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Literary Review of Canada

$6.50

Vol. 15, No. 3 • April 2007

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FUNDING ACKNOWLEDGEMENTS

We acknowledge the financial support of the Government of Canada through the Canada Magazine Fund towards our editorial and production costs.

We acknowledge the assistance of the OMDC Magazine Fund, an initiative of Ontario Media Development Corporation.

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POETRY SUBMISSIONS

The Literary Review of Canada accepts poetry submissions by email from May 1 to October 1 each year, although it solicits poetry year round. Send submissions to poetry@lrcreview.com in a single Word file as an attachment and include the poems in the body of the email as well. The LRC does not review poetry.

FOUNDED IN 1991 BY P.A. DUTIL

The *Literary Review of Canada* is published 10 times a year by the Literary Review of Canada Inc.

ANNUAL SUBSCRIPTION RATES

Canada $57; the rest of the world US$57. Libraries in Canada $72; elsewhere US$77. Price includes postage.

SUBSCRIPTIONS AND CIRCULATION

Jon Spencer, Abacus Circulation
P.O. Box 8, Station K
Toronto, ON M4P 2G1
Phone: 416-932-5081 Fax: 416-361-9244
subscriptions@lrcreview.com

ISSN 1188-7494

Canadian Publications Mail Product Sales Agreement No. 1479083.

Postmaster: Please send address changes to the above address.

The *Literary Review of Canada* is indexed in the Canadian Literary Periodicals Index and the Canadian Index and is distributed by Disticor and the Canadian Magazine Publishers Association.

Essay

Referendum? What Referendum?

A constitutional expert argues that the federal insistence on clarity has paid off.

Sujit Choudhry

At the time this essay went to press, Quebecers were already in the throes of an unusually volatile election. Although the Parti Québécois appeared poised to suffer a significant setback on March 26, its commitment to holding a "public consultation" (read: referendum) on sovereignty had become a major campaign issue. Whether Jean Charest's Liberals or even Mario Dumont's Action démocratique du Québec win the election, Quebec sovereigntists will certainly continue to work toward a vote on separation.

Will Canada be ready? The problem is not our ongoing debate over whether Quebec should remain within the Canadian federation. The intense national controversy last November over the adoption of the House of Commons resolution recognizing "the Québécois" as a "nation within a united Canada" vividly reminded us that this issue is far from settled. Indeed, it may be Canada's particular fate to engage periodically in existential constitutional discussions that may be impossible to resolve once and for all. Rather, the real difficulty is the lack of agreement over the constitutional framework within which the next referendum will be held.

In politics, there are two kinds of disagreements. We frequently disagree about the substance of public policies. We differ with our fellow citizens over the appropriate level of taxation and redistribution, or on how to fight crime without unduly restricting individual liberty. A basic goal of a constitution is to prevent these kinds of political disagreements from spilling into the streets. It does so by channelling disagreements on what governments should and should not do into institutions that operate according to rules of procedure that specify how political decisions are made. But if citizens disagree on the legitimacy of these very rules by questioning their impartiality, then political institutions can never produce decisions that they will accept as final. And if we step outside the procedures of politics, we step outside the rule of law and imperil the survival of the constitutional order.

In a nutshell, this is the difficulty which lies at the heart of the constitutional politics of secession. Alongside disagreement on the substantive question of whether Quebec should remain in Canada, there is a procedural—and legal—disagreement between federalists and sovereigntists over which rules should govern the process of secession. However, recent events suggest that Canada is not staring into the constitutional abyss. The *Secession Reference* and the federal *Clarity Act* have set out a process whereby Quebec could leave Canada—a process supported by the precedent of Montenegro's recent secession from Serbia, and one that voices from within the sovereigntist movement have started to acknowledge. Based on this emerging consensus, the odds of a yes vote in any future referendum on separation seem increasingly slim.

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I.

To get a handle on the situation, we need to begin with the Canadian constitution. As a strictly legal matter, the Canadian constitution creates the province of Quebec and defines its territory, and erects its governing institutions and endows them with limited legal authority over the province. Since unilateral secession clearly does not lie within provincial jurisdiction, provincial legislation purporting to declare independence would be unconstitutional. But this does not end matters. The constitution neither explicitly permits nor prohibits the secession of a province. So a change in Quebec's status from province to independent nation could in principle be achieved through constitutional amendment. While debating the exact mechanics of such an amendment became a pastime for constitutional scholars after the Meech Lake accord's failure, they all agreed that the consent of the federal government and most if not all of the provinces would be necessary, and unilateral secession would be unconstitutional.

