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BACKGROUND TO THE INTRODUCTION OF BILL C-20, THE CLARITY BILL

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BACKGROUND

The events that led to the tabling of Bill C-20 (colloquially known as the "Clarity Bill") in the House of Commons on 10 December 1999, subsequent to the Supreme Court decision in *Reference re Secession of Quebec*,* began prior to the Quebec referendum of 30 October 1995 and intensified in its aftermath. These events are described below in order to place Bill C-20 within the context of recent history and to show some of the factors that may have influenced its development.

A. The Quebec Government's Approach

The exact process whereby Quebec might become an independent country following a referendum vote in favour of that step was a subject of discussion in the province both during and after the 1995 referendum. The Government of Quebec established a process that would include consultations with Quebeckers (prior to, and in the form of, a referendum) and the National Assembly (prior to, and in the event of a ''Yes'' vote after, a referendum).

1. Draft Bill: Loi sur la souveraineté du Québec

The six steps proposed for leading up to Quebec's assumption of independence were described in the explanatory notes that accompanied a draft bill (Avant-projet de loi, Loi sur la souveraineté du Québec) tabled for public consultation by the Government of Quebec on 6 December 1994.(1) The steps proposed included publication of the initial draft, and public

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* [1998 2 S.C.R. 217]. The full name of Bill C-20 is "An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court in the Quebec Secession Reference." Various terms are used in connection with this concept (e.g., sovereignty, independence); this paper for the most part follows Bill C-20 in using "secession."

(1) The full process as proposed had six steps: 1. publication of the draft bill; 2. an information and consultation period to allow for amendments to the draft and to compose a declaration of sovereignty to become the bill's Preamble; 3. debate on the bill and its adoption by the National Assembly; 4. approval of the bill by the population by means of a referendum; 5. discussion with Canada on transitional measures, notably on the division of assets and debts, while at the same time preparing a new constitution for Quebec; and 6. Quebec's assumption of independence.

consultations on its content, followed by its adoption by the National Assembly, and a vote by the public in a referendum. If the bill were to be supported by a ‘‘Yes’’ vote, it would be tabled in the National Assembly as the first item of business. Quebec would then enter into discussions with the Government of Canada on transitional arrangements, after which the province would assume independence.

The first clause of the draft bill stated that “Québec is a sovereign country,” while the second would have authorized the Government of Quebec to conclude an agreement with the Government of Canada in order to maintain an economic association between the new entity and Canada. This economic accord was to be approved by the National Assembly. Other clauses in the proposed bill addressed the issues of Quebec’s boundaries (which would be conserved), citizenship (which could be held concurrently with Canadian citizenship), currency (the Canadian dollar would be retained), the status of treaties, international alliances, the continuity of laws, and the division of the debt and assets between an independent Quebec and Canada.

It was proposed that certain clauses, such as those dealing with the agreement of Canada and the adoption of a constitution, would take effect immediately after a ‘‘Yes’’ vote. The bill in its entirety would have become law one year following its approval in a referendum, unless the National Assembly selected an earlier date.

The draft bill also proposed the wording of the referendum question that would be submitted to the voters:

> Are you in favour of the Act passed by the National Assembly declaring the sovereignty of Quebec? YES or NO. [translation]

2. Public Consultations

In January 1995, the Government of Quebec established 18 commissions to hold public consultations on the draft bill.[(2)] The goal of the hearings, according to Yves Duhaime, a former minister in René Lévesque’s government, was to determine whether this kind of question

(2) There were 16 regional commissions, as well as one commission for youth and one for seniors. Both the federal and Quebec Liberal parties boycotted the hearings.

made it possible to find a consensus among Quebeckers. If no consensus emerged, he suggested that the question should be amended.(3)

At the hearings held by the commissions, a considerable variety of views were offered. Most people who addressed the commissions favoured the use of a simple majority. On the wording of the question, the members of a National Commission, composed of the chairs of the regional commissions, noted in their summary report that most of those who addressed the issue agreed on one thing:

> Those on all sides were generally in favour of a question that was short, clear and simple, and to which the answer would not be confusing or open to interpretation.(4) [translation]

While the National Commission's Report dealt with the issues raised in the draft bill, it did not deal with the concept of negotiation with Canada following a ''Yes'' vote. The Commissioners did, however, note the fears expressed over the possible failure to negotiate an economic association between an independent Quebec and Canada. They wrote that steps had to be taken to address these concerns, in part by pointing out that such an association would be in Canada's own best interests: "This economic pragmatism, we think, will be much more convincing in the debate than the mood of Canada's elected officials."(5)

Noting the desires of some Quebeckers for an independent Quebec to develop common institutions with Canada, the Commissioners recommended that the government clarify that an independent Quebec could eventually propose and negotiate the formation of common political structures.(6)

When the report of the National Commission was released on 19 April 1995, it was immediately attacked by the leader of the "No" forces, Daniel Johnson. Johnson, whose

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(3) *Le Devoir*, "Yves Duhaime fera campagne pour le Oui" [Yves Duhaime will campaign on the Yes side"], 23 February 1995. Duhaime was asked whether or not the question should be modified or the referendum delayed in light of recent poll results. Duhaime replied that the process should proceed as planned.

