

ONE NATION UNDER COURT: THE SUPREME COURT AND CANADIAN FEDERALISM
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INTRODUCTION

“When the country gets into trouble the Supreme Court of Canada has been there to come to the rescue”. (Markin: A4) This statement, expressed by Justice Lamer soon after the federal government under Jean Chrétien decided in September 1996 to refer the legality of a unilateral declaration of independence to the Supreme Court of Canada (SCC), leaves us to wonder - has the SCC indeed come to Canada’s rescue? The Court *has* been embroiled in the political struggles between the federal and provincial governments regarding their attempts to unilaterally amend fundamental features of Canada’s Constitution. This was especially true with the Senate Reference, 1980; the Patriation Reference, 1981 (Authority of Parliament in Relation to the Upper House, 1980); the Quebec Veto Reference, 1982 (Amendment of the Constitution of Canada, 1981); and the Secession Reference, 1998 (Secession of Quebec, 1998). But, what kind of country did the Court think it had to rescue? And, what seemingly did it think should be its own role in the rescue effort?

In commenting on the role of the Court and the effects of its opinion in these four references, political scientists and legal scholars have, for the most part, focused their analysis upon the political aspect.¹ This is not surprising. The references were political. In each of them, the SCC was asked to settle a political dispute between the two orders of government or between the federal government and the Quebec government. I use the term “political dispute” because all four references involved the ability or inability of the governments to unilaterally amend or prevent amending the Constitution. Further, all four references resulted from either the federal or the provincial governments’ inability to advance their vision of the Canadian federation through the traditional political means of federal-provincial negotiations. Though an analysis focusing on the political aspect of the references seems reasonable, we run the risk of underestimating the role an understanding of federalism played in the opinions of the Court. Further, we miss how in the four references, the Court, seeking to act as mediator, commented on the nature of the Canadian nation and its federal system.

In each of the four references the Court was presented with at least two distinct visions of the Canadian federation: a centralist, a provincialist, a dualist and a multinational. The first two visions are indicative of a mono-national conception of Canada, and the latter two of a plural-national conception. The Court, in being asked to resolve the conflict between the federal and provincial governments in the Senate and Patriation References, or between the federal and Quebec governments in the Quebec Veto and Secession References, was asked, in effect, to choose between these conflicting visions. And, in rendering an opinion that implicitly gave precedence to one or other of these visions, it elaborated a conception of Canada.

In this paper I argue that in all four references, the SCC, acting as mediator, expanded upon a particular vision of the Canadian federation reflecting a mono-national conception of Canada, even when faced with an alternative plural-national conception. In this way, the Court emphasized the imperative need for “one Canada” at the expense of the constitutional expression of nationhood outside the nation. In contrast to mono-nationalism, plural-nationalism goes

beyond the idea of one nation and the familiar set of political and civil rights afforded to citizens in a liberal democratic polity by recognizing and accommodating the distinctive identities and needs of the significant ethno-cultural groups residing within the state.

In elaborating upon the mono-national conception, the Court ultimately preserved its legitimacy as a “neutral arbiter” and supported the idea of Canada as a single nation. This exposes a deeper tension between the continued commitment of the Court to ensure the viability of the Canadian state on the one hand and on the other hand, the increased pressure to recognize ethno-cultural diversity in the federation.

These four references were unique because first, *they were references*, so the Court had to determine the validity of an action or legislation before the action occurred or the legislation enacted; and second, the Court was asked about the power of governments acting alone to change or prevent changing fundamental features of the Constitution. Such issues profoundly affect the type of federation Canada has and relations among governments.

I begin this paper by discussing the role of courts. I then move to describe the constitutional visions evident in the four references and how they relate to either a mono-national or plural-national conception of Canada. In the third part of the paper, I analyze how the opinions of the Court were predicated on a particular constitutional vision, one that reflects a mono-national conception of Canada. In the final section of paper, I briefly look at the implications of these findings.

THE ROLE COURTS

The SCC as an institution is understood to be an arbiter or umpire of federalism. More specifically, however, the SCC can be seen as either adjudicator or the policy maker (Weiler 1968). As the adjudicator, the Court resolves disputes between two parties. As the policy maker, the judge makes policy choices and gives them the force of law. Both these roles are distinct from the “mediator” whose task it is to come to a resolution that both parties would agree upon. (Russell 1989) The main role of the Court nonetheless remains to give meaning to the ambiguous words of the Constitution while maintaining a balanced federal Constitution. (Lederman 92)

In attempting to understand how courts exercise the task of giving meaning to the words of the Constitution, legal scholars hypothesize a two-step process: in step one, judges focus on the impugned legislation to determine the pith and substance; in step two, they focus on the Constitution to determine the scope of powers of the government whose legislation is under review. (Swinton: 151; Hogg: 328; Laskin: 148) Frequently overlooked and undervalued in this two-step process is the role played by federalism as a variable in its own right. As a result, we risk missing how the Court elaborated a conception of the Canadian federation and how this ultimately served to re-affirm the idea of Canada as one nation.