Not even the most ardent sovereigntists disputed this reading of the constitution. Rather, they challenged the prior assumption that Quebec's accession to sovereignty would be governed by the Canadian constitution at all. The reason was that the amending rules begged the question. Those rules reflect a conception of Canada that treats Quebec as one province among others. But since it is precisely this constitutional vision that the Quebec sovereignty movement challenges, sovereigntists—predictably enough—rejected the amending rules as a neutral framework within which the question of Quebec's independence could be resolved. Instead, they asserted that Quebec independence would result from a majority yes vote in a referendum (a stance actually shared by many Quebec federalists, such as the late Claude Ryan).

In 1994, with the election of the PQ, this position became official government policy. Both the Draft Bill on Sovereignty and Bill 1 explicitly contemplated a unilateral declaration of independence following a yes vote. And in the *Bertrand* litigation before the Quebec courts, both before and after the 1995 referendum, the Quebec government rejected the applicability of the Canadian constitution to the referendum process.

II.

The *Secession Reference* was launched in 1996 against the backdrop of this fundamental divide over process. The federal government's objective was to provide "clarity" on the legal rules governing secession. It posed questions to the Supreme Court on the legality of unilateral secession by Quebec under the Canadian constitution and international law. Observers expected the Court to agree with the federal argument that Quebec had no right to secede under constitutional or international law. The only unpredictability was whether the judgement would be relatively narrow or broad—a narrow judgement limiting itself to holding that a unilateral declaration of independence was unconstitutional, a broader judgement addressing which amending rules would be engaged by secession. No doubt realizing that it had little to gain from the judgement, the Quebec government attempted to delegitimize the case by refusing to appear before the Court.

The judgement, handed down in August 1998, was an enormous surprise. The Supreme Court agreed that unilateral secession would be unconstitutional and that Quebec had no right to secede under international law. But the Court went on to hold that even though a referendum vote for independence would not legally lead to Quebec's secession, a "clear majority" voting in favour of a "clear question" in a referendum on secession would trigger a constitutional duty on the "political actors" to negotiate the terms of secession in good faith. The Court crafted this obligation from the "unwritten constitutional principles" of federalism, constitutionalism and the rule of law, democracy and minority rights.

Moreover, these same principles had to be taken into account by the negotiating parties and properly balanced in the terms of any secession agreement, although there would be no guarantee that the negotiations would succeed. The Court also signalled that it did not wish to be drawn into supervising these negotiations. But the constitutional rules it spelled out were nonetheless legally binding on the governments concerned.

These new obligations are found nowhere in the text of the constitution. They must be seen as the Court's attempt to pre-empt a descent into chaos during the next referendum campaign by laying down in advance a set of ground rules to which both parties would likely agree. Without a shared framework through which to understand and react to the referendum results, the most likely response to a yes vote would be for the federal government to insist that any change in Quebec's political status occurs from within the Canadian constitution, and for Quebec simply to reject this position. The consequence would likely be a unilateral declaration of independence, followed by attempts by Quebec to displace the authority of the Canadian legal system within Quebec, with corresponding responses by the federal government. The result would be legal chaos. To quote former federal justice minister Allan Rock, "for the average citizen, business or institution in Quebec, there would be the greatest confusion. Individual Quebecers would be uncertain what laws applied, what courts and law officers to respect, to whom to pay their taxes. In such an environment, it is certain that Quebec society would be deeply divided over the course the provincial government would have adopted." If the Quebec government used more forceful methods to assert effective control over its territory, the result could be much, much worse.

The result of a unilateral declaration of independence by Quebec would be legal chaos.

III.

The *Secession Reference* was welcomed by the federal government, which won on the illegality of secession. But it was also welcomed by the PQ government then in power in Quebec, because the judgement recognized the legitimacy of the Quebec sovereignty movement and imposed a duty to negotiate on secession in response to a yes vote. Despite these important differences in emphasis, the judgement appeared to provide a shared legal framework within which the next referendum could occur. Matters were relatively stable for about a year after the *Secession Reference* was handed down, until the PQ reverted to its earlier position at the Mont Tremblant Conference in October 1999. The falling apart of this early consensus has produced two competing statutes, the federal *Clarity Act* and Quebec's *Fundamental Rights Act*, each an attempt to lock in one view on the rules of the next referendum.

