THE CLARITY LAW: NECESSARY AND INSUFFICIENT CONDITIONS OF A HEALTHY DEMOCRACY

Paul Wells
Senior political columnist
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As a working journalist whose main field of inquiry is Canada's federal parliament, I should begin with some caveats. First, I speak French and English but no Spanish, and I am no expert in Spanish constitutional politics. And while five years ago I might have been the English-language journalist most familiar with the intricacies of my country's secession debate, I have used a recent decline in national anxiety over Quebec secession as an excuse to take a break from the subject for several years.

Besides giving me a chance to visit your country, then, this conference allows me to refresh my understanding of these issues. But I would have had to get back up to speed fairly soon anyway, because I fear the debate over Quebec secession is returning to a more prominent role in Canada's politics. So I am rehearsing arguments here that I will soon need to make in my own country.

I'm going to explain the genesis and the tenets of Canada's federal Law C-20, introuced in Parliament in 1999 and passed into law in 2000, better known as the Clarity Act. My main point is that the Clarity Act represented a belated injection of common sense and responsibility into the Quebec secession debate. It tries to point out, before a secession referendum, a few things that will at any rate become clear immediately after, if a majority votes with the

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fundacion@fundacionmgimenezabad.es

secessionist party. But the Clarity Act is of limited use or interest if it is not part of a broader, continuing discussion about the things we owe one another as Canadians. No law can substitute for an intelligent and compassionate national conversation. Good law can illustrate simple truths; it can't corner the market on truth.

To demonstrate the truths the Clarity Law illustrates I will refer — oddly enough — to an editorial in El Pais last week about the proposed changes to Catalonia's constitutional status.[1]

The editorialist expressed his delight that even the nationalist Catalonian parties proposing changes "were prepared to admit modifications" to their project "and to adapt the statute to fit into the Spanish Constitution." This was a big change from the Ibarretxe plan for the Basque regions, "which from the start affirmed that the Spanish Congress could only rubber-stamp what the Basque Parliament had passed." Such unilateralism "was absolutely incompatible with the Constitution, and indeed with any federal or regional system," El Pais correctly noted, before quoting the Catalan nationalist leader Manuela de Madre, who said, "We come to negotiate, not to impose," and asked for "everyone's involvement."

Finally, the editorialist notes that by receiving 90 percent approval in the Catalan Parliament, the text "does not deserve the same short shrift in Madrid as did the Ibarretxe plan, which had been passed in the Basque Parliament by a narrow majority."

Even in my naive state, I'm aware that coalition politics is influencing Prime Minister Zapatero's response to the Catalan proposals. And a newspaper editorial is just another editorial. But I was amazed at the assumptions

[1] http://www.iht.com/getina/files/287212.html

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underlying this editorialist's argument — not because any of them seem unreasonable, but because in Canada, in the context of our Quebec debate, a lot of people would argue that nobody can responsibly make this sort of argument.

What are these assumptions? First, that proposals for even major changes to the country's organization should be discussed in good faith by the national parliament. That a discussion in good faith is no guarantee of success or satisfaction for any party. That the more widely a fundamental change is supported, the more seriously it should be considered — in other words, that a consensus carries more weight than a majority. And that no change should be contemplated if it can't be accomplished within the bounds of constitutionality.

This may all seem obvious. But in Canada until quite recently, none of it was obvious as it applied to Quebec secession, even though the entire provinice went through two traumatic referendum campaigns on that very topic.

On Oct. 30, 1995, Quebecers were asked whether they wanted their province to become "sovereign" after having made a "formal offer of economic and political partnership" with Canada. The question also made reference to a proposed law on the future of Quebec, and to an "accord signed on July 12, 1995."

Careful attention to the discourse of some secessionist leaders would have made it clear that the proposal was for Quebec to secede and become an independent state. But if it wasn't obvious, it's because the secessionists did not want it to be. The biographer of Jacques Parizeau, who led the secessionist campaign in 1995, reveals that the word "country" was at first included in the question — the proposal was that Quebec become a country — but that its

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presence reduced support for a Yes vote in polls, so they took the offending word out. Similarly, the proposed "law on the sovereignty of Quebec" was changed into a "law on the future of Quebec." Secessionist campaigners systematically downplayed those elements of their program that made their goal clear. They called themselves "the camp of change" and their campaign literature promised, in one famous case, that a Yes vote would make it possible to use the Canadian dollar. [2]

Many in Canada still dispute any suggestion that this elaborate plotting had any effect on the result, which saw 49.4% of Quebec voters endorsing the "change" on offer, whatever they may have thought it was. Clearly Quebec's independentist leaders thought this camouflage was useful or they wouldn't have done it. One has to assume they will be tempted by similar shading of the plain truth in a future referendum.

And who could blame them? It is harder to be a separatist in Quebec than it may seem. Since the modern sovereignist movement was founded in Quebec in the late 1960s, the secessionists have contested nine provincial elections, four federal elections and two referendums on Quebec's constitutional status — *and they have never won 50% of the popular vote.* It is one of the most majestic losing streaks in Western democracy, but there was a widespread view that if the narrowest majority voted Yes to "change" for a "future," then the first dozen or twenty defeats would be forgotten and Quebec would immediately become a new country, whatever the history or the circumstances.

The only problem is that indulging the secessionists' preferences in this way is not respectful to other Canadians — or to the many Quebecers who tell pollsters they are happy to consider themselves both Quebecers and

[2] Pierre Duchesne, *Jacques Parizeau Tome III: Le Régent, 1985-1995* (Montreal: Éditions Québec Amérique 2004), pp. 426-427

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Canadians.