(4) *Ibid*, p. 16.

(5) Commission nationale sur l'avenir du Québec, Rapport, Québec, p. 35 – 36.

(6) *Ibid*., p. 65.

party had not participated in the Commission hearings, argued that the report was merely an attempt to camouflage the real stakes involved, and a crude effort to make people believe that English Canada would accede to the wishes of an independent Quebec:

> There is nothing that allows Quebeckers to trust that these plans for association or union can be realized. We cannot decide on an association or on terms that we do not control. We cannot decree an association with our neighbours. We cannot decree a marriage unilaterally..(7) [translation]

Prime Minister Chrétien also attacked the report, as did his Minister of Labour, the Hon. Lucienne Robillard, who told *Le Devoir* that neither English Canada nor the federal government would be ready to enter into a dialogue on partnership following a "Yes" vote. "It's much the same as a divorce," she told the paper, "the day after, you do not suggest getting married again [translation]."(8)

3. The Agreement of the Three Party Leaders in Quebec

On 12 June 1995, the leaders of the Parti Québécois (Jacques Parizeau), Bloc Québécois (Lucien Bouchard) and Action démocratique du Québec (Mario Dumont, whose seat in the National Assembly was the only one held by his party) signed an agreement on a common approach to the impending referendum. This agreement, which was later referred to in the wording of the referendum question, set out how Quebec would assume independence, what would be contained in a treaty between Canada and Quebec, and the joint institutions that the two would share.

The agreement stated that after a "Yes" victory, the National Assembly "will, on the one hand, be able to proclaim the sovereignty of Québec, and on the other hand, the government will have the duty of proposing to Canada a treaty on a new economic and political Partnership."(9) The referendum question was to reflect both factors. The negotiation period

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(7) *Le Devoir*, "Rapport de la Commission nationale: Johnson crie au camouflage," 22 April 1995.

(8) *Le Devoir*, Les péquistes ne peuvent promettre l'association, croit Robillard," 28 April 1995.

(9) Text of the Agreement between the Parti Québécois, the Bloc Québécois and the Action démocratique du Québec, 12 June 1995, p. 2.

would be limited to one year, but "in the event that negotiations prove to be fruitless, the National Assembly will be able to declare Québec sovereignty upon short notice."[10]

Lucien Bouchard declared that the agreement represented a sacred promise by sovereigntists that they would conduct negotiations in good faith with the rest of Canada on a new partnership.[11] He added, however, that negotiations would not lead to renewed federalism:

> It is a sovereigntist plan. Our goal is sovereignty. Of course, Quebeckers must understand that once we have voted Yes, Quebec will become sovereign, no matter what Canada's reaction is.[12] [translation]

4. Bill 1: Loi sur l'avenir du Québec

Following the consultations, the report of the National Commission, and the agreement signed by the three party leaders, an amended bill was produced. Bill 1, now entitled *Loi sur l'avenir du Québec*, had a lengthy Preamble culminating in a declaration of Quebec's independence. A new first clause proposed to give the National Assembly authority to proclaim this sovereignty within the context of the bill. Clause 2 stated that that the Preamble would take effect and Quebec would become independent on a date to be determined by the National Assembly. Under clause 3, the Government of Quebec would have been bound to propose a treaty on economic and political partnership[13] with the Government of Canada, based on the agreement reached by the leaders of three provincial parties in Quebec on 12 June 1995. As with the original draft, the bill proposed continued use of Canadian currency (clause 13), the ability of Quebeckers to hold dual Quebec and Canadian citizenship (clause 14), and the maintenance of Quebec's boundaries as they existed within the Canadian federation (clause 10).

Collectively, the public consultations, the 12 June agreement, and Bill 1 can be seen as an effort to develop a broad consensus behind a "Yes" vote, as well as an attempt to

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(10) *Ibid*., p. 2.

(11) *Le Devoir*, L'entente tripartite: un engagement sacré de négocier de bonne foi" ["The Three-Way Agreement: a Sacred Promise to Negotiate in Good Faith"], 13 June 1995.

(12) *Ibid*.

(13) The initial draft had proposed an economic association alone. This change appeared to be a response to recommendations made by la Commission nationale sur l'avenir du Québec, Report, p.65, and recommendation 19, and the agreement of 12 June signed by the three party leaders.

reassure Quebeckers that by voting in favour of these proposals they would not be deprived of the benefits of an economic and political partnership with Canada.