The *Clarity Act* was enacted in 2000 and reflects a series of critical choices concerning the federal response to the next referendum. It affirms the unconstitutionality of a unilateral declaration of independence, and the need for a constitutional amendment for Quebec to secede constitutionally. The act also requires the House of Commons to determine 1) if the question Quebec has chosen is clear, and 2) if the level of support that that question obtains is adequately clear to trigger the federal government's constitutional duty to negotiate secession. Simultaneously, the act limits how the House of Commons can make these decisions, treating the two assessments of clarity very differently.

The House of Commons would determine the question's clarity before the referendum vote. The issue would be whether the question would clearly state that "the province should cease to be part of Canada and become an independent state." The act does not lay down the precise text of an acceptable question, or provide that the House of Commons could set out the text of a clear question. But it specifically rules out the 1995 referendum question, which envisaged a yes vote as a mandate for Quebec to negotiate a new economic and political partnership with Canada, and the 1980 referendum question, which merely sought a mandate to negotiate.

Likewise, the *Clarity Act* does not define what would constitute a clear majority. But the act takes a different approach to determining whether a majority vote in favour of secession is clear. It does not set down a numerical threshold for a clear majority. Nor does it grant the House of Commons the power to determine what a clear majority would be before the vote. Rather, the act leaves that assessment until after the referendum vote, based on factors including the size of the majority and voter turnout, votes of minority groups, etc.

In establishing these rules, the act does not attempt to use the *Secession Reference* as a basis for federal legislation on the rules for a provincial secession referendum. Quebec can hold whatever referendum it wants, but if the House of Commons determines the question not to be a clear question on secession or the resulting majority to not be clear, the federal government would be legally barred from entering into secession negotiations.

In addition, the *Clarity Act* limits the power of the prime minister and the federal Cabinet. Before the act, the PM and Cabinet would have had a free hand in determining how to respond to a yes vote. The act significantly reduces the PM and Cabinet's room to manoeuvre, because it prohibits the federal government from negotiating Quebec secession if the House of Commons determines that the question or the majority are not clear. The federal government has therefore legally committed itself to a public process for examining these issues. Making the decision in the House of Commons also empowers individual members of Parliament, who may chafe against party discipline in the exceptional situation of a sovereignty referendum. In a minority Parliament situation, the government will not control the outcome of those deliberations. Moreover, by affirming that a constitutional amendment is the only way for secession to occur, the act may rule out a scenario in which the federal government circumvents the constitution and simply recognizes an independent Quebec as it would any new state.

Quebec responded to the *Clarity Act* almost immediately with Bill 99, the *Fundamental Rights Act,* also enacted in 2000. Bill 99 claims exclusive provincial jurisdiction over the process surrounding a future referendum on Quebec secession. It states that the people of Quebec have the right to freely decide their political regime and legal status, and that the manner of exercising this right is a matter for Quebec alone to determine through its political institutions. The clear message is that federal attempts to regulate the referendum process would contravene Bill 99.

Since the *Clarity Act* sets conditions only for the federal recognition of a Quebec referendum, this is not an issue. But Bill 99 takes direct aim at the recognition of the *Clarity Act* as well. One provision states that "no condition or mode of exercise of that right, in particular the consultation of the Québec people by way of a referendum, shall have effect unless" accepted by the people of Quebec. Another states that "no other parliament or government may reduce the powers, authority, sovereignty or legitimacy of the National Assembly, or impose constraint on the democratic will of the Québec people to determine its own future." Finally, Bill 99 states that a clear majority in a referendum is 50 percent plus one.

So where do things stand? The Supreme Court may have hoped that the federal and Quebec governments would agree on the wording of a referendum question and the level of majority before the next referendum. But while they do not explicitly set out different referendum questions, we now have two statutes that differ on the key issue of what constitutes a clear majority. Bill 99 defines a majority as 50 percent plus one. Although the *Clarity Act* deliberately does not lay down a precise figure, the federal government has taken pains to criticize the simple majority standard. According to the federal government, a simple majority would be a misinterpretation of the *Secession Reference*—which always referred to a "clear" majority, never to an "absolute" or "simple" majority or just a "majority." It would also be unwise, because irreversible negotiations over secession should be undertaken only on the basis of a clear and stable majority, not a momentary and temporary majority of circumstance. The two bills therefore set the stage for a serious disagreement between the federal government and Quebec in the event of a future referendum vote.