CONCEPTIONS OF CANADA

The distinguishing factor between the two conceptions of Canada is the different understandings of the ‘Canadian nation.’² It is not a matter of whether cultural diversity is recognized or embraced, both approaches do. Rather, it is the degree to which diversity is embraced by society, including governments and the SCC, and how diversity factors into the conceptualization of the Canadian ‘nation’. In other words, is Canada a single political nation where the people identify themselves as having one ‘national character’ that celebrates cultural diversity? Or is it a plural-nation where the people conceive themselves as belonging to multiple, overlapping, self-governing nations within a nation?³

In assessing the different visions of Canadian federalism according the criteria of a mono-national and plural-national typology it becomes crucial to clarify how the notion of ‘nation’ is understood within each perspective. We must also grapple with the question of whether unity of the whole – implicit in the promotion and the encouragement of the homogeneity – or the necessary fragmentation of the political sphere – implicit in the promotion of ethno-cultural heterogeneity – is most salient in these two competing visions. Though there will always be discrepancies, debates, and contradictions, what defines a nation here is a collective commitment held by the members of a particular social group to pursue a ‘national’ or ‘nation-building’ project within the state. What is distinctive about nations then, is that they typically understand themselves and frame their aspirations in terms of a certain degree of social solidarity and aspirations of self-governance.(Moore: 5-8)

Under the mono-national approach, the Canadian nation is understood as a ‘polyethnic’ entity comprised of many ethno-cultural groups which, though they subscribe to a common national identity, still express a multiplicity of values that distinguish them from other groups. These divisions remain important and are recognized formally and informally by the state. In other words, the Canadian nation still recognizes cultural diversity through various judicial, legislative, or even constitutional concessions despite its overarching commitment to the unity of the political nation. (Kymlicka: 28-33)

An example of this is the pan-Canadianism advocated by Trudeau with its commitment to bilingualism, multiculturalism, equal rights and a common Canadian identity. Similarly, the provincialist vision has a commitment fostering provincial equality and an overarching common identity. Both visions begin upon the premise that Canada is a single political nation. The difference between the two rests in the relationship between the two orders of government and the manifestation of this in a federative form.

In contrast, the Canadian nation under a plural-national can be understood as a state comprised of various sub-state identities that may exist in tandem with the common national one. Typically, these minority nations demand the political recognition of equality and autonomy *as* nations. Like the majority nation, all engage in a nation-building project and assert the power and ability to do so. This conceptualization of the Canadian nation as a plural-nation informs both the third and fourth constitutional visions, dualism by the Quebecois and multi-nationalism by the Aboriginal peoples respectively, where both rest upon the premise that Canada is made up of more than one nation living equally, side by side with the majority political and cultural

nation. These nations demand that they be recognized politically and constitutionally as self-governing nations with the right to self determination.

Vision One: Centralism

This first vision is based on a territorial political identity; accordingly, the only legitimate political identity is the Canadian one. Those who subscribe to this vision favour a strong federal government and advocate a centralized federation. Francois Rocher and Miriam Smith identify three variants of this first vision.⁴ The third variant, Trudeau pan-Canadianism,⁵ is particularly relevant with regard to these four constitutional references.

Trudeau pan-Canadianism stressed the idea that a citizen of Canada is first and foremost Canadian. The identification with a province, a region or another national grouping within Canada, though recognized, is secondary. (Rocher and Smith: 59) In light of this, the federal government acts on behalf of all citizens, who are all regarded as equal. Further, it is believed that the federal government can and should override the narrow interests of the provinces in order to serve Canadians better, thus intimating a hierarchy between the two orders of government. Subscribers to this vision therefore reject both decentralized and asymmetrical federalism as both militate against a unified Canada. (Rocher and Smith) Trudeau pan-Canadianism centred on the idea of promoting one political identity rooted in bilingualism, multiculturalism, and most importantly, individual rights. All this would be secured with a strong central government with which French and English-speaking Canadians and other linguistic and cultural groups can identify and rely on to protect and promote their individuality.

Vision Two: Provincialism

The second vision, built upon the compact theory of Confederation, asserts the primacy of the provinces, rather than the federal government, as the building blocks of the Canadian community. “Confederation was a contractual agreement among the provincial governments.” (Stevenson: 40) Autonomous governments came together to form a union; federalism was adopted as a form of governance in order to ensure that the provinces were able to maintain their autonomy.

In contemporary Canadian politics, the provincialist vision promotes the respect for the principle of provincial equality: not only are provinces equal to each other – thus rejecting the idea that one province is distinct and so deserving of special status (Rocher and Smith: 49) – but also equal to the federal government, with each constituent unit sovereign and autonomous within its jurisdiction. Further, it presupposes “that no changes can be made to the original agreement without the unanimous consent of all the parties to that agreement.” (Kwavnick: x) Consequently, this vision is in direct conflict with the dualist vision as well as the centralist vision; the former puts into doubt the equality of the provinces and the latter questions the principle of the equality of the two orders of government.

To be sure, under these first two visions, cultural diversity in Canada is not rejected. In fact it is embraced. The caveat, however, is that cultural diversity is politically and constitutionally recognized and protected so long as it does not threaten or upset the nation, the

dominant political nationalism, or the idea of equality amongst individuals, cultures and provinces. So, culturally diverse groups are recognized, but not as self-governing nations. They are seen as cultural communities that have the right and the ability to express their diversity within the constitutional framework.

