accurate version of the constitutional order, the more its rigidity

can be appropriated by sovereignists to promote nationalist outrage. But no constitutionalist, or no legalist, could want the court to behave any other way.

Another of Professor Morin's critiques is his claim that the court failed to do its job fully — that it gave half-answers. For instance, he faulted the Court for saying that a clear majority in support of separation was needed in order to trigger negotiations over the terms of secession, but then failed to shed light on what a clear majority would be. I believe that when a court is faced with prescribing the conditions for maintaining the integrity of the regime — or ensuring that fundamental changes occur according to law — what it is most required to do is identify the values that must be respected in the process, not the precise formula for change.

Professor Morin complains that “clear” as in “clear question” or “clear majority” is not clear enough. However, the values behind the Court's requirements could not be clearer — the process for dissolving a nation should not commence if there is any basis for discerning ambiguity, or potential reversal, in the jurisdiction that is seeking to secede. The details about how we should measure consent in order to ensure that there is a reasonably certain commitment to the secession project should be determined later in a specific context. It is a precept of judge-made law to decide what is sufficient for the moment that the Court finds itself in and not presume to know what future moments will require by way of standards and rules.

The Supreme Court of Canada served Canada well; I do not accept that Professor Monahan's and Professor Morin's criticisms reveal fatal flaws in the judgment. I do not believe that we shall come to regret what was decided in this reference or the bases on which the decision rested.