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THE QUEBEC SECESSION REFERENCE AND THE FEDERAL CLARITY ACT: THE FASCINATION WITH CLARITY AND THE VALUE OF AMBIGUITY

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Abstract

This article examines the ongoing relevance of the Supreme Court of Canada's *Reference re Secession of Quebec* (1998) in managing tensions arising from the coexistence of multiple political communities within a single constitutional order. It explores the lessons to be learned from this landmark case in light of recent debates such as the Scottish independence referendum and Catalonia's "right to decide". The article argues that, while the Reference provides a valuable framework for analysing multinational democracies and federal systems, caution should be exercised when employing the political and legal grammar associated with the federal Clarity Act. The latter, enacted by the Canadian federal Parliament after the Quebec Secession Reference, purported to clarify the Supreme Court's advisory opinion, but actually aimed to exert control over Quebec's potential secession. By examining the historical, political and legal context, the present article highlights the divergence between the federal Clarity Act and the spirit of the Quebec Secession Reference. It underscores the need to reassess the legacy of these events and their relevance in managing political and legal tensions within multinational democracies. It also invites scholars and political actors interested in these issues to appreciate the significance of ambiguity and avoid overestimating the advantages of clarity.

Keywords: Clarity Act; *Reference re Secession of Quebec*; multinational democracy; federalism; Quebec; Canada; minority nations.

EL DICTAMEN SOBRE LA SECESSIÓ DEL QUEBEC I LA LLEI DE CLAREDAT: LA FASCINACIÓ PER LA CLAREDAT I EL VALOR DE L'AMBIGÜITAT

Resum

Aquest article examina la rellevància que segueix tenint el Dictamen del Tribunal Suprem del Canadà sobre la secessió del Quebec (1998) en la gestió de les tensions derivades de la coexistència de diverses comunitats polítiques dins d'un mateix ordre constitucional. Analitza les lliçons que poden extreure's d'aquest cas paradigmàtic a la llum dels debats recents sobre el referèndum d'independència d'Escòcia i el dret a decidir de Catalunya. L'article sosté que, si bé el Dictamen proporciona un context valuós per analitzar les democràcies plurinacionals i els sistemes federals, s'hauria de procedir amb cautela en fer servir la gramàtica política i jurídica associada a la Llei de claredat. Aquesta llei, promulgada pel Parlament federal canadenc després del Dictamen sobre la secessió del Quebec, pretenia aclarir l'opinió consultiva del Tribunal Suprem, però en realitat pretenia exercir control sobre la possible secessió del Quebec. En analitzar el context històric, polític i jurídic, aquest article posa en relleu les divergències entre la Llei de claredat i l'essència del Dictamen sobre la secessió del Quebec. Així mateix, subratlla la necessitat de tornar a avaluar el llegat d'aquests esdeveniments i la seva rellevància en la gestió de les tensions polítiques i jurídiques en el si de les democràcies plurinacionals. També convida els acadèmics i els actors polítics interessats en aquestes qüestions a apreciar la importància de l'ambigüitat i a evitar sobreestimar els avantatges de la claredat.

Paraules clau: Llei de claredat; Dictamen sobre la secessió del Quebec; democràcia plurinacional; Quebec; Canadà; nacions minoritàries.

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Contents

1 Introduction

On August 20, 1998, the Supreme Court of Canada (SCC) rendered its now-famous *Reference re Secession of Quebec* (SCC, 1998). Twenty-five years later, the SCC's opinion remains highly instructive for any scholar or political actor interested in managing tensions deriving from the coexistence of two or more political communities claiming a right to self-determination within the same constitutional order (Delledonne & Martinico, 2018; Guénette & Mathieu, 2023).

In the United Kingdom, for instance, the *Reference re Secession of Quebec* was referenced in 2022 by the Lord Advocate of devolution issues, under paragraph 34 of Schedule 6 to the *Scotland Act 1998,* to enlighten the political and legal debate on whether the Scottish Parliament has the power to legislate for upholding a referendum on Scottish independence (United Kingdom Supreme Court, 2022, para. 88). In 2023, Catalan leaders undertook to mobilise the Quebec-Canada debate, with the objective of unlocking the current constitutional status quo in Spain regarding Catalonia's "right to decide" over its own political destiny. Indeed, President of the Generalitat Pere Aragonès appointed Professor Marc Sanjaume-Calvet of the Universitat Pompeu Fabra to chair a special committee of experts to discuss the merits of promoting a "Catalan Clarity Agreement" (Generalitat de Catalunya). Composed of nine members, the committee received a mandate to guide the Catalan executive in the elaboration of the clarity agreement.

The present article argues that, although the *Reference re Secession of Quebec* offers a valid and powerful framework to reflect upon contemporary multinational democracies and federal systems, caution should be exercised before using the political and legal grammar associated with Canada's Clarity Act per se (Catalan News, 2023), especially if such legislation is associated with the Canadian experience. Indeed, in the wake of the Quebec Secession Reference, the federal Parliament of Canada passed legislation purporting "to give effect to the requirement for clarity" of the SCC's advisory opinion, the official title of which is *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference* (Parliament of Canada, 2000).

Although the federal Clarity Act claims, in concrete terms, to clarify the SCC's Quebec Secession Reference, the Act had a political purpose that has little to do with this purported objective. It was used as a means to allow the federal government of Canada to unilaterally dictate the main terms under which Quebec could eventually secede from the rest of Canada. On that matter specifically, the federal Clarity Act could hardly drift further from the spirit of the Quebec Secession Reference.