B. The Referendum Question

On 7 September 1995 – slightly less than two months before the referendum date – the Government of Quebec made public the wording of the referendum question:

> Do you agree that Québec should become sovereign, after having made a formal offer to Canada for a new Economic and Political Partnership, within the scope of the Bill respecting the future of Québec and of the agreement signed on June 12, 1995?

Presenting the question, Premier Parizeau told Quebeckers that, as they could see, it was simple and direct.

C. The 1995 Referendum Results

On 30 October 1995, a total of 4,757,509 Quebeckers cast ballots, a participation rate of 93.52% of those registered to vote. A slight majority – 50.58% of the valid votes cast – voted "No." Those who voted "Yes" made up 49.42% of the valid votes.(14) The difference amounted to 54,288 votes, or 1.16 percentage points.(15)

D. Post-Referendum Events

Both sides were strongly affected by the outcome of the referendum – federalists because they had come so close to losing, secessionists because they had come so close to winning.

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(14) "Valid votes" excludes the number of ballots that were spoiled. In 1995, 86,501 ballots were spoiled, or 1.82% of the total votes cast. In the 1980 referendum, 1.74% of the total votes cast were spoiled.

(15) In contrast, the previous Quebec referendum touching on the issue, held in 1980, saw a participation rate of 85.61%. Those who voted 'No' constituted 59.56% of the total valid votes while 40.44% voted "Yes." The difference separating the two options was 19.12 percentage points. Readers should note that the question asked in the 1980 referendum essentially asked Quebeckers if they would authorize the Quebec government to negotiate sovereignty with the federal government and promised a second referendum on the results of the negotiation.

For both sides the results suggested that Quebec secession from the federation was far from being an abstract possibility. In contemplating the possibility of a future referendum, many federalists argued that the federal government had to be in a better position to win any such referendum or must avoid a subsequent referendum entirely. Some were outspoken in their criticism of both the federal government and Prime Minister Chrétien for not having taken a more aggressive stance during the 1995 referendum campaign.

Many observers referred to a two-part federal response. The first part ("Plan A") would consist of efforts to renew Canadian federal arrangements in order to address the concerns of the province and to persuade Quebeckers that Canada was able to accommodate Quebec's desires. The second part ("Plan B") involved establishing clearer ground rules governing secession. Supporters saw two principal benefits to this approach: it would persuade Quebeckers that secession would be a complex process with no guaranteed outcome, and would establish a framework within which the process could take place with the minimum confusion and trauma.

A number of events following the referendum may have further persuaded some federalists of the need for a more robust response.(16) In 1996, a book by Benoît Aubin, then information director of Quebec's TVA television network, referred to a videotaped statement by Premier Jacques Parizeau that was to have been broadcast immediately after a "Yes" victory. According to Aubin's account, Parizeau sought to calm the fears of those in Quebec, Canada, and around the world, who harboured doubts about the consequences of the referendum vote. However, it was Aubin's interpretation of Mr. Parizeau's demeanour that drew the most attention in the media:(17)

(16) See, for example, Susan Delacourt, "Thinking the Unthinkable Suddenly in Vote: In the Wake of Jacques Parizeau's Remarks This Week, Plan B – Confronting the Possibility of Separation – Gains Currency," *Globe and Mail* (Toronto), 9 May 1997.

(17) *Le Soleil*, "Ce qu'aurait dit Parizeau avec un OUI…Benoît Aubin révèle dans un livre l'AUTRE discours et le commente," ["What Parizeau would have said after a Yes vote … Benoît Aubin's book reveals and comments on the OTHER speech"] 17 February 1996. The article noted that two of Mr. Parizeau's close advisors, Jean Royer and Jean-François Lisée rejected Aubin's interpretation and produced extracts from Parizeau's speech in which he reminded his audience of his government's commitment to negotiate a new partnership with Canada.

> They were ready. Not, as we thought from what they had been saying during the campaign, to negotiate patiently with Ottawa for at least a year, but ready to move ahead. Immediately, forcefully, on all fronts. More quickly, more actively, and more *irremediably* than anything they had implied during the campaign, and even in the wording of the question they had gone to the people with that day.(18) [translation]

In a second, equally controversial, event, excerpts from a collection of Jacques Parizeau's speeches (released in 1997 under the title *Pour un Québec souverain)* were picked up by both the English and French media prior to publication. These resulted in the impression – strongly denied by Parizeau – that the Parti Québécois government had arranged to have France officially recognize an independent Quebec shortly after a "Yes" vote, rather than at the conclusion of successful negotiations with Canada; that is, that Parizeau would have declared a UDI (unilateral declaration of independence) immediately following a "Yes" vote.(19) Several prominent sovereigntists who had worked with Mr. Parizeau during the referendum campaign immediately distanced themselves from him.(20)

There was also a perception that some Quebec politicians felt that a "Yes" vote in a referendum could be used as a lever or bargaining chip to obtain concessions on constitutional change that had not been achieved in negotiations within the framework of Confederation. Indeed, it was suggested that Lucien Bouchard's strategy was to "win a referendum on sovereignty, then negotiate a new confederation with the rest of Canada."(21) Viewed from this perspective, legislation that would permit the federal government to negotiate a "Yes" vote only with respective to secession (rather than to "sovereignty," "sovereignty-association," or a "new partnership") would have effectively excluded this approach.