Vision Three and Four: Dualism and Multi-nationalism

Unlike the preceding two, the third and fourth visions begin with the assumption that Canada is a plural-nation. Supporters of the dualist vision argue that Confederation was a compact between the provinces to deal with their vast diversity, in fact, federalism was adopted because of the diversity within Canada. (Rocher and Smith: 52); and between two founding peoples who agreed “that Canada should be a country inhabited by two nationalities and that the new nation, Canada, should recognize its bicultural nature.” (Cook: 51) Accordingly, there is an implied obligation that governments ought to promote and preserve Canada as a bi-cultural state (today it is often referred to as a bi-national state, mainly by Quebecois nationalists).

The dual compact theory acquired additional prominence with the Quiet Revolution and the emergence of modern Quebec nationalism. The belief is that Quebec is the homeland of French Canada, so the National Assembly should have the power to protect and enhance the French language and culture in order to serve its citizens better. The province of Quebec is viewed as a nation within a nation. This constitutional vision is not necessarily a rejection of Canada; it simply asserts that certain powers in the area of culture are required to ensure the vitality of the Quebec nation. Constitutionally and politically dualism asserts that the consent of the Quebec government, as it represents the people of a nation within Canada, is needed in amending the Canadian Constitution. Further, as a nation, the Quebecois have the right of self-determination.

According to the Aboriginal peoples who adopt a multinational vision, conceiving Canada as a dualist state ignores the historical and current role of the Aboriginal community in the development of Canada. As a result a new concept has emerged in contemporary Canadian politics; Canada as a multinational federation. (Rocher and Smith: 56) This vision asserts that because Aboriginal nations have the right to self determination, their consent is necessary if constitutional and political changes affect their identity, status, and/or rights.

For the purposes of this paper, it is taken for granted that Quebec and the Aboriginal Peoples are nations, and the other entity is the rest of Canada (ROC). This is done not because it accords with the definition given above, but rather, because both Aboriginal Peoples and Quebec presented themselves as nations to the SCC, Quebec in the Quebec Veto and Secession References and the Aboriginals in the Secession Reference. This conditioned their approach to the understanding of Canada and Canadian federalism.

The struggles of the different and conflicting visions of the Canadian federation were widely expressed in the arguments presented to the Court in the four references. The Senate and Patriation References speak directly to the role of the provinces in the federation. Thus the contrasting visions present in these two references can be located within the mono-national approach. That Canada is made up of a single political nation is not questioned. In fact, it is not

even raised as an issue. Rather the issue of these two references is centred on the relationship between governments. In the Senate Reference, the provinces challenged⁶ the federal government's assertion that it had the power under s. 91(1)⁷ to abolish the Senate; in the Patriation Reference, the provinces (excluding Ontario and New Brunswick⁸) challenged the federal government's plan to unilaterally patriate the Constitution. In both references, the provinces argued that the two orders of government were equal to each other, thus both had a role to play in amending the Constitution where amendments affected their powers and their relationship with the federal government. Adopting the centralist vision, the federal government, in both references argued that provincial consent was not necessarily required in the amending of the Constitution, even if it affected provincial powers and/or federal-provincial relations.⁹

In the Quebec Veto and Secession References, the question of nationhood distinct from the Canadian nation is put directly to the Court. The contrasting visions are not centred on the struggle between nations as both speak specifically of the English Canadian nation versus the Quebec nation. In the Quebec Veto Reference, the government of Quebec challenged the constitutionality of the Constitution Act, 1982 as it had not agreed to the patriation package; and in the Secession Reference, the federal government challenged the constitutional ability of the province of Quebec to unilaterally declare independence. If it is true that the people of Quebec form a nation equal to the Canadian nation, as Quebec nationalists argue, then the province's consent was required when the Constitution was patriated. Following from this perception, Quebec as a nation would have the right to self-determination, which may or may not lead to a right to declare independence.¹⁰ If however, Quebec is a province like the others, (as the federal government argued in both references) then not only was the patriation process legitimate despite Quebec's lack of consent, but also, Quebec does not have the right to unilaterally declare independence. This issue is further complicated by the Aboriginal groups who argue that not only does the secession of Quebec require an amendment to the Constitution, but they, because of their vested interest, must be present at the negotiating table. Therefore, a nation to nation agreement is required. The Court thus had to grapple with the issue of reconciling not only different visions, but also different nationalities, while assuring the viability of Canada as a federation.

THE COURT DECIDES

In the Senate Reference, a unanimous Court found that s. 91(1) does not authorize the federal government to unilaterally amend the BNA Act where amendments affect the provinces or federal-provincial relations. Both the spirit of the Senate and the obligations emerging from Canadian federalism prevent the federal government from unilaterally changing fundamental features of the Senate, including its abolition.

In the Patriation Reference, a 7-2 majority found that there was no requirement of law that obligates the federal government to obtain provincial consent before asking Britain to amend the Constitution even if amendments affected federal-provincial relations. On the second question, dealing with convention, a 6-3 majority found that as established by constitutional convention apart from law, the federal government was required to obtain a substantial degree of provincial consent on matters dealing with and affecting federal-provincial relations.