While various experts speak of the Clarity Act as characterised by bad faith on the part of federal political authorities (Laforest, 2003; Bérard, 2016, p. 262), others do not hesitate to call it arbitrary (Taillon, 2014, p. 13; Guénette & Gagnon, 2021, p. 147). Our main purpose here is to revisit this period of Canadian political and constitutional history in an attempt to determine whether the Quebec Secession Reference and the federal Clarity Act have stood the test of time, a quarter-century later. It is also meant to enlighten international debates over the value and limits of the *Reference re Secession of Quebec* and the Clarity Act in relation to the management of ongoing political and legal tensions in multinational democracies. That being said, we make no specific recommendations in the context of any particular case, leaving this up to the political actors themselves. Nonetheless, we hope the conclusions we reach in light of Quebec-Canada dynamics inform political and legal actors' views on the various courses of action they promote, should they favour fairness between equal partners in a multinational democracy.

The article is composed of four sections. First, we recall the political context in which the SCC rendered the Quebec Secession Reference, with a brief discussion of the spirit of the advisory opinion. Second, we highlight the key effects of the federal Clarity Act. Third, we show whether the Act did indeed succeed in "giving effect" to the Secession Reference. Finally, we conclude by stressing the value of maintaining a certain amount of ambiguity in constitutional matters in a multinational democracy.

2 Quebec-Canada dynamics and the *Reference re Secession of Quebec*

The Quebec Secession Reference, as it came to be known, marked the culmination of two decades of intense constitutional debates and tensions between Quebec and Canadian political and intellectual elites. Back in the

late 1970s, Canada was going through a national identity crisis. This period is characterized in particular by the work carried out by first, the Laurendeau-Dunton Royal Commission on Bilingualism and Biculturalism (1963–1971) (Lapointe-Gagnon, 2018), and later, the Pepin-Robarts Task Force on Canadian Unity (1977–1978) (Wallot, 2002; Rocher, 2021). This is also when the Parti Québécois first took power (1976) in the Province of Québec and subsequently organised a referendum over a "sovereignty-association" programme (1980). The referendum was lost by the pro-independence forces by a margin of roughly 40 to 60.

In 1981–82, the Pierre Elliott Trudeau-led Liberal government then took the initiative to "patriate" Canada's Constitution from the United Kingdom, incorporating the *Canadian Charter of Rights and Freedoms* while also establishing a new procedure for amending the fundamental law of the country. However, this major restructuring of the constitutional architecture was accomplished without the approval of Quebec, one of the country's founding peoples.

Patriation marks a turning point, especially for Quebec nationalists. Presented as an opportunity for the federal government to change the way the Canadian federal system worked in favour of a better deal for Quebec, as promised by Pierre Elliott Trudeau during the 1980 referendum campaign (Mathieu & Guénette, 2022), the result was certainly not what Quebec expected. Before patriation, the province was convinced that it had a conventional veto over any constitutional changes that would directly affect its rights or powers (Quebec, 2017). However, in two major decisions, the SCC denied the existence of such a veto right (SCC, 1981, 1982), which considerably weakened Quebec's position in the constitutional debate, and brought tensions between Quebec and the rest of Canada to a peak.

The Quebec-Canada dynamics then changed quite drastically, as Brian Mulroney's Progressive Conservatives replaced Pierre Elliott Trudeau's Liberals in Ottawa, and René Lévesque's Parti Québécois was replaced by Robert Bourassa's provincial liberals. Direct confrontation between Quebec and Ottawa's political elites gave way to a more respectful view of each other's interests. Despite not receiving support from all the key political figures in the country, Brian Mulroney and his government worked hard to meet Quebec's demands for endorsing the Canadian Constitution. This led to two major "constitutional rounds", the first of which was the Meech Lake Accord, which aimed to recognise Quebec as a distinct society, among other things. However, in 1990, the Meech Lake Accord failed to be ratified by all 10 provinces and the Parliament of Canada, which meant the project failed to materialize (Cairns, 1998; Wehrling, 1992, p. 12; Swinton, 1992, p. 139; Stein, 1997, p. 307).

This then led to the Charlottetown Accord and the inclusion of Indigenous peoples' demands, something that was missing from the previous constitutional round. Nevertheless, when the Charlottetown Accord was put to a referendum in October 1992, support from Quebec and several other provinces was lacking (Boyer, 1992, pp. 75–76; Pelletier, 1994, p. 51; Pelletier, 1996, p. 15), marking the end of these constitutional rounds and the resurgence of sovereigntists on the Quebec political stage.

Ultimately, these episodes not only preceded the SCC's opinion, they were representative of the actual political drama that led to it, with the 1995 referendum acting as a direct catalyst. The "No" option having narrowly won the 1995 referendum with 50.58% of the votes, against the "Yes" option's 49.42%, the federal government became more active in its quest to counter the Quebec independence movement and settle the issue once and for all. Indeed, after the 1995 referendum, the federal government put forward a series of measures or actions aimed at ensuring that it would never again be placed in a similar situation. The Quebec Secession Reference was at the centre of this new strategy, which was called the "Plan B". In short, Plan A could be said to be about convincing Quebecers to stay within Canada, whereas Plan B was aimed at preventing Quebec from seceding.

In September 1996, the federal government did indeed ask the SCC to clarify whether Quebec could legally pursue unilateral secession from the rest of Canada, under both Canadian constitutional law and international law. For its part, the Quebec government, wishing to "avoid giving any legitimacy to a process in which a federal institution would rule on Quebec's right to declare independence," decided "not to take part in the debate before the Supreme Court" (Guénette & Gagnon, 2021, p. 160). Put differently, the government of Quebec "refused to participate in what it saw as nine federally appointed judges deciding on the right to self-determination of the Quebec people" (Des Rosiers, 2000, p. 172).