The Clarity Law was necessary because leaders who favour Canadian unity had spent too much time before the 1995 referendum claiming that the protection of rights and law was none of their business. Allan Rock, Canada's justice minister during the 1995 referendum, said a year before the vote that any attempt to take the province out of the country without the consent of other Canadians was unconstitutional. "But," he quickly added, "the question is technical."[3]

In such a vacuum, secessionist leaders were free to argue that international law and precedent supported their claim that Quebec could secede on the will of Quebec's provincial legislature alone, after the narrowest victory on a referendum question set by the secessionist majority in that legislature. Or at least they they were free to make that argument until 1997, when the government of Canada began to contest those claims in public arguments and in a set of questions they formally referred to the Supreme Court of Canada.

In 1998, the top court found[4] that neither Canadian domestic law nor international law gave Quebec's government a right to effect secession. Taking Quebec out of Canada would require the consent of other Canadians and the national government through constitutional amendment. The court did decide, however, that other Canadians would be required to *discuss* secession if a sufficiently clear majority of Quebecers expressed their desire for secession in a referendum on a sufficiently clear question.

The court didn't specify what would constitute a clear question or a clear

[3] Mario Cardinal, *Point de Rupture* (Montreal: Bayard, 2005), p. 85.

[4] the decision in *Secession Reference* is archived at http://www.canlii.org/ca/cas/scc/1998/1998scc63.html.

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majority. And neither does the Clarity Law, which was introduced in Canada's national parliament 16 months after the court's opinion in the Secession Reference. Instead C-20 simply transforms into a legal obligation, binding on the House of Commons, the court's opinion that Canadians outside Quebec must enter into secession negotiations if a clear majority endorses a clear question.

The precondition to negotiation, then, is a determination that the question and the majority were clear enough. So the Clarity Law provides that within a month after a provincial legislature tables a referendum question on secession, the House of Commons must decide and publicly declare whether the question is clear enough to be broadly understood. And soon after a referendum vote, the Commons must declare whether it deems the majority to be big enough to trigger secession talks.

One striking aspect of the Clarity Law is the list of other bodies and organizations whose opinions the Commons must consider when deciding these two clarity tests: provincial legislatures, the appointeds federal Senate, aboriginal groups and more. This is a loose obligation — federal Members of Parliament are not told to obey these opinions, only to listen to them. But it serves as a handy reminder that all Canadians will want a say in the future of their country.

In many ways the Clarity Law simply offers protection against the absurd. It is absurd to suggest that a rule system contrived by a regional legislature could *necessarily* bind the national Parliament. (News from Quebec City may of course be worth the Parliament's immediate attention, but the only entity that could decide *whether* that's so is the *Parliament.)* It is absurd to suggest that in a complex federation, secession of the middle third of the country's territory would be a matter for simple bilateral negotiation. And even if a province trying

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to leave Canada feels like ignoring the constitution, it is absurd to believe the rest of the country could ignore the constitution too.

And here is where we begin to see that the Clarity Law, while it is a *necessary* part of any fair discussion about attempted secession, is not *sufficient.* The Clarity Law doesn't go into detail about the mechanism of the constitutional amendment that might permit secession. If it did, it would point out that two of the largest provinces, Alberta and British Columbia, have their own laws requiring that any constitutional amendment be approved by their populations in separate referendums before the provincial legislatures can approve it. This gives a veto over the terms of secession to the populations of the two provinces that are most distant from Quebec. Two provinces that are hardly dependent on trade with Quebec and therefore hardly required, by the cold arithmetic of public finance, to cut Quebecers any slack.

It would be really good if Quebecers understood this, and better if they learned it before they vote than the day after. But it's no fault of C-20's drafters that this information was left out; it is simply another part of the necessary broader conversation.

So is this: all these rules seem like nothing more than petulant obstacles to Quebecers' free will if they are not accompanied by arguments about *why* peaceful and democratic countries are better off staying together than trying to figure out how to break up. Here are the two shortest arguments I can contrive. The first is global: a country like Canada has accomplished things for all its citizens, including Quebecers, that make it worth having in the world. The second is local: a narrow majority would not be an expression of Quebecers' strength but of their profound division. Major change should be the product of a durable consensus, not of a circumstantial majority.

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Longer arguments could fill a book, as Minister Dion has discovered.

But if nobody makes those arguments, the Clarity Law starts to look like a strange and lonely document indeed. I would push this argument further. If we had a long tradition of frank discussion about the web of mutual obligations that underpin our democracy, we wouldn't need a Clarity Law. It would of course be rather obvious that a vote contrived in Quebec can't bind a Parliament that sits outside Quebec. It would be obvious that a national government must consider national opinion in deciding the fate of the nation.

But in the *absence* of a robust and respectful discourse about where we have all been together as a country, the Clarity Law isn't enough. If the national government simply hopes it can get by without explaining, again and again, Quebec's role in Canada and Canadians' relations with one another, then the Clarity Law won't be much help when a crisis comes.

That's where we are lately as a country. After a brief flowering of frank talk in the late 90s, a kind of Prague Spring of constitutional clarity, our national government has gone back to pretending that the only people who should talk about secession are the secessionists. The Clarity Law remains in place, but there is eerie silence where first principals used to be. It is significant that the book of speeches Minister Dion is here to launch is several years old and that, while he takes his new job as Environment Minister seriously, none of his colleagues has seen fit to continue with the pedagogical work that was his most important contribution to Canadians' understanding of themselves.

Proposals for major change should be discussed in good faith. A discussion in good faith is no guarantee of success. A consensus carries more weight than a majority. And even major change should be accomplished within the bounds of constitutionality. All because a good country is worth keeping. It is good to be

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reminded of these things, and odd to read in a Spanish newspaper the arguments I used to hear from my Canadian government.

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