In the Quebec Veto Reference, a unanimous Court ruled that not only was unanimity of the provinces not required when the Constitution was patriated, but that a historical veto requiring the consent of the Quebec province had not been established. Thus the Constitution Act, 1982 was indeed constitutional.

In the Secession Reference, the Court found that the Constitution does not authorize Quebec to unilaterally declare independence as the secession of a province requires an amendment to the Constitution. However, a clear majority on a clear question dealing with the desire to secede means that Canada has a duty to negotiate on the part of governments. Such an obligation emerges from four constitutional principles: federalism, democracy, constitutionalism and the rule of law, and protection of minorities.

REINFORCING THE NATION

While it may be true that the Court in all four references rendered balanced decisions by recognizing the role of both orders of government, it is also true that the Court reaffirmed a particular conception of the nation, one that asserts the idea of 'one Canada'. In the Senate Reference, the SCC affirmed the legitimacy of the Senate as a federally appointed institution that secures regional representation at the centre within the federal policy-making institutions by arguing that the Senate, as is – an appointed body acting as a chamber of sober second thought – cannot be altered unilaterally by any one order of government. As a result of this opinion, the SCC seemingly strengthened the position of the provinces in the federation in two ways: first, the Senate must continue to exist because it ensures regional representation at the centre, a key federal principle; second, abolition of this institution affects federal-provincial relations, thus the provinces must be consulted and their consent obtained. In actuality however, this decision, though it did not constitutionally strengthen the position of the federal government vis-à-vis the provinces and central institutions, did reinforce and legitimize this position politically by assuring that the Senate remains a body appointed solely by the federal government. The Court did not expand upon why the Senate must continue to be appointed to perform its legislative function or if the Senate performed its function in practice – it simply stated that it must.

Stemming from this, the Court seems to indicate that in matters that affect the provinces and federal-provincial relations, unanimity of the provinces is required. If it is true that the Senate cannot be fundamentally altered because it represents a key feature of the federal bargain, then it is arguable that all provinces must consent to the changes as all provinces will be affected. It should be noted that the degree of provincial consent was not an issue raised by either order of government or by the Court. Nonetheless, it is an inference that can be drawn. Fundamental changes to the original bargain and to Canadian federalism affect all parties involved, as the Court indicates in this opinion. If, as Lord Sankey argued and the Court adopted, it is not “legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract of the federating bodies,” (Authority of Parliament in Relation to the Upper House, 1980: 13) then certainly it is safe to assume that when the contract is changed all parties to that contract must agree. A fundamental change to the contract cannot be imposed on either order of government by another order of government or by the Court.

The provinces in this case were able to claim victory as the Court recognized, if only on the surface, the role of the provinces in the federation. Because they were well situated within the mono-national discourse, the arguments of provincial equality and autonomy were well received by the Court. That is, the idea of the Senate as an institution effectively representing the provinces at the centre and the requirement that this institution to be altered only upon the consent of the provinces, reinforced the idea of a federation made up of two equal orders of government and equal constituent units.

The same is true of the Patriation Reference. The Court provided both sides with a little something enabling them to each claim victory. However, upon closer analysis of the decision, it becomes quite obvious that faced with two distinct visions of the Canadian federation, the Justices reinforced the constitutional position of the federal government.

Throughout its opinion, the Court made the relationship between law and convention clear. Though conventions “form an integral part of the Constitution and of the constitutional system,” (Amendment to the Constitution of Canada, 1981: 87) they are based on political precedents established by government and because, more often than not, they are in contrast with legal rules, they are not enforced by the courts. (Amendment to the Constitution of Canada, 1981: 84-85) Further, with a breach of convention, there are no legal repercussions, only political ones. In short, conventions do not necessarily enjoy the privilege of law as they are not enforceable by the courts; they are simply political obligations. Thus it was only by way of convention, bearing no legal weight, that the provinces were constitutionally equal to the federal government.

In the Quebec Veto Reference, the Court had to give meaning to its ruling in the Patriation Reference. In doing so, it adopted a politically pragmatic understanding of the convention it recognized as existing. It was able to do so by underplaying the historical role of Quebec in past attempts to amend the Constitution.¹¹ In turn it de-legitimized claims of dualism as understood by the government of Quebec at the time. As a result, this opinion legitimized the constitutionalization of the vision of Canada held by the provincial premiers (excluding René Lévesque) and most notably by the Prime Minister of the time, Pierre Trudeau, by reinforcing that Canada is a single political nation made up of equal provinces. The political legitimacy of the new Constitution was therefore ensured. In the end, the decision had the effect not only of silencing Quebec’s claims, but also and more importantly, it silenced the debate concerning the principle of dualism in the Constitution.