The SCC issued its advisory opinion in 1998. According to the Quebec Secession Reference, the principles of federalism and democracy dictate the following:

> […] that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. (SCC, 1998, para. 88)

In addition, the SCC concluded that "a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize" (SCC, 1998, para. 150).

According to the SCC, therefore, the path for Quebec or any other Canadian province to attain secession would require (1) a clear question, (2) a clear answer, (3) a constitutional duty to negotiate, and (4) a constitutional amendment to validate secession. Although the SCC ruled out the possibility of unilateral secession, it did open a path for secession that would comply with Canadian domestic law. As such, experts from contrasting normative perspectives considered this to be a well-balanced, legally sound and somewhat impartial opinion (Mathieu & Taillon, 2015; Rocher & Casanas-Adam, 2015; Bérard, 2018). Consequently, the Secession Reference was well-received, not only in Quebec, but also in Canada and around the world. It is thus not surprising that in 2023 the Catalan Government seeks to take inspiration from it to develop its own political agenda.

That being said, the SCC did have to be somewhat creative to reach such a conclusion. Indeed, the Canadian Constitution is a rather "complex object", composed of various sources, that remains "silent" on many important issues (Brouillet, 2004; Brouillet, 2010; Guénette, 2015). When describing Canada's Constitution, it is common to say that it "is neither fully written nor fully unwritten; it is neither fully domestic nor fully foreign; and […] it is neither fully unilingual nor fully bilingual" (Choquette, 2009, p. 1).

Therefore, the SCC's approach in delivering the *Reference re Secession of Quebec* was rooted in what it called Canada's unwritten, fundamental constitutional principles, as it navigated a constitutional landscape that was silent on the matter of secession:

> In our view, it is not possible to answer the questions that have been put to us without a consideration of a number of underlying principles. An exploration of the meaning and nature of these underlying principles is not merely of academic interest. On the contrary, such an exploration is of immense practical utility. Only once those underlying principles have been examined and delineated may a considered response to the questions we are required to answer emerge. (SCC, 1998, para. 1)

The SCC considered these fundamental principles in great detail, stating that such principles "inform and sustain the constitutional text", that "they are the vital unstated assumptions upon which the text is based" (SCC, 1998, para. 49), and that "it would be impossible to conceive of our constitutional structure without them" (SCC, 1998, para. 51). In short, according to the SCC, those "principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood" (SCC, 1998, para. 51). These are the principles of federalism (SCC, 1998, para. 55–60), democracy (SCC, 1998, para. 61–69), constitutionalism and the rule of law (SCC, 1998, para. 70–78), and respect for minorities (SCC, 1998, para. 79–82). We will assess the Clarity Act through the lens of these principles.

3 Shedding light on the federal Clarity Act

Following the breakdown of the Meech Lake Accord in 1990 and the Charlottetown Accord in 1992, the Quebec nationalists momentarily regained prominence in the constitutional discussions. But power relations between Ottawa and Quebec would evolve substantially over the following years. Indeed, during Jean Chrétien's tenure as leader of the Federal Liberals and Canadian Prime Minister (1993–2003), the governing party seemed to have made it a priority to resist any requests for greater autonomy in Quebec (Gagné & Langlois, 2002). Apart from minor concessions – we think here of the *Act Respecting Constitutional Amendments*, a federal law that grants Quebec and other Canadian "regions" with a "legislative" veto over some constitutional amendments;

or the House of Commons resolution to recognise Quebec as distinct from the rest of the country – there was no appetite for constitutional reforms to accommodate Quebec.

The Liberal Party's return to power in Ottawa after the debacle of the Progressive Conservative forces at the 1993 federal election therefore played a key role in galvanising the Quebec electorate. After almost a decade in opposition, the Parti Québécois led by Jacques Parizeau was able to take power as a result of the 1994 provincial election. The parallel arrival of Chrétien and Parizeau at the head of the federal and provincial executives, respectively, further polarised constitutional debates. On the one hand, the federal government was determined to maintain the 1982 constitutional framework at all costs, disregarding Quebec's grievances as the only dissenting province when the Canadian Constitution was "patriated". On the other, Quebec demanded changes to the constitutional pact that was made without its consent in 1982, and contemplated seceding from the federation if these demands were not met.

As we have already recalled, this "tug of war" between Quebec and Ottawa led to the 1995 independence referendum, won by a narrow majority (roughly 54,000 votes) of the "No" camp. Fear of a similar scenario in the near future prompted the Chrétien government to seek the SCC's opinion on whether Quebec had the right to secede. The answer is now known: a province can secede if there is "a decision of a clear majority of the population […] on a clear question to pursue secession" (SCC, 1998, para. 93). Negotiations between "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" (SCC, 1998, para. 93), would also be required to give effect to that wish, just as it would require a formal constitutional amendment: "Under the Constitution, secession requires that an amendment be negotiated" (SCC, 1998, para. 97).

Yet the SCC's definition of a "clear majority" remains somewhat unclear. The SCC itself declares that it "has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so" (SCC, 1998, para. 100). While most political actors in Quebec believe that 50% plus one vote constitutes a clear majority (National Assembly of Québec, 2000), others have advocated for a qualified majority, i.e., a considerably higher outcome (Dion, 2012; Bérard, 2016; see also, Norman, 2006; Bossacoma Busquets, 2020). However, let us recall the SCC's precision to this effect:

> […] 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. (SCC, 1998, para. 87, our italics)

While this clarification stresses the value of qualitative criteria to determine the interpretation of a clear majority, what carried more weight after the rendering of the Secession Reference was not the entitlement of Quebec to secede, but rather the quantitative dimension or percentage of votes required to initiate the process.