Finally, there was considerable concern about the clarity of the 1995 referendum question, which had been a central issue during the referendum campaign. The "No" Committee

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(18) Benoît Aubin, *Chroniques de mauvaise humeur*, Boréal, Montréal, 1996, p. 217.

(19) See, for example, Alan C. Cairns, "The Quebec Secession Reference: The Constitutional Obligation to Negotiate," *Constitutional Forum*, Fall 1998, p. 26; Rhéal Séguin and Graham Fraser, "Parizeau Book Stuns Separatists. Bouchard, Duceppe Deny Any Knowledge of Plan to Declare Independence Unilaterally," *Globe and Mail* (Toronto), 8 May 1997.

(20) *Globe and Mail* (Toronto), 10 May 1997.

(21) Rhéal Séguin, *Globe and Mail* (Toronto), 29 December 1999.

had argued that the wording masked the real intention of the government -- the "definitive and irreversible separation of Quebec from Canada."[22] Some federalists suggested that the use of the term "sovereignty" could lead to confusion.[23] Throughout the campaign, leaders of the "No" side argued that a "Yes" vote would result in Quebec's secession and irreversible separation from Canada, rather than in any form of partnership or renewed federalism. They also stressed that there would be no guaranteed outcome of any negotiations, and that the reference in the question to "the scope of [Bill 1] and of the agreement signed on June 12, 1995" was misleading.

The results of polls sponsored by the "No" Committee during the campaign,[24] by the Council for Canadian Unity in 1997 and 1998,[25] and by the Privy Council Office in 1999, suggested that there was considerable voter confusion, resulting in large part from the wording of the question.[26] The Privy Council poll in particular found that support for the "Yes" option declined when questions clearly linked the referendum to secession.

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(22) Advertisement in *Bonjour Dimanche*, 17 September 1995, p. 13, paid for by Les Québécoises et les Québécois pour le NON.

(23) Professor John Trent of the University of Ottawa prepared a guide to the 1995 referendum in which he argued that "sovereignty" was "a soft" word used to confuse people. For instance, the usual definition of federalism specifies that each order of government, the federal and the provincial, is "sovereign" within its own jurisdiction. Thus, "sovereignty" can mean varying degrees of political autonomy, which, he argued, is exactly why nationalists use it rather than "independence" or "separation." ("A Practical Guide to the 1995 Referendum," *Dialogue Canada*, Ottawa, Internet).

(24) *Le Devoir*, 23 September 1995. The poll was conducted 15–19 September among 1,004 respondents, giving it a margin of error of plus or minus 3.2%, 19 times out of 20. Of those who indicated their intention to vote Yes, 49% believed that "sovereignty" would be declared only after negotiations and the conclusion of an agreement with Ottawa; and 28% thought that a sovereign Quebec meant that Quebec would remain a province of Canada.

Among all those polled, 57% did not know that the reference to "the agreement signed on 12 June" in the referendum question dealt with the agreement of the three party leaders (see above). Of the 43% who did know of the agreement, 16% thought it was between the federal and provincial governments.

(25) The Council for Canadian Unity is a non-profit federalist organization that receives most of its funding from the federal government. CROP conducted the first poll by telephone 3-9 July 1997. The opinions of 604 Quebeckers were registered and the poll had a margin of error of plus or minus 4%. 31% of respondents believed that a sovereign Quebec would still be a part of Canada. Among those who indicated that they would vote "Yes" to the same question that was asked in the 1995 referendum, those who believed Quebec would remain in Canada after a "Yes" vote rose to 44%.

The second poll was conducted on April 3-19, 1998, with a sample size of 1,004 and a margin of error of 3%. It found that 29% of respondents believed that under sovereignty-partnership, Quebeckers would continue to send MPs to Ottawa; 39% of respondents believed that Quebeckers would remain citizens of Canada; and 36% of respondents believed that Quebec would still be a province of Canada.

(26) The poll was conducted by CROP between 9 June and 2 August 1999, with a sample size of 4,992. Of this number, 3,394 were chosen on a random basis. The margin of error among this group was 1.6%, 19 times out of 20. Another 1,058 respondents were chosen on a non-random basis. Among this population, the margin of error was 3%, 19 times out of 20.

