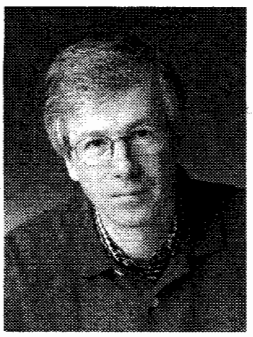
The Clarity Act Debate in the House of Commons

by Stéphane Dion MP, Joseph Facal MNA, Claude Ryan, Patrick Monahan, Gordon Gibson

On December 13, 1999 the Government introduced 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 Bill provides for the House of Commons to determine the clarity of a referendum question on the secession of a province and sets out some of the factors to be considered in making its determination. The Bill also provides for the House of Commons to determine, following a referendum if a clear majority of the population of the province has clearly expressed a will to cease to be a part of Canada. The Bill also provides that certain matters must be addressed in negotiations before a constitutional amendment on secession is proposed by a Minister of the Crown. In February 2000 a Legislative Committee chaired by Deputy Speaker Peter Milliken heard from 39 witnesses and on February 24, 2000 reported the Bill back to the House. Bill C-20 was adopted by the House on March 15, 2000. The following article looks at some arguments raised for and against the Bill during Committee hearings. Stéphane Dion is the federal Minister of Intergovernmental Affairs. He testified before the Legislative Committee on February 16, 2000. Joseph Facal is the Quebec Minister of Intergovernmental Affairs. He testified on February 24. Claude Ryan is former editor of Le Devoir and Leader of the Liberal Party of Quebec. He testified on February 2. Patrick Monahan is a Professor at Osgoode Hall Law School in Toronto. He testified on February 21. Gordon Gibson is a Senior Fellow in Canadian Studies at the Fraser Institute in Vancouver. He testified on February 2. For the full text of all testimony see the parliamentary internet http://www.parl.gc.ca.



Stéphane Dion MP: If I had to summarize this bill in a single word, it would obviously be "clarity". If I had to come up with a second word, it would be "reasonable".

Secession can be negotiated only on the basis of a clear secession question. It is completely reasonable not to consider entering into such serious negotiations on the basis of a slight majority. There needs to be a clear majority. It would also be entirely reasonable to expect that these negotiations, if they were to be undertaken, would comply with the constitutional framework of the country in question. That is what the Supreme Court said, and that is what the clarity bill says. It is the characteristic of reasonableness in this bill that explains why the efforts of the Quebec government and the Bloc Québécois to try to arouse emotions and inflame the debate over this bill have failed. Que-

beckers, on the whole, have found it to be reasonable and they are not afraid of clarity; in fact, they want clarity.

The prospect of dividing up the country implied in the possibility of secession is already worrisome enough without allowing for an approach that would be outside the law and that would lack clarity. It is therefore first and foremost as a Quebecker that I am proud to be the minister sponsoring this bill, because an attempt at secession done in confusion outside the legal framework would have very negative effects in Saskatoon, Winnipeg, Vancouver, Toronto, and Halifax, but the consequences would be much worse in Tadoussac, Chicoutimi, Montreal, Quebec, and Trois-Rivières.

This bill is pro-Quebec, this bill is pro-democracy, and this bill is good for all Canadians. One of the reasons that this bill is reasonable is that it is based on the opinion expressed by the Supreme Court of Canada on August 20, 1998. It said that in order for there to be an obligation to negotiate secession, there must be a clear majority expressed in favour of secession in response to a clear question, and once there was an obligation to negotiate secession, the negotiations must be carried out within the constitutional framework, with everything on the table and nothing decided in advance.

One of the reasons that we need a bill in addition to the Supreme Court opinion is that the current Quebec government has refused to commit itself to not holding a referendum and the Premier of Quebec has refused to commit himself to abiding by the Court's opinion.

> ***It is entirely reasonable for a modern democratic State not to consider entering into negotiations on breaking up the country unless there has been a clear question on secession.***
>
> *Stéphane Dion*

His interpretation is, of course, an incomplete one. He starts the sentence without finishing it. He says: "They are obliged to negotiate". He does not complete the sentence, by adding "where there is a clear majority based on a clear question and within the constitutional framework". The rest of the sentence is in the clarity bill. This concerns you as members of this House. Why, because it says "they will be obliged to negotiate", the "they" involves you.