Here the federal government saw an opportunity to take advantage of the debate. Dissatisfied with the SCC's guidance, the federal government appeared not to take its recommendations too seriously, opting instead to interpret the Quebec Secession Reference in its own words. By enacting the Clarity Act (Bill C-20), *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, the federal order of government aimed to establish the process to follow should Quebec – or any other province – ever decide to hold another referendum. The Act was given assent in June 2000.

The federal Clarity Act can be summarised in six key elements (Mathieu & Gagnon, 2021, p. 69). The first refers to the House of Commons giving itself the power to consider whether a referendum question is clear enough for people to vote on it. Indeed, Article 1 (1) of the Act reads as follows:

> The House of Commons shall, within thirty days after the government of a province tables in its legislative assembly or otherwise officially releases the question that it intends to submit to its voters in a referendum relating to the proposed secession of the province from Canada, *consider the question and, by resolution, set out its determination on whether the question is clear.* (Parliament of Canada, 2000, Art. 1 (1), our italics)

Second, the Clarity Act distinctly states that only a question concerning secession would be considered "clear", implying that no "third option" (i.e., greater autonomy, but not complete secession) would be deemed acceptable. This is presented as follows, in Article 1 (3) and (4) of the Act:

> (3) In considering the clarity of a referendum question, the House of Commons shall consider whether the question would result in a clear expression of the will of the population of a province *on whether the province should cease to be part of Canada and become an independent state*.
>
> (4) For the purpose of subsection (3), a clear expression of the will of the population of a province that the province cease to be part of Canada could not result from
>
> > (a) a referendum *question that merely focuses on a mandate to negotiate* without soliciting a direct expression of the will of the population of that province on whether the province should cease to be part of Canada; or
> >
> > (b) a referendum question that *envisages other possibilities in addition to the secession* of the province from Canada, such as economic or political arrangements with Canada, that obscure a direct expression of the will of the population of that province on whether the province should cease to be part of Canada.
>
> (Parliament of Canada, 2000, Art. 1 (3) and (4), our italics)

Third, the House of Commons gave itself the authority to wait until after the votes are counted before stating what it would consider a clear result, thereby suggesting that 50 per cent plus one vote would be unacceptable and that an unspecified substantial majority would be necessary:

> (1) Where the government of a province, following a referendum relating to the secession of the province from Canada, seeks to enter into negotiations on the terms on which that province might cease to be part of Canada, the House of Commons shall, except where it has determined pursuant to section 1 that a referendum question is not clear, consider and, by resolution, set out its determination on whether, in the circumstances, there has been a clear expression of a will by a clear majority of the population of that province that the province cease to be part of Canada.
>
> (2) In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account
>
> > (a) the size of the majority of valid votes cast in favour of the secessionist option;
> >
> > (b) the percentage of eligible voters voting in the referendum; and
> >
> > (c) any other matters or circumstances it considers to be relevant
>
> (Parliament of Canada, 2000, Art. 2 (1) and (2))

Fourth, the federal Parliament interpreted the SCC's "duty to negotiate" logic by stating that, not only the federal government, but also member states of the federation and Indigenous peoples would be part of any negotiation process. Indeed, in addition to stating that "an amendment to the Constitution of Canada would be required for any province to secede from Canada, which in turn would require negotiations involving at least the governments of all of the provinces and the Government of Canada" (Parliament of Canada, 2000, Art. 3 (1)), it suggested that the views of "the representatives of the Aboriginal peoples of Canada, especially those in the province whose government is proposing the referendum on secession" would also have to be considered (Parliament of Canada, 2000, Art. 1 (5)).

Fifth, the federal Clarity Act makes clear that Ottawa could override a vote in favour of secession if it considers that aspects of the Act have been violated. Regarding the referendum question, it provides the following:

> The Government of Canada shall not enter into negotiations on the terms on which a province might cease to be part of Canada if the House of Commons determines, pursuant to this section, that a referendum question is not clear and, for that reason, would not result in a clear expression of the will of the population of that province on whether the province should cease to be part of Canada. (Parliament of Canada, 2000, Art. 1 (6))

And it has this to say about the majority:

> The Government of Canada shall not enter into negotiations on the terms on which a province might cease to be part of Canada unless the House of Commons determines, pursuant to this section, that there has been a clear expression of a will by a clear majority of the population of that province that the province cease to be part of Canada. (Parliament of Canada, 2000, Art. 2 (4))

Finally, the Act provides that an amendment to the Constitution would be required to allow the secession of a province:

> It is recognized that there is no right under the Constitution of Canada to effect the secession of a province from Canada unilaterally and that, therefore, an amendment to the Constitution of Canada would be required for any province to secede from Canada. (Parliament of Canada, 2000, Art. 3 (1))

4 "Giving effect" to the Quebec Secession Reference?

As we consider the six defining elements of the federal Clarity Act, we ask ourselves whether these elements comply with the normative framework presented by the SCC in its *Reference re Secession of Quebec*. In other words, do they adhere to the logic that underpins the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities?

From this perspective, some aspects of the federal Clarity Act appear to be fully in line with the principles of the Quebec Secession Reference, as can be seen for elements two (only a question concerning secession would be considered clear), four (not only the federal government, but also member states of the federation and Indigenous peoples would be part of the negotiation process), and six (an amendment to the Constitution would be required to allow the secession of a province). Here it is easy to conclude that the logic of the underlying principles of the Secession Reference are positively met in these dimensions of the Clarity Act. A clear referendum question on the intention to secede is the only democratic way to consult the people on such an important issue. The participation of various federal partners in the negotiations that aimed to define the terms of said secession is a process that respects the principle of federalism and the protection of minorities. Finally, the fact that secession would be subject to a constitutional amendment appears to be consistent with the principle of constitutionalism.