These poll results were taken by the English-language media as a sign that a significant number of Quebeckers were confused about the possible outcome of a "Yes" vote.(27) On the other hand, the results could also suggest that many Quebeckers accepted the suggestion that some form of economic and political partnership between Canada and Quebec could be achieved. A significant number of respondents also appeared to have accepted assertions that an independent Quebec would be able to continue to use Canadian currency and that Quebeckers could, if they so wished, hold dual Canadian/Quebec citizenship. Certainly the results demonstrated the limited success of the efforts of the "No" forces to refute secessionists' arguments.

According to federalists, these results demonstrated that Quebec had been misled. They pointed out that questions relating to currency, political partnership, and citizenship would not be resolved unilaterally by Quebec, either prior to or following a "Yes" vote, but would instead be subject to negotiations, whose outcome was not predictable.

E. Federal Government Response

1. Renewing Federalism

On 27 November 1995, the government unveiled its initial response to the referendum outcome and to commitments made by the Prime Minister during the referendum

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(cont'd)

When they were read the 1995 referendum question, 61% said that it was not clear;

Following a "Yes" vote, 58% believed that it would be "likely" that an agreement on an economic association would be reached with Canada, 58% believed that Quebec would continue to use the Canadian dollar, 54% believed that Quebeckers could continue to work in Canada, 49% believed that Quebeckers could keep their Canadian citizenship and passports, and 23% believed that Quebeckers would continue to send MPs to Ottawa.

The poll also found 10% of respondents would vote "Yes" to sovereignty-partnership and would also vote "Yes" to Quebec's remaining a province of Canada. Among these voters (who were labelled "ambivalent "Yes" voters"): 71 % said that if sovereignty partnership was achieved, Quebec would still be a part of Canada; 59% said they wanted Quebec to become an independent country; 75% would vote "Yes" to force Canada to make a better offer to Quebec, and 78% said that with sovereignty-partnership, Quebeckers would continue to be Canadian citizens.

(27) See, for example, Jeffrey Simpson, "Conditional Voters," *Globe and Mail* (Toronto), 16 December 1999.

campaign. The government announced that, in the days to follow, it would table the following in the House of Commons:

- a motion recognizing Quebec as a distinct society within Canada that includes a French-speaking majority, a unique culture and a tradition of civil law;
- a bill (C-110) requiring the consent of Quebec, Ontario, and the Atlantic and Western regions[28] before the government could introduce any constitutional amendment in Parliament (thus giving these provinces and regions the appearance of a veto over constitutional amendments); and
- a bill changing the name of the *Unemployment Insurance Act* to the "Employment Insurance Act" and initiating the withdrawal of the federal government from labour-market training.[29]

Commentators in the press and elsewhere generally saw these measures as part of an approach designed to address the concerns of Quebeckers who desired a change in the status of Quebec within the Canadian federation ("Plan A"). Some observers, however, asserted that Quebeckers must be convinced not only of the flexibility of Canadian federalism, but also of the difficulties involved in exiting from it ("Plan B").

2. Clarifying the Rules Governing Secession

Indications emerged early that the federal government intended to do more than simply respond to some of Quebec's desires. Only days after the referendum, the Prime Minister pointed to the ambiguity of the referendum question at a fund-raising dinner:

> I know and you know that a lot of the ''Yes" vote came that way because there was a deliberately ambiguous question by the leaders of the "Yes," to try to camouflage their operation…[30]

Several months later, in the Speech from the Throne opening the Second Session of the Thirty-Fifth Parliament, 27 February 1996, the government formalized its commitment to clarifying the debate:

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(28) British Columbia was later added as a fifth region.

(29) Gaining control over job training had been one of Quebec's traditional demands.

> …as long as the prospect of another Quebec referendum exists, the Government will exercise its responsibility to ensure that debate is conducted with all the facts on the table, that the rules of the process are fair, that the consequences are clear, and that Canadians, no matter where they live, will have their say in the future of their country.

In addition to the near-loss in the 1995 referendum, polling results and claims about the real intentions of the "No" forces, other events may have influenced the federal government's decision to submit to the Supreme Court of Canada certain questions regarding a potential unilateral declaration of independence by Quebec.

In early 1996, a civil lawsuit brought before the Quebec Superior Court helped set the stage for the federal government's secession reference to the Supreme Court of Canada. On 8 January 1996, a lawyer and former supporter of secession, Guy Bertrand, filed an initial notice in Quebec Superior Court seeking a permanent injunction banning further referendums on the issue. In documents filed with the Court, he stated that he planned to argue that Quebec could not use laws passed by the National Assembly to separate or to declare unilateral independence.(31)

On 27 March, Mr. Bertrand asked the federal government to join in his challenge. He was critical of the federal government for not having mounted a legal challenge to Quebec's October referendum, arguing that by participating in the referendum Ottawa had in effect endorsed an illegal and unconstitutional act. Ottawa declined immediate comment on Mr. Bertrand's request

In early May Premier Bouchard urged the federal government not to intervene in the case. In the meantime, Quebec responded to Mr. Bertrand's efforts to seek an injunction by asserting that, with respect to secession, Quebec should be bound only by international law and not by either Canadian domestic law or the Constitution of Canada.

