Reference re Secession of Quebec

The *Reference re Secession of Quebec* is the advisory opinion of the Supreme Court of Canada that addresses the constitutionality of a hypothetical unilateral declaration of independence by the province of Quebec.[1] Two related sets of events led to the Reference. First, in the latest step in its long march to independence, the Parti Québécois government of Jacques Parizeau announced in 1994 that it would hold another referendum on independence in October of 1995. Second, a Quebec lawyer and former sovereignist, Guy Bertrand, launched a court action prior to the referendum asking the court to order that the referendum not take place because a "Yes" vote could threaten Bertrand's rights as guaranteed under the *Canadian Charter of Rights and Freedoms*.[2] The Court agreed with the argument but declined to stop the referendum. When the referendum was finally held, the Quebec government lost by the narrowest of margins. After the vote, Bertrand went to court again asking that the government be restrained from holding any future referenda on sovereignty.[3] This action was abandoned when the federal government decided to submit three questions to the Supreme Court of Canada in a reference.

The federal government asked the Court to offer its opinion on the constitutionality of a unilateral declaration of independence by Quebec. In other words, could Quebec legally leave Canada simply by declaring that it is sovereign? What about the existing amendment procedures in the Canadian Constitution? Second, the Court was asked whether Quebec enjoys the right under international law to declare independence unilaterally. Third, the Court was asked which body of law, domestic or international, would take precedence in the event of a conflict.[4]

In August 1998 the Supreme Court rendered its opinion. In regard to the first question, the Court declared that secession "must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation."[5] The opinion stresses the conditions and processes of negotiation almost to the exclusion of formal constitutional amendment. If a future Quebec referendum was "free of ambiguity both in terms of the question asked and in terms of the support it achieves", then a positive result "would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire."[6] Quebec does have a democratic right to initiate the move to independence, wrote the Court, but the population of Quebec must vote by a clear majority on a clear question in order to trigger the constitutional obligation on the part of the rest of the country to negotiate in good faith the terms of separation.[7] Quebec cannot legally – that is, within the terms of the Canadian Constitution – declare independence unilaterally. It can, however, initiate a process of change leading to independence in which Canada has an obligation to participate.

On the question of Quebec's right of self-determination at international law, the Court answered in the negative.[8] Accordingly, it did not have to answer the third question.[9]

[1] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 1998 CanLII 793 (SCC).

[2] See: *Bertrand* v *Quebec (Procureur General)*, 127 D.L.R. (4th) 408, 1995 CanLII 11036 (QC SC).

[3] See: *Bertrand* v *Quebec (Attorney General)*, 138 D.L.R. (4th) 481, 1996 CanLII 12476 (QC SC).

[4] *Reference re Secession of Quebec*, *supra* note 1 at para 2.

[5] *Ibid* at para 84.

[6] *Ibid* at paras 87-88.

[7] *Ibid* at paras 92-94.

[8] *Ibid* at para 138.

[9] For more information on the SCC's decision, see: David Schneiderman, ed, *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto: Lorimer, 1999).