However, elements one (the House of Commons giving itself the power to determine whether a referendum question is clear), three (the House of Commons giving itself the authority to wait until after the votes are counted before stating what it would consider a clear result), and five (the House of Commons could override a vote in favour of secession if it considers that aspects of the Act have been violated) appear to be much less in line with the provisions of the Quebec Secession Reference.

Regarding the first element and the authority the House of Commons pretends to have regarding the clarity of the referendum question, the federal principle would require the issue of determining the clarity of a referendum question to be managed by both "partners", with neither one having the last word. As Stephen Tierney wrote, "the Supreme Court of Canada confirmed that the determination of the question's clarity was to be left to the 'political actors.' The court did not, however, suggest that this issue should be resolved exclusively by actors at federal level" (Tierney, 2012, p. 318; see also, Tierney, 2022).

If only the federal House of Commons may decide on the clarity of the question – that is, if it may do so unilaterally – this makes it quite difficult to conceive both orders of government in the federal system to be of equal status, where neither is subordinated to the power and interests of the other. In this respect, let us remember the SCC's statement that there can be two legitimate majorities involved in the process, "namely,

the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities 'trumps' the other" (SCC, 1998, para. 93).

The fact that the federal House of Commons is habilitated to vote on the issue before the referendum is interesting, however, because it provides the province with the opportunity to consider the federal Parliament's opinion and revise the wording of a referendum question before the vote occurs, thus permitting some form of dialogue between the two federal partners. Thus, the first element presents a moderate deficit vis-à-vis the Quebec Secession Reference.

Let us now turn our attention to the third element, which pertains to the federal House of Commons granting itself the power to delay declaring what it deems a clear outcome until after the votes have been tallied. This implies that a simple majority of 50 per cent plus one vote most probably would not be satisfactory, suggesting instead that a hitherto undefined, significant majority would be required. This leads straight into a major federal and democratic deficit.

First, it must be recalled that, according to the democratic principle, "there may be different and equally legitimate majorities in different provinces and territories and at the federal level", and that "no one majority is more or less 'legitimate' than the others as an expression of democratic opinion" (SCC, 1998, para. 66). It runs contrary to the SCC's opinion that only the "federal majority" may decide on the clarity of the referendum results. Hence, this element of the federal Clarity Act violates the principles of both federalism and democracy.

Second, it must be said that there is something fundamentally problematic in claiming that, in a referendum exercise free of irregularities and marked by a high turnout, the option that receives a majority of votes is nonetheless not deemed to have won. Nor must we neglect to consider the capacity of the House of Commons to wait until after the referendum is conducted to declare its definition of a clear majority, while retaining the right to unilaterally adjust its own understanding of "clarity" according to the political objectives it wishes to achieve. It is difficult to imagine a greater democratic deficit in a multinational and liberal democracy. In this regard, the federal Clarity Act certainly does not live up to the principles of the Quebec Secession Reference.

Finally, the fifth element is also somewhat problematic if we consider the value of the four underlying constitutional principles identified by the SCC in 1998. While this element exhibits a federal and democratic deficit for the exact same reasons we discussed in relation to the third element, this time the principle of constitutionalism and the rule of law is also at play. Indeed, as the House of Commons claims to retain the general power to reject the validity of a vote in favour of secession if it considers that *any* aspects of the Clarity Act have been violated, it limits the existence of a fully "stable, predictable and ordered society" and opens the door to the federal order of government to act somewhat arbitrarily (Taillon, 2014). Put differently, it makes it possible for the federal Parliament to act as both party and judge, in addition to being able to adapt the rules of the game to the changing political environment (Guénette & Gagnon, 2021).

From a more philosophical perspective, it could be said, using formulae proposed by Michael Burgess (2012), that this provision of the Clarity Act is entirely opposed to the logic of the *federal comity*, a key component of what Burgess calls the "federal spirit":

> [federal comity] requires of both federal and local officials a sense of "fair play" – the presumption of a willingness to "give the other side a break," to be ready for compromise wherever serious strains developed, to be, in other words, "pragmatic in the approach to problems" on which the federal and local authorities were divided or on which "their intrinsic interests clashed". (Burgess, 2012, p. 14)

Hence, there are several problems with the federal Clarity Act. Perhaps the most important of all is that the Act enters into direct confrontation with the SCC's Quebec Secession Reference, the very legislation it claims to clarify and to which it is directly submitted. But perhaps most strangely of all, the federal Clarity Act does not actually clarify anything. It reinterprets the Secession Reference – very loosely – while maintaining an absolute absence of clarity with respect to the most crucial consideration in an eventual secession process: the percentage of votes required for the results of a referendum to be considered "clear" by the federal authority. That being said, a certain amount of ambiguity may not always be a bad thing, as we will now consider.

5 Concluding remarks: turning away from the fascination with clarity to embrace the virtues of ambiguity

While cloaked in the virtuous appearance of clarifying the Canadian legal order, the federal Clarity Act is a political manoeuvre intended to establish power relations in the federal system. It is best understood as an attempt by the federal government to regain the upper hand in the debate over the possible secession of Quebec. In the first place, if the federal government had genuinely intended to "give effect" to the Secession Reference, it would be reasonable to conclude that it failed in its intention, since the Act broadly conflicts with the spirit of the SCC's opinion. Moreover, the Reference was already sufficiently clear, such that further legislation to clarify its scope and intent was not necessary.