(cont'd)

(30) Prime Minister Jean Chrétien, *Canadian Speeches: Issues of the Day*, November 1995, p. 5.

(31) Mr. Bertrand attempted to obtain a temporary injunction against the October 1995 referendum, but was turned down by the Court. The Government of Quebec did not participate in the case after it was unable to have it dismissed. It did not appeal the ruling.

On 10 May, Ottawa announced that it would indeed intervene in Mr. Bertrand's lawsuit, but only to challenge the Government of Quebec's position that Quebec's voters alone could decide on independence, without regard to the Canadian constitution and without the consent of the rest of the country.

The Government of Quebec's move to dismiss the case, on the basis that secession is a political, not a judicial, matter, was rejected by the Court on 30 August, leaving Mr. Bertrand free to proceed. The following week, on 4 September, the Government of Quebec announced that it would not participate in any future legal challenge to its right to secede from Canada. Mr. Bertrand again appealed to the federal government to join his court challenge.(32) On 19 September, before Ottawa had made its position public, he stated that he would go ahead.

F. The Supreme Court Reference

One week following Mr. Bertrand's announcement, on 26 September, the Minister of Justice, the Hon. Allan Rock, informed the House of Commons that the federal government intended to refer three questions to the Supreme Court of Canada in order to "clarify the legal issues that have arisen between the Government of Canada and the Government of Quebec"(33) regarding the latter's right to declare Quebec's independence unilaterally.(34)

The questions asked were:

1. Under the Constitution of Canada, can the National Assembly, legislature, or Government of Quebec effect the unilateral secession of Quebec from Canada?

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(32) *Globe and Mail* (Toronto), 6 September 1996.

(33) *Hansard*, 26 September 1996, p. 4709.

(34) In making this reference, the government relied on section 53(1) of the *Supreme Court Act* which reads that "the Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning (a) the interpretation of the Constitution Acts; (b) the constitutionality or interpretation of any federal or provincial legislation;(c) the appellate jurisdiction respecting educational matters, by the *Constitution Act*, 1867, or by any other Act or law vested in the Governor in Council; or (d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question had been or was proposed to be exercised.

2. Does international law give the National Assembly, the legislature or the Government of Quebec the right to effect the unilateral secession of Quebec from Canada? In this regard, is there a right to self-determination under international law that would give the National Assembly, the legislature or the Government of Quebec the right to effect the unilateral secession of Quebec from Canada?

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or Government of Quebec to effect the unilateral secession of Quebec from Canada, which would take precedence in Canada?

The response of the Government of Quebec was negative. Premier Bouchard called the reference a diversionary tactic designed to "create artificial obstacles to the will of the Quebec people"; he said that the Government of Quebec would refuse to participate in the hearings before the Supreme Court and would ignore the Court's ruling.(35)

G. Supreme Court Opinion

On 20 August 1998, the Supreme Court of Canada gave its opinion in the Quebec secession case. On the first question, the Court noted that arguments in favour of the existence of a unilateral right to secede were based on the principle of democracy; however, this principle could not "trump" other constitutional principles, such as federalism, constitutionalism and the rule and law, and respect for minorities. Secession of a province under the constitution could not be achieved unilaterally, but required principled negotiation with other participants in confederation within the existing constitutional framework.

On the one hand, there would be an obligation on the part of the rest of Canada to recognize any democratic will in Quebec to secede, if such a will did indeed exist. On the other hand, that democratic will must be clear; the basic test of a clear will being a clear question and a clear majority. The Supreme Court did not attempt to define "clear" in any of these contexts, but left it up to the political actors, or elected representatives, to judge the matter. There is little doubt, however, that a clear majority was understood to mean more than 50% plus one:

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(35) Rhéal Séguin, "Bouchard Dismisses Bid for Ruling on Sovereignty," *Globe and Mail* (Toronto), 27 September 1996.

> 73. …An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule. . .
>
> 77. …By requiring broad support in the form of an "enhanced majority" to achieve constitutional change, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted. . .
>
> 87. ...In this context, we refer to a "clear" majority as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.

The Supreme Court also noted that even a clear expression of a will to secede did not mean that Quebec could dictate the terms of a proposed secession.