Moreover, this disagreement could be made worse because Bill 99 sets the threshold of 50 percent plus one in advance of the next vote, but the *Clarity Act* delays the House of Commons assessment of whether there has been a clear majority vote until after the referendum. Sovereigntists allege that such a process is inherently unfair, because it would allow the House of Commons to set the standards for the federal response to the referendum result after the vote—judging the referendum by standards not known at the time of the campaign.

IV.

Even after the election of Liberal premier Charest in April 2003, the rules for a future referendum remain a live issue. But notwithstanding the clash between the *Clarity Act* and Bill 99, the *Secession Reference* and the *Clarity Act* appear to have changed the terms of the debate within Quebec. Indeed, in many respects, the federal government appears to have gained the upper hand.

In August 2004, Jacques Parizeau proposed, in an essay published in *La Presse*, that the PQ abandon its 30-year commitment to *étapisme*, and instead view an election victory as a direct mandate to pursue sovereignty without the need for a referendum. One of his goals was to evade the constraints of the federal *Clarity Act*. Public opinion polls consistently show that a clear question on independence would not garner majority support. Moreover, if the House of Commons determined the question to be unclear, support for a yes vote could drop, because a federal challenge to the question would launch a debate in the midst of the referendum campaign "over legitimacy, constitutionality and the meaning of a law." Faced with the choice between a losing question and an illegitimate and unconstitutional one, Parizeau proposed dumping the idea of a referendum entirely. The very fact that he made this proposal acknowledged that the *Clarity Act* had fundamentally changed the terrain on which the next referendum would be fought. The reason it had this effect is that while Quebec's political elites are willing to secede in defiance of the Canadian constitution, the citizens of Quebec themselves are firmly committed to the rule of law. The belief of Quebecers in legality is why the federal government chose to launch the *Secession Reference* and propose the *Clarity Act*, and why the Quebec government felt compelled to respond with legislation of its own.

Although Parizeau's proposal attracted support from some elements of the PQ, it was criticized by both sovereigntists and federalists within Quebec as being profoundly undemocratic, and was ultimately rejected. As the brief skirmish between André Boisclair and Paul Martin over the *Clarity Act* in November 2005 illustrated, the PQ still rejects the *Clarity Act*. But nevertheless, the PQ's new policy on the next referendum shows that the *Clarity Act* and the *Secession Reference* have had a significant impact. In its 2005 policy document, *Un projet de pays*, the PQ committed to hold a referendum on sovereignty early in its first mandate. The question would be directly about whether Quebec should become an independent country, apparently with no reference to an ongoing association with Canada or a mandate to negotiate. Gone are the questions of the 1980 and 1995 referenda. Although *Un projet de pays* does not provide the exact wording of the question, a question of this sort would likely meet the requirements of the *Clarity Act* and the *Secession Reference*.

So, as of 2005, the debate over the need for a referendum and a clear question appears to have abated, although the PQ's election platform, "Reconstruisons notre Québec," is oddly silent on what the actual wording of the referendum question would be. But the size of the majority required, the need for constitutional amendment and the sequencing of negotiations and the independence of Quebec are still up for grabs. The PQ platform sets the threshold for victory at 50 percent plus one, to be followed by an immediate unilateral declaration of independence. No attempt would be made to negotiate a constitutional amendment with Canada. An independent Quebec would immediately adopt laws to ensure legal continuity, to create a supreme court and to ensure that all taxes paid within the province would be collected by the Quebec government. Quebec would then signal its intention to negotiate an agreement with Canada allowing for the free movement of persons, goods, services and capital, would commence negotiations to accede to international treaties to which Canada is a party and would take steps to secure international recognition and admission to the United Nations. This is a variation on Bill 1, which set out the roadmap to independence for the 1995 referendum. But there is one critical difference. Bill 1 delayed the date of a unilateral declaration of independence to a year after the referendum vote. The immediate unilateral declaration and transfer of power that the current platform envisions would result in legal chaos.