Hence, the Clarity Act appears to be more of a political position promoted by the federal government than the establishment of a legal path for allowing a province to eventually secede. It reads as an explicit checklist of federal intentions and demands, rather than a clearly defined secessionist process.

Above all, it is our contention that the federal Clarity Act purports to clarify a situation that, by its very nature, could simply remain in abeyance until real, concrete constitutional negotiations take place. And in so doing, the Act overlooks the value of constitutional ambiguity in a divided society such as Canada. Constitutional ambiguity arises when there is a degree of uncertainty about a particular issue: the answer to a particular question is not provided for in the constitutional text, but rather kept in a state of equivocality.

Michael Foley uses the concept of *constitutional abeyances* to describe the parts of a constitution that remain floating or uncertain in their effect: "In contrast to conventions which are determinable and amendable to description, 'constitutional abeyances' represent a form of tacit and instinctive agreement to condone, and even cultivate, constitutional ambiguity as an acceptable strategy for resolving conflict" (Foley, 1989, p. xi). Put differently, constitutional abeyances "refer to those constitutional gaps which remain vacuous for positive and constructive purposes" (Foley, 1989, p. xi). These may include "contradictions, tensions, anomalies, and inequities" (Foley, 1989, p. 9). Hence, throughout "various forms of evasion and obfuscation, the unsettled questions, 'the gaps and fissures' are kept in a state of irresolution. And by remaining obscure, they are able to accommodate conflicting interpretations" (DiGiacomo, 2010, p. 76).

David M. Thomas applies Foley's work to the Canadian case in his book *Whistling Past the Graveyard. Constitutional Abeyances, Quebec, and the Future of Canada* (Thomas, 1997). Published just before the Quebec Secession Reference and the federal Clarity Act, Thomas could not discuss these in his monograph. Nonetheless, contemplating a moment of great tension between Quebec and the rest of Canada, Thomas writes that the most important abeyance of all in the entire Canadian constitutional order concerns "the status and recognition of Quebec as something other than a province" (Thomas, 1997, p. xvii).

When constitutional abeyances are viewed through such an analytical lens, the virtues of ambiguity are more easily appreciated and any fascination or obsession with absolute clarity can be rejected. Alain-G. Gagnon and Jan Erk arrived at a similar conclusion:

> It is our contention that legalistic clarification of the constitutional terms of a federal arrangement may not be the most appropriate measure to ensure the stability of multinational federations, and moreover, that obsessive constitutional precision may actually work to undermine a potential source of longevity for these federal partnerships. (Erk & Gagnon, 2000, p. 93)

In addition:

> […] intentionally leaving the constitutional definition of a federal arrangement ambiguous may, under certain circumstances, promote the durability of federations as each side can interpret their membership in the association differently, rather than being forced to accept the legally defined interpretation of the federation favoured by one side of the partnership. When important differences between the constituent nations of a federal compact exist, constitutional ambiguity is a way to keep the federation going. (Erk & Gagnon, 2000, p. 93)

Of course, this is not to suggest that ambiguity is necessarily the best solution, nor that clarity should be rejected across the board. Rather, it is an invitation for scholars and political actors to exercise caution when using the logic of the Canadian Clarity Act as they attempt to act upon their political and legal order. More importantly, it points to the conclusion that a nuanced and balanced approach should be prioritised in any reflection upon the need to either clarify certain constitutional matters or leave them "floating". Approaching such a dilemma in the context of a liberal and multinational democracy, we contend that inspiration should be sought in the spirit of the Quebec Secession Reference and the four underlying constitutional principles identified by the SCC in 1998, while forgoing the wording of the federal Clarity Act.

This is because, from a more philosophical perspective, the former appears to be rooted in what Ferran Requejo called "liberalism II" or "liberal nationalism" (Requejo, 2004); whereas the latter embraces the normativity of "liberalism I", or what Guy Laforest described as "monolithic liberalism" (Laforest, 1995). To avoid any confusion, let us briefly present these two diverging political philosophies.

A number of authors have shed light on the logic underpinning liberal nationalism, including Charles Taylor (1993), Yael Tamir (1995), Will Kymlicka (1995), Ferran Requejo (2004), Guy Laforest (2014), and Alain-G. Gagnon (2022), among others. While there is no single definition of liberal nationalism upon which all its proponents explicitly agree, we believe some of its guiding principles can be defined (Gagnon & Mathieu, 2020, p. 261).

At its core, liberal nationalism acknowledges that nationalism is not inherently good or bad (Tamir, 2019). The idea is to recognise that, while it has been responsible for heinous atrocities throughout history, as evidenced by the sociopolitical events of the twentieth century, it can also serve as a strong catalyst for building collective solidarity and promoting patterns of social cooperation.

Likewise, it suggests that, for the time being, liberal democracy and social justice can only be achieved (though not without limitations) within national communities, and this necessitates the existence of a demos. However, the demos does not need to possess full sovereignty to serve its purpose, since it is possible to envision genuine multinational democracies that acknowledge and uphold national diversity through political and constitutional empowerment. Consequently, sovereignty or external self-determination is not, and should not, be seen as an end in itself for a nation.

Finally, this philosophical and methodological standpoint underscores the significance of contemplating and reinforcing the national institutional framework only if it promotes the individual liberty and empowerment of its members. In other words, the national framework is desirable precisely because it seems indispensable for individuals to be fully autonomous and benefit from a genuine "context of choice", to borrow from Will Kymlicka (2001).