In the Secession Reference, the Court not only downplayed the dualism principle, but, perhaps inadvertently, it ensured the federal government’s position in the federation to de-constitutionally legitimize any call for a fundamental change to the idea of ‘one Canada.’ The Court did so by demanding clarity and by affirming that any expression of diversity must take place within a constitutional framework; a framework that the province of Quebec has refused to sign on to because it embodies a vision of Canada to which it does not subscribe. The Court in this reference understood federalism in provincialist terms. Federalism was defined as “a political and legal response to the underlying social and political realities.” (Secession of Quebec, 1998) The Court recognized the diversity of the component parts of Confederation and the autonomy of the provincial governments to develop their societies within their respective spheres

of jurisdiction. Such a vision is compounded when considering its next observation: “the federal structure adopted at Confederation enables French-speaking Canadians to form a numerical majority in the province of Quebec and so exercise the considerable provincial powers conferred by the Constitution Act, 1867 in such a way as to promote their language and culture”.(Secession of Quebec, 1998) However, implied in the Court’s view is that this expression of diversity, if it threatens to upset the single political nation, is not acceptable or permissible. Ultimately, the expression can only be meaningful if it is exercised within the parameters of the Constitution in general and the amending formula in particular.

Further, when speaking of “expressing diversity”, the Court speaks not of *nations* wishing to revisit the federal bargain, but of provinces or minority groups. This becomes clear when the Court elaborates upon the fourth principle, protection of minorities. As Gregory Millard argues, the Court recognized Quebec’s collective goals and aspirations, but it did not equate it to a national minority interest; rather, it understood such interests as falling under the protection of minorities.(Millard 1999) The Court, in applying this principle to the conclusion of ‘a duty to negotiate’, ensured the minimal reach of this principle. Because diversity is only viewed at the provincial or individual level, and not in the context of a *national* minority, diversity embodied in the minority and its expression, were only acknowledged as legitimate when done within a constitutional framework. This is also true of its minimal acknowledgment of the Aboriginal peoples. The Court, did not, at any point of its decision, speak of the need for Aboriginal presence at the negotiation table in order to ensure full respect for this principle. Rather, in the Court’s understanding, the Aboriginal Peoples were understood as a minority, but not necessarily an ethno-national minority. A plural-national vision of Canada requires the recognition of the existence of national and ethno-national minorities.(Millard 1999)

The Canadian federation in the Secession Reference is understood as one nation made up of minority groups and not necessarily as a plural-nation containing several national minorities. This conclusion is further strengthened when considering the Court’s understanding of democracy and constitutionalism and the rule of law. Though the Court adopted a traditional positivist view of both terms,¹² it narrowed the reach of these principles by demanding clarity: “the will [of a province] must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.”(Secession of Quebec, 1998) By demanding clarity, the Court created quite the hurdle for Quebecers. Clarity because is it fluid and relative, is unachievable; what is clarity and is it desirable? Clarity demands one agreed upon discourse to the exclusion of all others; “democracy implies a continuous process of deliberation [...] Terms are not defined with unequivocal certainty, as the comprehension of these terms function in the context which they are used.” (Rocher and Verrelli: 212) To demand clarity is to demand uniformity.

Further, the Court stated that constitutionalism and the rule of law leads it to conclude that if Quebec wants to secede, it must do so within a constitutional framework. In turn, despite claiming that no one principle trumps the other, the Court placed democracy and constitutionalism and rule of law in a superior position vis-à-vis the other two principles. In the end, it reaffirmed the vision of Canada embodied in the Constitution and in the unanimous opinion rendered in the Quebec Veto Reference. Maybe the federal government was not completely victorious in this decision, but it was certainly served with the ammunition it needed,

and will need, to de-legitimize and curtail future endeavours of a secessionist movement or, potentially, any movement questioning the nation.

The reaffirmation of one-nation is further evident when considering how the Court dealt with the silence of the law relating to the particular issue under review in each case. On the surface it may seem that the Court treated this silence differently. In the first case, the silence meant the federal government could not unilaterally abolish or fundamentally amend the Senate as its capacity to represent regions at the centre constitutes a key federal principle in Canada. In essence then, the spirit of Canadian federalism acts as an obstacle preventing the federal government from fulfilling its quest to unilaterally alter the nature of the Senate and possibly unilaterally patriating the Constitution. This *spirit of Canadian federalism* is understood to be a part of the Canadian Constitution; thus it is a legal barrier preventing unilateral action by the federal government. In the Patriation Reference, nothing explicitly written in the Constitution legally prohibited unilateral patriation of the Constitution; however, the spirit of federalism justifying a constitutional convention, obliged the federal government to obtain a substantial degree of provincial consent. The Quebec Veto Reference dealt exclusively with convention, and the lack of explicit consensus on the part of the political players meant that there was no constitutional veto for the government of Quebec. The spirit of federalism in this case seemed not to justify a historical veto for the government of Quebec. In the final reference, the silence was interpreted as prohibiting a unilateral declaration of independence. The spirit of federalism requires a constitutional amendment if a province wishes to secede. Upon closer analysis of how the silence was interpreted however, we recognize that regardless of the seemingly different interpretations and the manner in which the spirit of federalism was used to justify the interpretations, they all had the same outcome: reinforcing and sustaining Canada as one nation and the legitimacy of the Court to uphold the Constitution.

A pattern thus emerges when we look at the four opinions as a whole. The single political nation, as long as it is not questioned or shaken, will allow for the political accommodation of socio-cultural diversity. The Court safeguards this ideal. The federal government, which embodies this ideal, promotes it. The provinces, if they can *tweak* their arguments within this ideal, can flourish as was the case in the four references, especially the Senate and the Patriation References.

