Berkeley Law

From the Selected Works of Sujit Choudhry

April, 2007

Referendum? What Referendum?

Sujit Choudhry, Berkeley Law

Available at: https://works.bepress.com/sujit_choudhry/40/
Iraq and the future of the United Nations
Edward Luck

Canada’s report card on race: satisfactory, or can do better?
Denise Chong

Northrop Frye, up close and very personal
Bob Rodgers

A common female allergy: politics
Rosemary Speirs

Referendum? What referendum?
Sujit Choudhry

The 1960s: back to the future
Mel Watkins

+ Desmond Morton relaunches the cruise missile + Saeed Rahnema calls for reform in Tehran + David Cameron flushes the toilet + Bernice Eisenstein visits France during the Holocaust + Kenneth Bagnell strolls through Little Italy + poetry by Maureen Hynes, David Livingstone Clink, Jason Guriel and Jody Aliesan + fiction reviews by Allan Peterkin and M.A. Fitzpatrick-Hanly + responses from Piotr Dutkiewicz, Lawrence Wardroper and Charlie Hill

3 Iraq and the Future of the United Nations
Edward C. Luck

5 Searching for Race-Neutral Ground
A review of Race and the City: Chinese Canadian and Chinese American Political Mobilization, by Shanti Fernando
Denise Chong

7 Referendum? What Referendum?
An essay
Sujit Choudhry

10 Down the Toilett
A review of The Culture of Flushing: A Social and Legal History of Sewage, by Jamie Bendickson
David Cameron

11 Don’t It Always Seem to Go
A review of Shereen Issa’s Child Poverty and the Canadian Welfare State: From Entitlement to Charity
John Stapleton

13 Heroic Measures
A review of Villa Air-Bl: World War II, Escape and a House in Marseille, by Rosemary Sullivan
Bernice Eisenstein

14 The Woman and the Garden
A poem
David Livingstone Clink

14 Dear Reader
A poem
Jason Gueli

15 It happens on a bus
A poem
Jody Aliesan

15 The Hanged Man
A poem
Maureen Hynes

16 The Novel as Rubik’s Cube
A review of Brett Josef Grubisic’s The Age of Cities
Allan D. Peterkin

17 The View from Alice Munro
A review of Alice Munro’s The View from Castle Rock
Margaret-Ann Fitzpatrick-Hanly

18 The Inner Frye
Bob Rodgers

21 Allergic to Dirty Politics
A review of Louise Garber’s Rural Women’s Leadership in Atlantic Canada: First-Hand Perspectives on Local Public Life and Participation in Electoral Politics
Rosemary Speirs

23 A Place with Pizzazz
A review of College Street, Little Italy: Toronto’s Renaissance Strip, edited by Denis De Klerck and Corrado Paina
Kenneth Bagnell

24 An Intriguing But Incomplete Picture
A review of Conversations in Teheran, by Jean-Daniel Lefond and Fred A. Reed
Saeed Rahmena

27 Shadow Dancing with the Americans
A review of John Murray Clearwater’s Just Dummies: Cruise Missile Testing in Canada
Desmond Morton

28 The Past Reframes Itself
Mel Watkins

30 Letters and Responses
Piotr Dutkiewicz, Lawrence Wardrope, Charlie Hill

Cover art and pictures throughout the issue by Tom Pokinko.

Tom Pokinko is a graphic artist based in Montreal. His work has appeared in The Progressive, Clamor and Fine Books & Collections, as well as with the United Nations Association in Canada. His portfolio is available at www.tompokinko.com.

Copyright and permissions
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 by email.

The Literary Review of Canada is published 10 times a year by the Literary Review of Canada Inc. Founded in 1991 by p.a. dutil and the United Nations Association in Canada. Its mission is to support and promote the writing of Canadian literature.

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.
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 sovereignists 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 sovereignists over which rules should govern the process of secession. However, recent events suggest that Canada is not staring into the constitutional abyss. The Scession 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 sovereignist 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.

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 sovereignists 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, sovereignists—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 Scession 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 delegitimate 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.

**Essay**

Referendum? What Referendum?

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

SUJIT CHOUDHRY

SUJIT CHOUDHRY holds the Scholl Chair at the University of Toronto’s Faculty of Law and is cross-appointed to the Department of Political Science and the School of Public Policy and Governance. His most recent book is The Migration of Constitutional Ideas (Cambridge University Press, 2007).

April 2007
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 sides 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 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.

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 judgment 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 concerns regarding 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 moral vote to organize 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 challenge the 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 constitutional 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 own 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 the interpretation of the Quebec 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 Quebec 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. Sovereignists argue 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 étape deux, the result of a unilateral declaration of independence by Quebec would be legal chaos.
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. 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 was determined the 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 PQ’s election platform claimed that if Quebec were to achieve “correct” 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 constitution. The heart of the manifesto’s argument is that the PQ platform’s failure to comply with the Clarity Act and the Secesssion 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 would 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 good faith negotiations with Canada, would enable Canada to argue internationally that a unilateral declaration by Quebec would 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 good faith negotiations with Canada, would enable Canada to argue internationally that a unilateral declaration by Quebec would not be recognized.

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 Quebeckers 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 Secesssion 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 Secesssion Reference and the Clarity Act. The next referendum, if there is one, will be conducted on dramatically different terms than the referendum of 1995.