Although the SCC did not explicitly express it in these terms, we contend that it framed its 1998 advisory opinion in accordance with the normative logic guiding liberal nationalism. Indeed, the way the judges define the four key underlying principles that they say "inform and sustain the constitutional text" is somewhat coherent with this normative approach.

On the other hand, "monolithic liberalism" is an inhospitable philosophy with which to contemplate the peaceful coexistence of two or more demoi or national communities claiming a right to self-determination amid a single sovereign state. Political actors that identify with the cultural majority in multinational democracies tend to embrace this philosophy, more or less consciously, which essentially refuses the value and legitimacy of pluralism connected to "deep diversity," i.e., minority nations.

As Guy Laforest writes, "monolithic liberalism makes no secret of its view of the fate of national minorities in the modern world: they will inexorably be assimilated" (Laforest, 1995, p. 176). According to this rationale, no energy whatsoever should be wasted on empowering minority nations, which are viewed as backward cultural artefacts, with the corollary that those who identify with them would be better off assimilated into the

cultural and national majority, i.e., the only legitimate demos in the sovereign state (Parekh, 2006, p. 182). The federal Clarity Act appears to be rooted in this perspective.

Finally, we urge scholars and political actors interested in managing the tensions that derive from the coexistence of two or more political communities within the same constitutional order to neither overlook the value of ambiguity nor overestimate the benefits of clarity. Appearances of clarity may conceal political ill intentions, as in recent years in Catalonia and Scotland, while ambiguity may leave room for political discussion and accommodation. And there is value in that.

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References

Bérard, Frédéric. (2016). Du caractère lénifiant de la règle de droit interne en matière d'accession à l'indépendance: les impacts du renvoi relatif à la sécession du Québec. In Michel Seymour (Ed.), *Repenser l'autodétermination interne* (pp. 245-264). Éditions Thémis.

Bérard, Frédéric. (2018). De la réceptivité des enseignements de la Cour suprême à l'échelle internationale: impacts et répercussions du *Renvoi sur la sécession du Québec*. In Amélie Binette & Patrick Taillon (Eds.), *La démocratie référendaire dans les ensembles plurinationaux* (pp. 299-311). Presses de l'Université Laval.

Bossacoma Busquets, Pau. (2020). *Morality and legality of secession – a theory of national self-determination*. Palgrave Macmillan.

Boyer, Patrick J. (1992). *Direct democracy in Canada. The history and future of referendums*. Dundurn Press.

Brouillet, Eugénie. (2004). La dilution du principe fédératif et la jurisprudence de la Cour suprême du Canada. *Les Cahiers de droit*, *45*, 7-67.

Brouillet, Eugénie. (2010). Le fédéralisme et la Cour suprême du Canada: quelques réflexions sur le principe d'exclusivité des pouvoirs. *Revue québécoise de droit constitutionnel*, *3*(2010), 1-22.

Burgess, Michael. (2012). *In search of the federal spirit*. Oxford University Press.

Cairns, Alan C. (1988). Citizens (outsiders) and governments (insiders) in constitution-making: the case of Meech Lake. *Canadian Public Policy*, *14*(1988), S121-S145.

Catalan News. (2023, April 24). Quebec experts warn that Clarity Act carries risks for Catalonia. *Catalan News*.

Choquette, Hugo Yvon Denis. (2009). *Translating the Constitution Act, 1867. A legal historical perspective* [M.A. thesis]. Queen's University.

Delledonne, Giacomo, & Martinico, Giuseppe. (2018). *The Canadian contribution to a comparative law of secession – legacies of the Quebec secession reference*. Palgrave Macmillan.

Des Rosiers, Nathalie. (2000). From Quebec veto to Quebec secession: The evolution of the Supreme Court of Canada on Quebec–Canada disputes. *Canadian Journal of Law & Jurisprudence*, *13*(2), 171-183.

DiGiacomo, Gordon. (2010). *The impact of constitutional abeyances on the assertiveness of the federal government* [Doctoral thesis]. Carleton University.

Dion, Stéphane. (2012). La sécession et les vertus de la clarté. *Ottawa Law Journal*, *44*, 387-402.

Erk, Jan, & Gagnon, Alain-G. (2000). Constitutional ambiguity and federal trust: Codification and federalism in Canada, Spain and Belgium. *Regional & Federal Studies*, *10*(1), 92-111.

Foley, Michael. (1989). *The silence of constitutions. Gaps, "abeyances" and political temperament in the maintenance of government*. Routledge.

Gagné, Gilles, & Langlois, Simon. (2002). *Les raisons fortes: natures et significations de l'appui à la souveraineté du Québec*. Presses de l'Université de Montréal.

Gagnon, Alain-G., & Mathieu, Félix. (2020). La richesse des (petites) nations et l'agir hospitalier. In Joseph Yvon Thériault & Jean-François Laniel (Eds.), *La question des petites nations. Culture, politique et universalité* (pp. 261-280). Garnier.

Gagnon, Alain-G. (2022). *The legitimacy clash: Challenges to democracy in multinational states*. University of Toronto Press.

Generalitat de Catalunya. (2023, April 18). El Govern crea el Consell Acadèmic que guiarà l'elaboració de l'Acord de Claredat per resoldre el conflicte polític amb l'Estat.

Guénette, Dave. (2015). Le silence des textes constitutionnels canadiens – Expression d'une Constitution encore inachevée. *Les Cahiers de droit*, *56*, 411-446. https://doi.org/10.7202/1034457ar

Guénette, Dave, & Gagnon, Alain-G. (2021). From referendum to secession – Québec's self-determination process and its lessons. In Jorge Cagiao y Conde & Alain-G. Gagnon (Eds.), *Federalism and Secession* (pp. 147–174). P.I.E. Peter Lang.