> 92. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.(36)
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> 149. The Reference requires us to consider whether Quebec has a right to unilateral secession. Those who support the existence of such a right found their case primarily on the principle of democracy. Democracy, however, means more than simple majority rule. As reflected in our constitutional jurisprudence, democracy exists in the larger context of other constitutional values such as those already mentioned. In the 131 years since Confederation, the people of the provinces and territories have created close ties of interdependence (economically, socially, politically and culturally) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

(36) *Reference re Secession of Quebec*, [1998] 2 S.C.R.-217, para. 92.

On the second question, the Supreme Court found that Quebec had no "right" in international law to unilateral secession, because the province does not meet the threshold of a colonial or an oppressed people.(37) However, the Court also recognized that negotiations would be difficult and might fail.

> 151. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. No one suggests that it would be an easy set of negotiations.

It was therefore possible that Quebec might make an unconstitutional declaration of secession, or a UDI (unilateral declaration of independence), leading to *de facto* secession. The success of such a UDI would, however, depend upon the reaction of the international community. The Court suggested that this reaction would depend in part upon the conduct of both Quebec and Canada following a possible "Yes" vote.

> 155. Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

Since there was no conflict between domestic and international law, the Court did not need to answer the third question.

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(37) *Ibid.*, para 154.

H. Reaction to the Opinion

In contrast to their opposition to the reference, secessionists welcomed the Supreme Court's opinion, concentrating on the references to Canada's obligation to negotiate should a clear majority of Quebeckers vote "Yes" on a clear question. Premier Bouchard, for example, was quoted as saying at a news conference that "the obligation to negotiate has a constitutional status. This is of the utmost importance. There is no way the federal government could escape it." He went on to state that it would be easier for Quebeckers to vote "Yes" in a future referendum in the knowledge that negotiations with Canada would ensue.(38)

The rest of Canada tended to focus on the need for a clear question and a clear majority expressing the unambiguous will of the people of Quebec. (It is this issue that Bill C-20 addresses.) However, some commentators, both inside and outside Quebec, also noted that the Court had been less than clear in describing what entity would negotiate with Quebec in the event of a clear will to secede.

> 93. . . The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, *whatever that may be*. [italics added]

As Alan Cairns, for one, points out, any such negotiations would result in the emergence of not one, but two new countries. While Canada without Quebec, which Cairns refers to as "new Canada," might maintain the name Canada, it would be a very different entity from the present "Canada as whole." "Canada as a whole" would cease to exist at the moment of secession, but the "new Canada" might find itself bound by agreements negotiated by that country.

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(38) Rhéal Séguin, "Federalist Cause Poisoned by Ruling, Bouchard Says," *Globe and Mail* (Toronto), 22 August 1998.

> Further, any idea that the federal government of old Canada can speak and bargain for its successor, the central government of a different successor country, should be rejected. (39)

Claude Ryan, the former leader of the Quebec Liberal Party, expressed similar concerns about the ambiguity of the negotiating structure from a somewhat different point of view:

> How is the paragraph suggesting negotiations between "the two *representatives of legitimate majorities*" to be reconciled with the many passages in which the Court affirms that the amendment of the Constitution begins with a political process undertaken *pursuant to the Constitution itself* [emphasis added]? Would there be two bargaining tables, one political but without any legal clout, the other legal but having little if any political clout with one of the two "legitimate majorities"? What would the standing be of the parties at those tables? Who would have the power to decide? How would effective decisions be reached?(40)

BILL C-20: DESCRIPTION AND ANALYSIS

Bill C-20 consists of a Preamble of eight paragraphs, detailing the underlying rationale of the proposed legislation, followed by three clauses that address:

- the role of the House of Commons in assessing a referendum question relating to a proposed secession
- the role of the House in assessing the results of a referendum on secession, and
- the matter of constitutional amendments needed to effect the secession of a province.

The Preamble declares that:

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(39) Alan C. Cairns, "The Constitutional Obligation to Negotiate," in David Schnerderman, ed., *The Quebec Decision*, p. 147.

(40) Claude Ryan, "What If Quebeckers Voted for Separation," *The Quebec Decision*, p. 151.

- the Supreme Court of Canada has given its opinion that neither the Government nor the legislature of Quebec has the right under the constitution of Canada or international law to secede from Canada unilaterally; (the only reference to Quebec in the bill)

- secession is a serious matter and of importance to all citizens;

- the government of a province can consult its population by referendum on any question, and has the right to formulate the wording of the referendum question;

- the Supreme Court has given its opinion that the result of a referendum on secession must be free from ambiguity before an obligation to negotiate can arise;

- the Supreme Court has said that a clear majority in support of secession would be needed to create an obligation to negotiate, that a qualitative assessment would be needed to assess whether a majority was clear, and that more than a simple majority would be required

- the Supreme Court has stated that secession, in order to be lawful, would have to involve a negotiated amendment to the constitution in which at least the governments of all the provinces and the federal government were involved and that four principles (federalism, democracy, constitutionalism and the rule of law, and the protection of minorities) would have to govern negotiations.