The Court talked about political actors, participants in the federation that would have to assess the question and the majority and, if necessary, negotiate. I am sure that everyone will recognize that these actors include the House of Commons and the Government of Canada.

In the propaganda that the Quebec government and the Bloc Québécois have been disseminating widely, they claim that the federal authorities and those elected in the federal election may not in any way try to determine whether the question is clear and whether the majority is clear. Their argument is that here in the House of Commons elected representatives from Quebec are in the minority.

Two things need to be said in response to that. We Quebeckers are also Canadians and we have the same rights as other Canadians. Our federal Parliament cannot walk away from its responsibilities towards us without ensuring that that is what we want. That is what the Court told us to do, in any case, and it is what we have a moral obligation to do and what would happen in any other country. I imagine that the Parliament of a country would never agree to let one quarter of its population lose its rights in the country without ensuring that that was what those people wanted.

There is a second thing that must be said as well. Other Canadians are not strangers to us in Quebec. They are our fellow citizens. If we had an obligation to negotiate because the will to secede had been clearly expressed, the negotiations would involve dividing up their country, since Quebec is part of their country and the loss of Quebec would have serious consequences for them, in the same way that the loss of Canada would have serious consequences for us.

They therefore need to ensure that other Canadian voters, like those in Quebec, who are their fellow citizens, recognize that there is a clear desire for secession before entering into such serious negotiations.

Let us talk about clarity. This debate over clarity was not invented by the Supreme Court opinion or by the clarity bill. The debate has been going on since the beginning of this whole affair.

In 1980, there was no agreement between Mr. Lévesque and Mr. Trudeau on what the repercussions of the referendum would be. Mr. Trudeau had said to Mr. Lévesque during one of his famous speeches in the referendum campaign. If you knock on the door of sovereignty-association, there will be no negotiation possible.

Mr. Trudeau was excluding any possibility of negotiations in 1980. One cannot talk about changing the rules of the game, since there was no agreement on the rules at that time.

In 1995, just after the referendum, when he was describing the campaign in the House, Mr. Bouchard expressed indignation at the fact that, in his opinion, Mr. Chrétien had reserved the right "to not respect a referendum decision in favour of sovereignty if the yes side won with a slim majority".

There was no agreement in 1995. It is wrong to invent things that do not exist. There has not been any agreement and, after a yes vote, there would have been no more agreement on what that Yes meant.

Let us start with the clarity of the question. The Supreme Court tells us, in paragraph 151, that in order for a question to be clear, it must be clear that there is a will to no longer be part of Canada.

The way to be sure of the existence of this will to no longer be part of Canada is to ask a question only on that. If you ask a question that covers other areas as well, you make it confusing. Partnership is not the same idea as secession and should not be included in a question on secession. That is what the clarity bill says, by giving effect to the court's opinion.

The second reason that partnership should not be in the question is that, in addition to being different from secession, people do not know what this partnership is. They have had 30 years to define it.

Since 1997, despite all the meetings that the Bloc Québécois has held, all of them inconclusive, they have not been able to put any flesh on the skeleton. They also threw in the towel and said that it would be decided later, during the negotiations. Quebeckers were invited to vote on something, but no one knew on what. It is easy to understand why they do not know. How can 25% of the Canadian population break up the country? They come right back and say: "Guess what, we will have a 50% share in joint institutions". But if it is not 50% in joint institutions, if it is less than 50%, the Bloc Québécois should say so. That is no longer independence. If you have a partner that always holds the majority in every decision, you are still a minority. It is therefore impossible to be in a partnership when you are an independent country, unless it is in Europe, where there is a partnership of a number of countries. But in a dual partnership, it is 50% in joint institutions. In Canada, there is no support for that idea. The Ontario premier has said that he did not see why Ontario would count for less than Quebec in this partnership and why Canada would impose an additional level of government.

Now let us talk about the majority. The Court said over 13 times that the clarity of any future majority would have to be assessed. It used the expression "clear majority" 13 times. So this notion is important, and not something this House could deal with lightly. The assessment would involve a very serious decision, and the Court tells us not to try to establish this clear majority in advance.

I quote paragraph 153 of the Court's opinion:

> It will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken.

This is very wise advice from the Court. Today, when Canada is united and calm, it would be very difficult to determine what would be a clear majority in other circumstances, and to put oneself in the place of politicians dealing with the disruption that would inevitably follow a Yes vote.