Guénette, Dave, & Mathieu, Félix. (2023). *Constitutionalism v diversity – essays on federal democracy*. P.I.E. Peter Lang.

Laforest, Guy. (1995). *Trudeau and the end of a Canadian dream*. McGill–Queen's University Press.

Laforest, Guy. (2003). *Pour la liberté d'une société distincte. Parcours d'un intellectuel engagé*. Presses de l'Université Laval.

Laforest, Guy. (2014). *Interpreting Quebec's exile within the federation: Selected political essays*. P.I.E. Peter Lang.

Lapointe-Gagnon, Valérie. (2018). *Panser le Canada. Une histoire intellectuelle de la commission Laurendeau-Dunton*. Boréal.

Kymlicka, Will. (1995). *Multicultural citizenship: A liberal theory of minority rights*. Oxford University Press.

Kymlicka, Will. (2001). *Politics in the vernacular: Nationalism, multiculturalism and citizenship*. Oxford University Press.

Mathieu, Catherine, & Taillon, Patrick. (2015). Le fédéralisme comme principe matriciel dans l'interprétation de la procédure de modification constitutionnelle. *McGill Law Journal*, *60*(4), 763-792. https://doi.org/10.7202/1034053ar

Mathieu, Félix, & Gagnon, Alain-G. (2021). (Still) in search of the federal spirit. Autonomy and self-determination in multinational federations. In Tracy B. Fenwick & Andrew C. Banfield (Eds.), *Beyond autonomy. Practical and theoretical challenges to 21st century federalism* (pp. 67–87). Brill Nijhoff.

Mathieu, Félix, & Guénette, Dave. (2022). Still not cheering: Understanding Quebec's perspective on 1982. In Kate Puddister & Emmett Macfarlane (Eds.), *Constitutional crossroads. Reflections on charter rights, reconciliation, and change* (pp. 438–453). University of British Columbia Press.

National Assembly of Québec. (2000). *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, S.Q. 2000, c. 46.

Norman, Wayne. (2006). *Negotiating nationalism – Nation-building, federalism, and secession in the multinational state*. Oxford University Press.

Parekh, Bhikhu. (2006). *Rethinking multiculturalism. Cultural diversity and political theory.* Oxford University Press.

Parliament of Canada. (2000). *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, S.C. 2000, c. 26.

Pelletier, Benoît. (1994). La clause Canada dans la défunte entente de Charlottetown. *Les Cahiers de droit*, *35*, 51-111.

Pelletier, Benoît. (1996). *La modification constitutionnelle au Canada*. Carswell.

Quebec (2017). *Quebecers, our way of being Canadians. Policy on Québec affirmation and Canadian relations*. Bibliothèque et Archives nationales du Québec.

Requejo, Ferran. (2004). *Multinational federalism and value pluralism: The Spanish case*. Routledge.

Rocher, François, & Casañas-Adam, Elisenda. (2015). L'encadrement juridique du droit de décider: la politique du confinement judiciaire en Catalogne et au Québec. In Patrick Taillon, Eugénie Brouillet, & Amélie Binette (Eds.), *Un regard québécois sur le droit constitutionnel. Mélanges en l'honneur d'Henri Brun et de Guy Tremblay* (pp. 877-909). Éditions Yvon Blais.

Rocher, François (Ed.). (2021). Dossier thématique: La commission Pepin-Robarts, quarante ans après. *Bulletin d'histoire politique*, *29*(2).

Stein, Michael B. (1997). Improving the process of constitutional reform in Canada: Lessons from the Meech Lake and Charlottetown constitutional rounds. *Canadian Journal of Political Science/Revue canadienne de science politique*, *30*(2), 307-388.

Supreme Court of Canada [SCC]. (1981). *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753.

Supreme Court of Canada [SCC]. (1982). *Re: Objection by Quebec to a resolution to amend the Constitution*, [1982] 2 S.C.R. 793.

Supreme Court of Canada [SCC]. (1998). *Reference re secession of Quebec*, [1998] 2 S.C.R. 217.

Swinton, Katherine. (1992). Amending the Canadian Constitution: Lessons from Meech Lake. *University of Toronto Law Journal*, *42*(2), 139-169.

Taillon, Patrick. (2014). De la clarté à l'arbitraire: le contrôle de la question et des résultats référendaires par le Parlement canadien. *Revista d'estudis autonòmics i federals*, *20*, 13-59.

Tamir, Yael. (1995). *Liberal nationalism*. Princeton University Press.

Tamir, Yael. (2019). *Why nationalism.* Princeton University Press.

Taylor, Charles. (1993). *Reconciling the solitudes. Essays on Canadian federalism and nationalism*. McGill–Queen's University Press.

Tierney, Stephen. (2012). *Constitutional referendums. The theory and practice of Republican deliberation*. Oxford University Press.

Tierney, Stephen. (2022). *The federal contract. A constitutional theory of federalism*. Oxford University Press.

Thomas, David M. (1997). *Whistling past the graveyard. Constitutional abeyances, Quebec, and the future of Canada*. Oxford University Press.

United Kingdom Supreme Court. (2022). *Reference by the Lord Advocate of devolution issues under paragraph 34 of schedule 6 to the Scotland Act 1998*, [2022] UKSC 31.

Wallot, Jean-Pierre (Ed.). (2002). *Le débat qui n'a pas lieu: la Commission Pépin-Robarts, quelque vingt ans après*. University of Ottawa Press.

Woehrling, José. (1992). Les aspects juridiques de la redéfinition du statut politique et constitutionnel du Québec. *Revue québécoise de droit international*, *7*, 12-41.