THE CHOSEN PATH

Path dependency can help us put the opinions of the Court into perspective. That is, the Court did not decide X because it is an institutional fact, or because it was written in the Constitution. How the Court dealt with the silence of the law is indicative of this. Rather, many factors at play, including past decisions and the politics of the day led the Court to decide as it did.

Coming on the heels of discussions concerning Quebec sovereignty and the referendum on that issue; a more favourable role for the provinces, especially Quebec, in the federation endorsed by the Pepin-Robarts Report on National Unity; and the ‘urgency’ to patriate the Constitution in order to ‘save’ Canada, it is not surprising that the Court found that s. 91(1) does not authorize the federal government to alter the Senate in such a manner as to affect its fundamental character. The public—which includes political leaders, media commentators and

citizens—had its reservations regarding first, Trudeau’s assertion that his government acting alone could abolish the Senate, second, the Pepin-Robarts report on National Unity, which accepted the dual principles of regionalism and dualism, and third Levesque’s ideas of sovereignty association. Canadian society at the time seemed to favour a federation where both orders of government were equal to each other and the provinces equal amongst themselves.¹³ The Court reinforced this perception of the federation with its opinion in the Senate Reference.

With regard to the Patriation Reference, it would be safe to argue that the SCC was aware of the urgency of patriating the Constitution given the Quebec national ‘crisis’, the desire of Canadians to have a patriated Constitution with a charter of rights and freedoms, and the growing animosity between the two orders of governments. In light of this, the SCC rendered a political decision by not seeming to lean more favourably to one side; it “reflected a shrewd political judgment on the part of the Court.”(Monahan: 192) It gave something to everyone, while elaborating upon a vision of Canada often promoted by Trudeau. All parties were able to point to certain aspects of the decision, be it in the legal findings or the convention findings, to claim victory and flex their political muscles.

In the Quebec Veto Reference, the Court was asked to deem the newly patriated Constitution unconstitutional. Canadians were quite content and relieved that the Constitution was finally patriated. So the timing of the case may have pushed the Court to decide as it did. The Court, however, in rendering the opinion, did save itself from having to declare the Constitution unconstitutional and from questioning the evident majority support for a newly patriated Constitution.

To explain the actions of the Court by highlighting the timing of the Quebec Veto Reference and the enthusiasm of the public would, however, undervalue the politics of the day, specifically the politics of the two major players at the time, Trudeau and Lévesque. Each had a particular and seemingly conflicting vision of Canada and Quebec’s position in the federation. Trudeau endorsed a pan-Canadian identity that promoted a strong central government. He promised to generate equality of the individual and in turn strengthen the Canadian identity by enabling the galvanization of such ideals through a Charter of Rights and Freedoms, a domestic amending formula, a strong central government with which the individual could identify, equality of Canada’s provinces, official bilingualism and multiculturalism. The goal was to have all Canadians align their political allegiance and identity to the Canadian nation and to the government that represents this nation.

Contrast this with the vision held by Lévesque, who stressed and urged respect for the “proper” roles of both orders of government. Lévesque as well as previous Quebec Premiers insisted upon the strict adherence to the division of powers coupled with the idea that Quebec represented a nation in both the social and political sense. Thus, the Quebec government ought to be party to all constitutional changes. Lévesque’s vision promoted the idea of two nations, equal to each other. This, it seemed, would place the Quebec government above the other provinces vis-à-vis constitutional importance and in turn Quebecers above other Canadians. Special status, it was perceived, would threaten the equality and just society Trudeau promised. In the end, it was Trudeau’s vision that won the battle.

In the Secession Reference, the Chretien government asked the SCC to arm the federal government with the ammunition it would need to thwart the secessionist agenda, to strengthen its role both within Quebec and within Canada outside Quebec, and to reaffirm Canada's status as a single political nation. The Chretien government would have been served well had the Court had simply agreed with the government's position and found Quebec to be bound by the Constitution and the vision of Canada it embodied. This, however, came with political risks. First, the federal government, by inquiring into the ability of the province to secede, was indirectly questioning Quebec's ability to hold a referendum on the matter; it was thereby interfering directly in Quebec provincial matters. Second, the federal government was resorting to an institution whose legitimacy is questionable in Quebec, which views the SCC as a centralist body.¹⁴ The Court, however, in rendering an opinion that gave something to both sides thereby appeasing them both, avoided any significant uprising. As Michael Mandel beautifully states, "the Court reads the polls. It knows that the sovereignists have been weakened, and it knows that nothing strengthens weak sovereignists like fresh insults from Canadian institutions. Better to show a little rhetorical generosity."(Mandel 1999)

REVISITING THE ROLE OF THE COURT

The Court was asked to determine if one order of government has the unilateral power to amend or prevent amending the Constitution. Its answers could not avoid choosing between the visions with which it was presented. Considering the politically charged nature of these four references and considering the legitimacy of the Court which could have been threatened, we need to question if the Court was acting as a neutral arbitrator (the questions in all four references were stated in a way that begged for a winner-take-all response) or as a political mediator. As Marc Gold argues, "our courts are acutely aware of the principal role that they have assumed in Canadian society and they want their decisions to be deemed acceptable to the society." (Gold: 154)