Not surprisingly, the PQ's new policy has been sharply attacked. But it is a sign of how much Quebec's political landscape has changed since the *Secession Reference* that the most acute criticisms came from within the PQ. The first misgivings were expressed by Louis Bernard, who placed fourth in the PQ leadership race in 2005. Alone among the leadership candidates, Bernard rejected the notion of a unilateral declaration of independence. Such a declaration would simply have no effect, he argued, because the federal government would continue to operate in the province. For independence to be achieved "correctly," negotiations would be required to ensure an actual transition of control.

But the most detailed critique came in the *Manifeste pour une approche réaliste de la souveraineté*, released in May 2006 by a group of prominent sovereigntists and published in *Le Devoir*. The heart of the manifesto's argument is that the PQ platform's failure to comply with the *Secession Reference* would be fatal to Quebec's attempts to secure international recognition as an independent state. A universal declaration of independence that did not follow a referendum on a clear question on secession, with a yes vote by more than a slim majority, followed by good faith negotiations with Canada, would enable Canada to argue internationally that a unilateral declaration by Quebec should not be recognized. But while the manifesto sharply rebukes the PQ's proposal for an immediate unilateral declaration of independence, it does not take the federal line that secession requires constitutional amendment. Instead, the manifesto claims that if Quebec negotiated in good faith after a clear majority vote in favour of a clear question, and Canada negotiated in bad faith, Quebec could issue a unilateral declaration and rely on the *Secession Reference* in support of its claim for recognition. And so, in another acknowledgement of the impact of the *Secession Reference*, the PQ's election platform returns to the position in Bill 1 that a unilateral declaration of independence would only occur after a year of negotiations.

The next referendum, if there is one, will be conducted on dramatically different terms than the referendum of 1995.

This argument—that Quebec could unilaterally secede after unsuccessfully attempting to negotiate in good faith to leave Canada—highlights an apparent contradiction in the *Secession Reference* that will figure centrally in the next referendum. The Supreme Court clearly stated that for the secession of Quebec to occur legally, it would require a constitutional amendment. But the Court also said that the negotiations would be very difficult and may be unsuccessful. So at that point, what would happen? One view is that nothing happens and Quebec stays within Canada. But another view is that if Quebec in good faith follows the constitutional rules on secession while the other parties do not, its unilateral declaration of independence is more likely to be recognized.

It is anybody's guess how the international community would determine who had negotiated in bad faith and who had not. Indeed, negotiations could break down even if both parties negotiated in good faith. But it is far from clear that we will reach that point. In addition to the fact that clear questions on secession tend to poll well below 50 percent, international practice is now heading in the direction of requiring an enhanced majority.

The key case is Montenegro, which voted for independence from Serbia in May 2006. The majority threshold was raised from 50 percent plus one to 55 percent after international pressure by the European Union, led by France, to abide by recommendations from the Venice Commission, the Council of Europe's advisory body on constitutional issues. The question of whether Montenegro is a precedent for a future Quebec referendum was a major issue in Quebec last spring. The logical conclusion was that France and the European Union would expect the same of Quebec. Since the PQ has always hoped that France would take the lead in recognizing an independent Quebec, the Montenegro precedent has caused a lot of concern. Every Quebec political party was quick to affirm that for Quebec, the rule is 50 percent plus one. Pauline Marois and Gilles Duceppe went one step further, penning editorials arguing that the Venice Commission did not actually require a 55 percent threshold and calling for referendum rules to be set by Montenegro alone, as Quebec had already done.

But the Montenegro precedent would almost certainly shape the international response to a unilateral declaration of independence by Quebec, as the manifesto acknowledged. Even here, the influence of the *Secession Reference* and the *Clarity Act* can be seen, because they were relied on by the Venice Commission in support of its decision. So if the *Secession Reference* and the *Clarity Act* are good enough for Montenegro, they will likely be good enough for Quebec.

V.

During the 1995 referendum, the federal government consciously chose not to challenge the legality of a unilateral declaration of independence and assert the supremacy of the Canadian constitution. Its fear was that standing on constitutional technicalities would backfire and fuel support for a yes vote. To argue to Quebecers that secession could be achieved only under the constitution was tantamount to issuing a threat that secession could not occur. So the clarity agenda—the *Secession Reference* and the *Clarity Act*—was a calculated risk. It seems that the federal gamble has paid off. Opinion within Quebec has changed. And the reaction of the international community will be shaped by the *Secession Reference* and the *Clarity Act*. The next referendum, if there is one, will be conducted on dramatically different terms than the referendum of 1995. Canada may indeed be ready.