- the House of Commons, as the only elected body representing all Canadians, would have an important role in determining what would constitute a clear question and a clear majority in a referendum on secession as a precondition to negotiating the secession of a province.

- the Government of Canada should not enter into negotiations that might lead to secession, and a loss of existing rights to Canadian citizens, unless there has been a clear expression by the population of a province that it wishes to secede.

The first clause of the bill would establish a role for the House of Commons in determining the clarity of a referendum question tabled by a provincial government “relating to” a proposed secession. Under clause 1(1) the House would be required to reach its determination within 30 days, presumably prior to a referendum ballot, while clause 1(2) would allow for an extension of an additional 40 days in case of a federal general election.

Clause 1(3) would require the House to consider and determine whether the question would elicit a clear expression of the will “of the population” of a province on whether it should cease to be part of Canada.

According to clause 1(4) there would be two circumstances in which the House would have to conclude that a question could not elicit a clear expression of popular will:

(a) when the question focused on a mandate to negotiate without reference to secession; and (b) when other options such as political or economic arrangements were mentioned in addition to secession.

Clause 1(5) states that the House would have to take into account the views of political parties represented in the legislature of the province whose government proposed to secede, the governments or legislatures of other provinces or territories, the Senate of Canada, and "any other views it considers to be relevant."

The Government of Canada would be prevented from entering into negotiations on secession if the House of Commons decided that the referendum question was not clear (clause 1(6)).

Clause 2(1) states that the House of Commons would have to determine and set out by resolution that there had been a clear expression of the will of a clear majority in favour of secession before the federal government could enter into negotiations on the terms of such a secession.

Clause 2(2) sets out that the House would have to take into consideration the size of the majority of valid votes in favour of secession, the percentage of eligible voters who cast ballots, and "other matters or circumstances" that the House considered to be relevant.

Under clause 2(3), before reaching a determination the House would have to take into account the views of the same entities mentioned in clause 1(5), as well as any other views it considered to be relevant.

The Government of Canada would be prohibited from entering into negotiations on the terms of secession if the House determined that the referendum results were not a clear expression of the will of a clear majority of the province to secede from Canada (clause 2(4)).

Since the right to unilateral secession does not exist under the constitution, clause 3 proposes that secession would require a constitutional amendment, which would in turn require negotiations involving at least the federal government and all provincial governments.

Under clause 3(2), a Minister of the Crown would be prohibited from proposing a constitutional amendment to effect a provincial secession unless the Government of Canada had addressed the following issues in negotiations: the division of assets and liabilities; any changes to the borders of the province; the rights, interests, and territorial claims of Aboriginal peoples, and the protection of minority rights.

COMMENTARY

Bill C-20 follows from the opinion handed down by the Supreme Court in response to the Quebec secession reference.(41) The bill would apply to any referendum question relating to the secession of any province; the only specific references to Quebec in the bill are in its title and in the first paragraph of the Preamble.

The bill does not stipulate the size of the majority that would be needed before the federal government could enter into negotiations on the terms of a secession.

According to Bill C-20, a question that contemplated other possibilities in addition to secession, such as further economic or political arrangements with Canada, would not be a clear question. It must be clear that the issue is whether or not the province should cease to be part of Canada. The House of Commons would not be obliged to consider referendum questions or results involving proposed changes to constitutional arrangements other than secession. Even a clear question and a clear majority on proposals that involved sovereignty-association, or political and/or economic partnerships, or any other outcome apart from secession would not result in an obligation to negotiate.

Though Bill C-20 separates the issue of a clear question from the issue of a clear majority, there is some indication that the Supreme Court saw the two issues as intrinsically connected, as well as being linked to the factual situation surrounding an actual referendum. The issue is whether if, in the context of an actual referendum, the quality of the question and the quantity of the majority come together to make unambiguously plain the clear will of the people of a province.

By separating the issue of the quality of the question from the issue of the quantity of the majority, and deciding in the middle, or near the end, of the referendum process whether the question was or was not clear, the House of Commons might inadvertently affect the outcome of the referendum. If the question was found to be insufficiently clear, participation in

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(41) See *Chart Indicating Annotations to the Draft Clarity Bill*, Parliamentary Research Branch, March 2000.

the referendum might be reduced; alternatively, the voters might decide that there was nothing to lose by voting “Yes.”

On the other hand, commentators have also queried whether Bill C-20 should go further in several areas. Should the bill contain an expanded clause 1(5) specifying other parties whose views would have to be taken into consideration, most specifically representatives of Aboriginal peoples? Should the list of issues to be negotiated under section 3(2) be expanded?