The centralist and provincialist visions do not challenge the idea that Canada is one nation. On the other hand, dualism and its associated consequences have the very real potential of challenging the idea of 'one Canada.' The government of Quebec, by bringing forth a challenge based on the dualism principle in the Quebec Veto and in the Secession References and Aboriginal Peoples based on multinationalism in the latter, threatened the one-nation idea. In essence both parties were asking the Court to perceive Canada differently from the dominant conception of Canadian federation held not only by the federal government, but by other governments and society outside the nationalist circles of Quebec and Aboriginal Peoples. The Court was being asked to deconstruct the nation and reconceptualise it so as to accommodate a plural-national theory. It was unlikely that the Court would take on such a political and academic endeavour. Further, it is much more doubtful that the Court would have entertained such a conception that threatens the potential stability of the federation, and would potentially repudiate the commonly held perception of Canada. The Court had to consider its legitimacy and its role in the eyes of the society.

Given the political environment, the Court adopted the role of mediator in order to ensure the public would continue to accept it as a legitimate institution. If the SCC were to produce an opinion/decision that contradicts the dominant ideology, it is questionable that the Court's

legitimacy would go unchallenged. In fact, and as demonstrated, the Court did endorse a vision of federalism and of the nation; one which best reflected the commonly held perception of the federation. As Andrée Lajoie argues, judges are able to maintain their neutrality by invoking judicial doctrine. (1997) So, for example, it is not the Court that created the four principles or the duty to negotiate in the Secession Reference, or the need for a substantial degree of provincial consent in the Patriation Reference. But both findings, and all its decisions, flow naturally from the Constitution. In turn, its vision of federalism went unnoticed and more importantly, its legitimacy was not the issue.

In the Secession Reference, the Court claimed, that it “has always recognized and respected these principles [democracy, federalism, constitutionalism and the rule of law, and protection of the minority].”(Secession of Quebec, 1998) What it did not acknowledge, at least not explicitly, is the degree to which these principles have been respected by the Court in the interpretation of the Constitution. It is plausible that these principles *did* inform the SCC’s decisions in both the Senate and the Patriation References; however, the weight they carried differed. In the Senate Reference, obligations emerging from these principles were said to be a matter of the Constitution. In the Patriation Reference on the other hand, respect for these principles was viewed as political goodwill emerging from conventions of the Constitution and not necessarily of the calibre of constitutional law. Finally, in the Quebec Veto Reference, the principles were virtually non-existent. The Court in the Secession Reference is quite explicit in pointing to the weight and importance of these principles: *Principles equal constitutional obligations, which in turn limit government action.*(Secession of Quebec, 1998) The difference in the weight of these principles in each of the references leads us to question whether or not a particular understanding of federalism and the other three principles is embedded in the fabric of the Constitution. The evidence of these references perhaps points to no.

THE CRITICS

The argument that the Court is influenced by the political environment and has a tendency of promoting a mono-national approach to the understanding of Canadian federalism, even when faced with a plural-national approach, has its critics. Canada’s Constitution does embody the one nation ideal and there is a centralized form of federalism embedded in the Constitution, this is an institutional fact. This may or may not be true. However, this analysis has shown that the Court altered its understanding of the obligations emerging from constitutional principles (including federalism). Consciously or not, the Court did ensure the one nation idea remains. Also, the ongoing work of Lajoie (1997) and Eugénie Brouillet (2006) indicates that the Court has had and continues to have a fluctuating understanding of federalism. In light of this, we need to reconsider preconceived ideas that institutional facts lead to a particular understanding of federalism and of the nation. They too are open for interpretation.

CONCLUSION

I have attempted to expose the deeper implications of such use and influence of federalism by pointing out that the Court reaffirmed and sustained the idea that Canada is one nation. This has and can have wider implications for the fabric of Canadian federalism than simply granting victory to one order of government or group versus another. Over time, such

endorsements can work to silence any meaningful constitutional expression of diversity or nationhood outside the nation.

Clearly, these four references alone cannot sustain the argument that the Court is influenced by a particular vision of the federation. Nonetheless, they do provide insight into how the Court deals with cases where the issue concerns the idea of the nation and cultural diversity. The Court is not simply the neutral arbitrator or the guardian of Canada's Constitution or its saviour, as Justice Lamer would want us to believe. Rather, the Court plays a much more profound role in shaping the contemporary understandings of the nation, Canadian federalism, and the relationship between governments and between nations.

Notes

¹ Academic analysis on the political aspect has revolved around the question of the whether or not the Court had reached a balanced opinion, why the Court chose to respond to these politicized issues, and the political consequences that have necessarily followed as a result. For further reference, see Canada Watch 7, Jan/Fen, 1999 edition; Saywell, John. *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*. (Toronto: University of Toronto Press, 2002); Meekison, Peter *Canadian Federalism: Myth or Reality?* (Toronto: Methuen Publications, 1968) – in particular Martha Fletcher, “Judicial Review and the Division of Powers” and Louis-Philippe Pigeon, “The Meaning of Provincial Autonomy”.

