

THE SUPREME COURT OF CANADA AND THE BORDERS OF QUEBEC

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BACKGROUND

On 20 August 1998, the Supreme Court of Canada handed down its decision in *Reference re Secession of Quebec*.¹ In this case the Court was asked to answer questions put to it by Canada's federal government on whether a unilateral secession of Quebec from Canada would be legal under either Canada's constitutional law or international law. In a single joint judgment the Court ruled that neither Canada's constitutional law nor international law permitted the unilateral secession of Quebec from Canada. However, the Court's judgment did not exclude the possibility of a legal secession of Quebec. Nor did it deny that a unilateral or illegal secession of Quebec would be effective if it were to be recognised by the international community. In either case the question of an independent Quebec's borders would be a significant issue. The question of borders was mentioned only in passing by the Court. However, these references, and the implications of other statements in the judgment, were instructive on the possible borders of an independent Quebec.

To date, the government of Quebec had maintained that Quebec's existing provincial borders would automatically become international borders upon the secession of Quebec. Canada's federal government and most of Quebec's aboriginal peoples deny this claim.²

A LEGAL SECESSION OF QUEBEC

Although the Supreme Court clearly ruled that a unilateral secession of Quebec was illegal under Canada's constitutional law, the Court did state that Quebec's independence from Canada could be achieved by means of

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¹ (1998) 161 Dominion Law Reports (4th) 385 ("Secession Reference").

² Radan "The borders of a future independent Quebec: does the principle of *uti possidetis juris* apply?" [1997] Australian International Law Journal 200.

an amendment to Canada's Constitution. If there was a "clear expression by the people of Quebec of their will to secede"³ from Canada, such a "clear repudiation"⁴ of Canada's existing constitutional order would "confer legitimacy on demands for secession"⁵ and oblige the federal government and other provinces to enter into negotiations with Quebec.⁶ These negotiations could lead to a legal secession of Quebec by means of amendment to Canada's Constitution. However, without such an amendment, secession would be legally impossible.⁷

In negotiations leading to a legal secession of Quebec the Court explicitly noted that the question of Quebec's borders would more than likely be raised, just as they had been raised in argument before the Court. The Court held:

Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec.⁸

³ Secession Reference at 424 para 87.

⁴ *Ibid* at 424 para 88.

⁵ *Ibid*.

⁶ *Ibid* at 426 para 92.

⁷ *Ibid* at 428 para 97.

⁸ *Ibid* at 427-8 para 96; and at 444 para 143.

Given that the issue of borders can be a matter raised in negotiations, it clearly follows that Quebec cannot maintain that its present provincial borders are sacrosanct and non-negotiable. It is possible that the issue of borders may be one of the reasons for the failure on any future negotiations on Quebec's desire to secede. If Quebec were to maintain that its present borders were sacrosanct and non-negotiable, it is likely that its legitimacy and credibility at the negotiations would be compromised. A loss of legitimacy and credibility could, as the Court indicated, be a relevant consideration for the international community to consider if Quebec persisted in seeking international recognition in the wake of failed negotiations.⁹ In this respect the Court suggested:

[A] Quebec that had negotiated in conformity with constitutional principles and values in the face of intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process.¹⁰

Thus, in the case of a legal secession of Quebec its international borders would not automatically be its present provincial borders. Existing provincial borders would become international borders only if secession negotiations did not raise the issue of borders, or if the issue was raised, it was agreed that existing provincial borders were international.

⁹ It can be noted that Katanga's secession from the Congo in 1960 was condemned as illegal by the Security Council of the United Nations, partly on the ground that the secession was contrary to the Congo's constitution: Security Council Resolution 169 (1961), 24 November 1961. On the other hand, rulings by the Constitutional Court of Yugoslavia that the secessions of Slovenia and Croatia were unconstitutional did not preclude the international community extending recognition to the secessionist Yugoslav republics: Odluka o ocenjivanju ustavnosti osnovne ustavne povelje o samostalnosti i nezavisnosti Republike Slovenije, 16 October 1991, Sluzbeni List SFRJ, God. XLVII, Broj 89, 13. decembar 1991, 1422-1423; Odluka o ocenjivanju ustavnosti zakona za sprovođenje osnovne ustavne povelje o samostalnosti i nezavisnosti Republike Slovenije, 16 October 1991, Sluzbeni List SFRJ, God. XLVII, Broj 89, 13. decembar 1991, 1423-1425; Odluka o ocenjivanju ustavnosti deklaracije povodom nezavisnosti, 9 October 1991, Sluzbeni List SFRJ, God. XLVII, Broj 89, 13. decembar 1991, 1427-1428; Buzadzic M, Secesija bivših jugoslovenskih republika u svetlosti odluka Ustavnog suda Jugoslavije, Zbirka dokumenata s uvodnom raspravom, Sluzbeni List SRJ, Belgrade, 1994, 156-162.

¹⁰ Secession Reference 430 para 103.

EFFECTIVE, BUT ILLEGAL, SECESSION

The Supreme Court also recognised that Quebec could successfully achieve independence even if it failed to achieve it by an amendment to the Constitution of Canada. In such circumstances, if Quebec persisted in its efforts to secede from Canada, independence could result if the international community accepted the validity of Quebec's claim to independence. This acceptance would be manifested by recognition of Quebec as an independent state. In the judgment, the Court stressed that, although such recognition would be effective, it would not change the illegal nature of the secession under both Canada's constitutional law and international law.¹¹

The Supreme Court did not directly say anything on the subject of borders in the context of the international community recognizing Quebec's secession. However, the Court's judgment appeared to assume that the recognition of Quebec would be within the scope of its existing provincial borders. In discussing the possibility of international recognition of a unilateral secession by Quebec, the Court's judgment spoke of "unilateral secession by Quebec",¹² action to that effect by the "National Assembly, legislature or government of Quebec"¹³ and other similar expressions. All of these expressions, when read in context, clearly contemplated the present territory of Quebec being the seceding unit. The Court never spoke in terms of part of Quebec seceding and obtaining international recognition.

