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The Quebec Secession Reference and the Proposed Charter of Quebec Values

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Case/Policy considered: *Reference re Secession of Quebec*, [\[1998\] 2 SCR 217](#); Charter of Quebec Values

It's as if Pauline Marois and her government knew we would be discussing the Quebec Secession Reference case in constitutional law this week when they finally [released their plans](#) for a Charter of Quebec Values on September 10. The Quebec Secession Reference case famously decided that Quebec did not have the unilateral right to secede from Canada under domestic or international law. It is also taught by many constitutional law professors as our first case, given its important pronouncements on sources of constitutional law and Canada's constitutional history and values. The constitutional values – actually unwritten principles of constitutional law – that the Supreme Court found to be relevant in the context of Quebec secession were federalism, democracy, constitutionalism and the rule of law, and respect for minorities (at para 32). The Court's elaboration on these principles takes on a new relevance in light of Quebec's proposed Charter.

In its discussion of federalism, the Supreme Court quoted (at para 43) from George-Etienne Cartier's speech, cited in the *Parliamentary Debates on the subject of the Confederation* (1865), where he stated:

Now, when we [are] united together, if union [is] attained, we [shall] form a political nationality with which neither the national origin, nor the religion of any individual, [will] interfere. It was lamented by some that we had this diversity of races, and hopes were expressed that this distinctive feature would cease. *The idea of unity of races [is] utopian -- it [is] impossible. Distinctions of this kind [will] always exist. Dissimilarity, in fact, appear[s] to be the order of the physical world and of the moral world, as well as in the political world.* But with regard to the objection based on this fact, to the effect that a great nation [can]not be formed because Lower Canada [is] in great part French and Catholic, and Upper Canada [is] British and Protestant, and the Lower Provinces [are] mixed, it [is] futile and worthless in the extreme. . . . *In our own Federation we [will] have Catholic and Protestant, English, French, Irish and Scotch, and each by his efforts and his success [will] increase the prosperity and glory of the new Confederacy. . . . [W]e [are] of different races, not for the purpose of warring against each other, but in order to compete and emulate for the general welfare.*

(Emphasis added)

The diversity of races and religions in Canada has of course changed since 1865, and it is important to note that the diversity of our founding peoples (ie: First Nations) was not mentioned

by Cartier. Quebec's identification with Catholicism has also evolved since 1865. However, Cartier's words help us understand the animating values underlying the creation of Canada as a federal state, and how those values would be compromised under Quebec's proposed Charter.

On the principle of democracy, the Supreme Court referenced (at para 64) *R v Oakes*, [1986] 1 SCR 103 at 136, for its articulation of the values inherent in a free and democratic society:

The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, *respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.*

(Emphasis added)

As the Court noted in the Quebec Secession Reference (at para 76), the principle of democracy must be considered along with other constitutional principles such as constitutionalism and the protection of minorities. None trumps the others. In that light, democracy means more than majority rule, and it is difficult to see how the democratic values discussed in *Oakes* would be furthered by Quebec's proposed Charter.

Further on the subject of minority rights, the Court remarked (at para 81) that although Canada's record is not spotless, "the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation." Quebec's proposed Charter, rather than instilling some sort of state neutrality as claimed, is a direct violation of the freedoms of members of religious minorities in that province. As argued by Emmett Macfarlane in the [Globe and Mail](#), the secular Charter "essentially targets religious groups that tend to be comprised of visible minorities, such as Sikhs and Muslims. This is the definition of systemic racism." Put another way, although the Charter purports to treat everyone in Quebec the same by subjecting them to the same "neutral" values, it targets members of groups whose religions are manifested in visible ways, and adversely impacts persons on the basis of their race and ethnicity.

Quebec did not accept the jurisdiction of the Supreme Court in the Quebec Secession Reference, so the statements from that decision that I am invoking here are not likely to be persuasive to the PQ government. And in any event, Quebec may invoke section 33 of the *Canadian Charter of Rights and Freedoms*, the notwithstanding clause, to shield its proposed Charter from constitutional attack on the basis of freedom of religion and religious discrimination (sections 2(a) and 15 of the *Canadian Charter of Rights and Freedoms*). However, the Quebec Secession Reference reminds us that our constitution also includes foundational unwritten principles that I hope will animate public debate about this issue. Those principles certainly animated our discussion of the proposed Charter in class.

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