The bill provides that, in the event of a majority in favour of secession, the first actor that would need to assess the clarity of that majority would be the separatist government itself. The government would receive the result, determine whether it had a majority, and then it or its legislative assembly would determine whether to invite other partners in the federation to negotiate separation. The separatist government would be responsible for that assessment.

Only after the separatist government had concluded that a clear majority existed and had invited the other participants in the federation to negotiate secession would the House of Commons proceed to make its own assessment. That is the process established by the clarity bill. No one can seriously claim that the Court placed such emphasis on the notion of a clear majority only to invite the House of Commons to accept, without further review, a majority of 50% plus one.

It would be incumbent upon us to assess clarity for ourselves, and that is not something anyone should question. I am quite surprised at the line the Quebec government and the Bloc are taking, which is that the 50%-plus-one rule is sacred, and that to question it under any circumstances is undemocratic. Let us take a closer look. The Reform Party is requiring two-thirds of its voters in order to have a dissolution of its party. The Quebec Civil Code requires a three quarters majority to terminate co-ownership because once a partnership is dissolved, it cannot be subsequently resurrected just by voting on it. Who would vote, since the partnership no longer exists?

The same holds true for a country. After a No vote, our separatist leaders may well say "See you soon!" or "See you next time!" after every referendum defeat, and come back with another referendum. In fact, that is exactly what they are doing—they have announced a third referendum, with no indication it would be the last.

But after a Yes vote, those who voted No could not say "See you soon" or "See you next time" if Yes led to separation. Only a Yes can give rise to an irreversible change that is binding on future generations. So for this very fundamental reason, there must be a clear majority before negotiations are undertaken on the possibility of affecting such a change, to give the action legitimacy that will hold for future generations, and to ensure that there is sufficient clarity to endure a difficult period of negotiations.

Indeed, Quebec's Referendum Act states as much. The White Paper contains the following passage:

> The fact that referenda are a consultation makes it unnecessary to include provisions about a required majority or a level of voter participation.

A referendum is a consultation. After a consultation, the political authorities assess the result and make decisions accordingly. This is the law of Quebec and the federal law of Canada.

I have raised these arguments many times but the fact remains that neither the Bloc nor the Quebec government has ever refuted them. Instead, they have called the Government of Canada undemocratic by repeating that it made voters unequal.

Equality of voters means that each voice in worth one unit when the votes are counted. It is up to political authorities to determine what action to take on the basis of the vote. That is what *Quebec's Referendum Act* says. Perhaps we should ask the Bloc and the separatist government if this Act is undemocratic as well.

They say that the 50%-plus-one rule is universal. Aboriginal populations voted in 1995 to stay in Canada by majorities of over 95%. And yet the separatist leaders say they can ignore such referenda. So is the 50%-plus-one rule more universal for some people than for others?

At least the Reform Party is coherent. The Reform Party said if 50% plus one is the rule to get out of Canada, it should be the rule to stay in Canada. It's a coherent argument, but it's a completely irresponsible one. It's obvious that for such a tremendous decision, 50% plus one does not fit.

The Economist joined the many others in saying that secession "should be carried out only if a clear majority (well over 50%—plus one of the voters) have freely chosen it." After all, if 50% plus one is a clear majority, what would be an unclear majority?

How can one limit the risks of disagreement on a clear majority? The government proposing secession has only to avoid holding a referendum until it is guaranteed to win it. Given the means at our disposal, that guarantee would come from various indicators, such as polls yielding clear and stable majorities in favour of secession or support for secession across the political spectrum. Indeed, this is what has happened elsewhere in the world.

With the exception of colonial situations which lead to referenda leading to secession, referenda have not been held to determine whether one half of the population wanted to separate. Indeed, these referenda have always yielded majorities of over 75%.

So Mr. Bouchard is quite right not to want to hold a referendum until he is guaranteed to win it. I do not blame him for that position. However, he must also acknowledge that the wording of the question ought not to be part of his arsenal of winning conditions. He must not word a question which may give him a win; the wording of a question must ascertain what the people want: "Do you want to leave Canada to live in an independent country, namely Quebec?" That is the question. That is my first point.