Given the attitude of the Quebec government to the border issue, it is reasonable to assume that an unconstitutional secession by Quebec's National Assembly would be based upon Quebec's present territorial borders. The Supreme Court's apparent assumption that Quebec's recognition would be within these borders was consistent with recent international practice. In the cases of the four republics that seceded from Yugoslavia and the dismantling of the Union of Soviet Socialist Republics, the international community insisted that former internal federal borders

¹¹ Ibid at 430 para 144, and at 449 para 155.

¹² Ibid at 444 para 144.

¹³ Ibid at 432 para 107.

became international borders.¹⁴ In the case of Yugoslavia this approach was given a legal basis by the Badinter Arbitration Commission in a number of opinions in late 1991 to early 1992.¹⁵

The Badinter Commission relied heavily upon the principle of *uti possidetis juris* in reaching its conclusions. Reaction of scholars to the Badinter Commission's interpretation of the principle of *uti possidetis juris* has been mixed.¹⁶ A report commissioned by the government of Quebec in 1992 and prepared by five international law experts (the "Experts' Report")¹⁷ relied heavily on these opinions in reaching its conclusion that Quebec's present provincial borders would automatically become international borders if Quebec seceded from Canada.

¹⁴ "Guidelines on Recognition", 16 December 1991 in Trifunovska S (ed), *Yugoslavia Through Documents, From Its Creation To Its Dissolution*, (1994, Martinus Nijhoff Publishers, Dordrecht) 431-432. These guidelines, formulated by the European Community ("EC"), referred to the sanctity of internal federal borders as future international borders. This approach was effectively affirmed by the Security Council of the United Nations in May 1992 when it rejected the validity of the change of these borders by the use of force: Security Council Resolution 752 (1992), 15 May 1992. Prior to that date the Security Council had consistently urged the parties to the Yugoslav conflict to cooperate with the EC's efforts to resolve the crisis, thereby implicitly approving of the EC approach to the sanctity of internal federal borders: Security Council Resolutions 740 (1992), 7 February 1992; 743 (1992), 21 February 1992. In *Secession Reference*, the EC guidelines were mentioned, in the context of another issue, with apparent approval by the Supreme Court: *Reference re Secession of Quebec* (1998) 161 *Dominion Law Reports* (4th) 385, 443 para 143. This may indicate the Court's acceptance of the sanctity of borders principle contained in these guidelines.

¹⁵ Opinion No 1 of the Arbitration Commission of the Peace Conference on Yugoslavia (1992) 31 *International Legal Materials* 1494; Opinion No 2 of the Arbitration Commission of the Peace Conference on Yugoslavia (1992) 31 *International Legal Materials* 1497; Opinion No 3 of the Arbitration Commission of the Peace Conference on Yugoslavia (1992) 31 *International Legal Materials* 1499.

¹⁶ For critical assessments of the Badinter Commission opinions see Radan note 2; Ratner, "Drawing a better line: *uti possidetis* and the borders of new states" (1996) 90 *American Journal of International Law* 590. Endorsement of the Badinter Commission is found in Shaw, "Peoples, territorialism and boundaries" (1997) 8 *European Journal of International Law* 478.

¹⁷ The English translation of the Experts' Report which was commissioned in 1992 is available on the internet at <http://www.mri.gouv.qc.ca/etieaso.html> (visited in December 1997).

Canada's federal government has not contested the legal basis of the views of the Badinter Commission opinions. Rather it claimed that the Commission's views were irrelevant on the ground that the principle of *uti possidetis juris* only applied to cases of dissolution of federal states, not to cases of secession of federal units from such states. The Canadian federal government appeared to recognize that the principle of *uti possidetis juris*, as understood by the Badinter Commission, would apply if Canada were to dissolve. Such a situation could arise if a unilateral secession by Quebec paved the way for other provinces to secede.¹⁸ The problem with this approach by Canada's federal government is that, if it is accepted that the principle of *uti possidetis juris* applies to cases of dissolution of a state, a careful analysis of the Badinter Commission opinions reveals that it also applies to cases of secession. The Experts' Report is correct in arguing that if the principle of *uti possidetis juris* applies to cases of dissolution of states it also applies to cases of secession.¹⁹

CONCLUSION

Although the references in *Secession Reference* to future borders of an independent Quebec were brief, the Supreme Court of Canada unambiguously rejected the proposition that Quebec was entitled to insist upon its present borders if it sought to secede by amendment to Canada's constitution. In such a situation, Quebec's international borders would be a matter for negotiation between Quebec and Canada's federal government and other provinces. However, if Quebec's secession could not be negotiated and Quebec unilaterally seceded, her present provincial borders might well be recognised by the international community as international borders. The case of Yugoslavia provided a precedent for such a course of action. The Supreme Court of Canada implicitly assumed that this would also happen in the case of Quebec.

¹⁸ These views were expressed to the author by Canada's federal Minister for Intergovernmental Affairs, Stephane Dion, in a discussion at the Jerusalem Conference in Canadian Studies organised by the Halbert Centre for Canadian Studies, Hebrew University, Jerusalem, 30 June 1998.

¹⁹ The Experts' Report at para 2.47.