² For the sake of brevity, my description of the ‘Canadian nation’ is brief. There exists a significant body of literature dealing with the relation of this ideal to different and varying emphases on federal principles, reasons for adopting federalism in Canada, and so on. In another paper (forthcoming) I elaborate upon these various factors in order to arrive at a satisfactory typology. For the purposes of this paper, what is seen as the crucial distinguishing factor is the relation of divergent conceptualizations of ‘the nation’ to competing constitutional visions for Canada. For further reading about these issues as well as the differences between mononational and pluralnational democracies, see: Kymlicka, Will. “Multinational Federalism in Canada: Rethinking the Partnership,” in *Beyond the Impasse: Toward Reconciliation*, ed. Roger Gibbins and Guy LaForest (Montreal: Institute for Research on Public Policy, 1998); Kymlicka, Will and Christine Straehle, “Cosmopolitanism, Nation-States, and Minority Nationalism: A Critical Review of Recent Literature”, *European Journal of Philosophy*, 7:1, (1999); McRoberts, Kenneth. “Canada and the Multinational State” *The Canadian Journal of Political Science* 34: 4, 2001: 683-714; and, Tully, James, “Introduction.” In *Multinational Democracies*, ed. Alain G. Gagnon and James Tully, 1-34. (Cambridge: Cambridge University Press, 2001).

³ These questions touch upon issues that arise in both Will Kymlicka's writings about non-immigrant minorities and Ken McRoberts discussion of internal nations. Kymlicka, understands the Quebec and Aboriginal Peoples as non-immigrant national minorities “because they have fought to form themselves (or rather to maintain themselves) as separate and self governing societies and have adopted the language of ‘nationhood’ to both express and justify this struggle for self-government. [...] These groups have defined themselves as ‘nations’ and, as such, they claim the same inherent rights of self determination as other colonized or conquered nations around the world.”

See, Kymlicka, Will. “Multinational Federalism in Canada: Rethinking the Partnership,” in *Beyond the Impasse: Toward Reconciliation*, ed. Roger Gibbins and Guy LaForest (Montreal: Institute for Research on Public Policy, 1998) 15; and, McRoberts, Kenneth. “Canada and the Multinational State,” *The Canadian Journal of Political Science* 34, 4, (December 2001): pp. 683-714.

⁴ The first is based on the National Project of the nineteenth century where the need for a strong central government to build the new nation is stressed; the second where centralists and social democrats denounced the legal existence of the compact theory of Confederation; and the third, the Trudeau pan-Canadian vision. See, Rocher, François and Miriam Smith. “Four Dimensions of the Canadian Constitutional Debate.” In *New Trends in Canadian Federalism*, eds. François Rocher and Miriam Smith, (Peterborough: Broadview Press, 1995) pp. 45-66.

⁵ I refer to this variant specifically as ‘Trudeau pan-Canadianism’ as it differs from other visions that have been put forth, most notably, the different pan-Canadianisms put forth by John Diefenbaker, Lester B. Pearson, and Stephen Harper.

⁶ Factums were submitted by the provinces of Alberta, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, and Saskatchewan.

⁷ In 1949, the British Parliament on request from the federal government (who did not obtain the consent of the provinces) added s.91(1) to the BNA Act. This new section enabled the federal government to unilaterally amend the BNA Act, if the amendment does not affect federal-provincial relations, exclusive provincial jurisdiction, rights of people with regards to schools or use of English or French, the five year maximum life of Parliament, or that there be one session of Parliament at least once a year. See: Canada. Department of Justice. *The Constitution Act, 1867*. Ottawa, 1982, s. 44 [previously s. 91(1) of the BNA Act, 1867.].

⁸ In the Patriation Reference, the provinces of Ontario and New Brunswick argued alongside the federal government in asserting that the federal government is able to proceed unilaterally in amending the Constitution.

⁹ To reiterate, the provinces were not necessarily unanimous in presenting a provincialist vision of the federation to the SCC. In the Senate Reference, British Columbia, Manitoba and Quebec did not participate, and in the Patriation Reference, Ontario and New Brunswick argued alongside the federal government.

¹⁰ It should be noted that the province of Quebec, recognizing the political undertones of the Secession Reference, decided not to participate. The Court then appointed amicus curiae, André Joli-Coeur to argue on behalf of the province.

¹¹ To argue that it had a historical veto, the Quebec government pointed to the failed attempts at patriating the Constitution. These include the proposals of 1951, 1960, 1964 and most notably, the Victoria Charter of 1971.

¹² In the Secession Reference, para. 65 the Court states that democracy is understood to be “the process of representative and responsible government and the right of citizens to participate in the political process as voters.” Para. 76 the Court states that constitutionalism and the rule of law are similar, but distinct in what each requires: “the constitutionalism principle requires that all government action must comply with the Constitution. The rule of law principle requires that all government action comply with the law, including the Constitution.” *Reference Re: Secession of Quebec*, [1998] 161 D.L.R. [Dominion Law Reports] (4th) 385

¹³ This conclusion regarding the perception held by society is derived from a review of various newspapers accounting for the reaction of political leaders and the public over these ongoing issues.

¹⁴ In fact, the Quebec government decided not to participate in the Reference citing the authority of the SCC as one of the reasons. See, Schneiderman, David “Introduction.” In *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession*, ed. David Sneiderman (Toronto: James Lorimer & Co., 1999) p. 5.

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