My second point deals with the timing of a referendum. The Premier alone may decide when to hold one; it is his prerogative. But the timing of a referendum must not be based on tactical considerations which would be based on a moment when emotions were running high in order to get a win. The timing of a referendum must take into account the interests of everyone involved and it must happen at a time when a clear majority would vote in favour of separation.

It would be morally wrong for a democracy to seek a permanent decision to settle a temporary situation. This is not in the public interest.

The public interest lies in knowing that the evening a referendum is held, if unfortunately there is to be another one, a Yes vote would mean one thing only, which is that Quebec should be an independent country with its own seat at the UN, as independent countries are entitled to, distinct from Canada. Anyone disagreeing with this premise must be included in the No side.

This would be the ideal situation, because if some people vote yes but do not share that view, it will not be long before the separatist movement breaks down during negotiations on secession. And if this majority were to disappear during negotiations, we would all find ourselves in a useless and dangerous impasse.

I would now like to address the third section of this short bill, which deals with the legal framework of negotiations.

The Supreme Court has confirmed that negotiations on secession would have to take place "within the existing constitutional framework" (paragraph 149), and would have to respect the principles identified by the Court (paragraph 90): federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.

One practical consequence of this is that the Government of Quebec could not determine on its own what would be negotiable and what wouldn't. To quote the court:

> It "could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties."

Instead, it would have to negotiate in such a manner as to address the interests "of the federal government" of Quebec and the other provinces, and other participants,

as well as the rights of all Canadians both within and outside Quebec", and of Aboriginals, on all matters, including division of the debt and the issue of borders. Here again, the clarity bill is completely in keeping with the Court's opinion.

The Government of Quebec and the Bloc do not want borders to be included in the list of issues to be negotiated. On this point, the Court noted in section 96:

> "Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec."

In a legal opinion commissioned by the Bloc, Professor Alain Pelet confirmed that the Supreme Court's opinion included the issue of borders among the issues that could be negotiated. But there is no certainty on that point. If nobody makes the request to do so, there would be no reason to negotiate borders. However, if there is a clear demand to do so, and if the demand is at least as clear as the demand for secession, it would be very difficult and probably immoral to ignore the request.

But there's no guarantee that this demand would be addressed. As it now stands, the Court said that nothing shall be determined in advance. What we know is that it is possible that borders may be redefined within the framework of a separation agreement. The Government of Quebec cannot hide its head in the sand; only last week, Aboriginal leaders reiterated that it would have to face up to that issue.

However, the clarity bill in line with the Court's opinion, does not reiterate the position that the Aboriginal peoples living in Quebec would have the right to remain integrated with Canada if they so desired. There is no guarantee of that.

In 1980 and 1995, Quebec's Aboriginal populations indicated their desire to remain in Canada. We know the problem will probably crop up again. And there may be many other potential bones of contention. Negotiations on secession necessarily entail serious and real risks of disagreement, both between governments and within populations. Neither of the clarity bill nor the Court's opinion invented nor created these disagreements. They are part and parcel of any claim to secession. The clarity bill limits the potential for disagreement as much as possible by insisting on the rule of law, clarity, deliberation and consultation.

Let us not forget that this bill only applies to the House of Commons and the Government of Canada. We do not interfere in the responsibilities of the other political actors in this federation. It would be for the legislative assembly of the province to decide on the question. It would be up to the other political actors, including the other provincial governments and legislative assemblies, to decide the way they want to assess the majority, the question, their participation in the negotiations, and so on. We cannot decide for them.

What we are saying to them is the following. We will take seriously the question, if it's clear or not; we will take seriously the majority, if it's clear or not; we will take seriously our responsibilities to all Canadians if we have to negotiate; and we will take into account openly their points of view. It's up to them. We hope we will work with the same mind, the same respect for the legal order of Canada.

In my view, the bill establishes clarity as much as possible given the circumstances. Secession remains a black hole full of uncertainty. It is important for us to know well in advance that negotiations would be held if there was clear support for secession, but that no negotiations would take place if there was no clear support. The House of Commons and the Government of Canada are clear on that point: this is the basic principle and negotiations would respect the rule of law if they unfortunately were to take place.

The Government of Canada has chosen to clarify the situation at this point, while emotions are not running high and in the absence of a referendum campaign. This is the right of Canadians. Secession is a black hole. The clarity bill merely provides us with the best flashlight available, with the best batteries.

Joseph Facal, MNA : On October 30, 1995, 2,308,360 Quebeckers voted Yes in answer to the question you now know so well. Today the federal government would have you—the 301 elected members of the federal Parliament—wield the power to decree that these 2,308,360 people did not understand the aforementioned question and that they must therefore be protected from themselves. "Father, forgive them, for they do not know what they are doing." That is the Bill C-20 message being sent to Quebeckers.

Thus it is believed this Canadian disorder may be swept from sight, while ignoring the fact that more Quebeckers voted Yes than there are voters to be found in Saskatchewan, Manitoba, Newfoundland, Nova Scotia and Prince Edward Island, all rolled into one. C-20 will not sweep sovereignty away, nor the idea that Quebec will one day become a country. How simplistic! Yet as the Government of Quebec stands represented here to-

day, it acts in the same capacity as previous Quebec governments have done, regardless of their constitutional options, as a government deriving its legitimacy from the National Assembly, the sole depository of the Quebec people's right to choose their political status by themselves.

Quebec's existence as a political entity dates from before the creation of the Canadian federation. Quebec exercised its right to freely choose its political status when it contributed to the formation of Canada in 1867. This must always be borne in mind.

By adhering to this federation, the people of Quebec neither renounced its right to choose another political status nor sought to subject its destiny for all time to a Parliament of which the majority of members originate from outside Quebec. Yet clause 1 of Bill C-20—which indirectly dictates the referendum question—allows a majority of MPs from outside Quebec to rule that a question is not clear enough to be acted upon, despite the will of the National Assembly and of the people who, having deemed the question clear, would have answered Yes to it.

Some will still maintain that the Quebec National Assembly remains free to ask any question it wishes. Not so! It is not so because C-20 renders the 1980 and 1995 questions unacceptable.

In clause 2 of the bill, the federal Parliament invests itself with the power to decide whether the majority obtained is inadequate, even if the people of Quebec were to accept the results and rally to them.

Finally, clause 3 confers upon the legislature of any other province an absolute veto on the future of the Quebec people through the amendment formula contained in a Canadian constitution of dubious legitimacy, since it was imposed on Quebec and never ratified by a Quebec government. Three clauses, three schemes for derailing a democratically expressed determination.

Bill C-20 also questions the universally accepted rule in democracy of 50% plus one, despite the fact that all referendums held in Canada to date have been based on the very same rule. Canada has also recognized many countries created as a result of referendums held on the basis of this rule, which in fact is the standard rule by which the United Nations operates when it supervises referendums on accession to sovereignty. Imposing any other rule would be tantamount to giving more weight to a federalist vote than to a sovereignist vote, which amounts to discrimination on the basis of political opinion. This would compromise the principle of the equality of voters.

Bill C-20 states that Quebeckers must be protected against their government but also against themselves, because they would be unable to weigh the issues set forth in a referendum question. By the same token, it becomes more important to take into account the opinion of a Manitoba or Saskatchewan MP, who would know better than the Quebec electorate what is clear and what is not.

> ***Bill C-20 is unacceptable for so many reasons: this bill seeks to subject the people of Quebec to a federal trusteeship; it negates basic democratic principles; it is an insult to the intelligence of all Quebeckers; it installs a system of arbitrary power; and lastly, it bears within itself the seeds of bitter disillusionment for you.***
>
> *Joseph Facal*

Members of the federal Parliament, do you realize what a ridiculous situation the authors of C-20 have created for you? Do you realize that you are on the eve of enshrining a legislative principle by which the judgment of elected members will be deemed superior to that of those who elected them?

Bill C-20 is also an insult because it is a grotesque distortion of the Supreme Court's opinion. Nowhere in the reference does the Supreme Court confer upon the federal Parliament the right to oversee the content of a referendum question authorizing Parliament to rule upon the clarity even before the National Assembly has adopted the question. Nowhere in the reference does the Supreme Court give the federal Parliament the right to impose a question that must expressly exclude any reference to an offer of partnership. Nowhere does the Supreme Court give authority to the federal Parliament to determine *a posteriori* and of its own accord the required majority. Nowhere does the Supreme Court give authority to the federal Parliament to unilaterally dictate the content of post-referendum negotiations.

The federal government played with fire when it made its reference to the Supreme Court. It got burned, because what it got was an acknowledgment of the fact that the territory of Canada can be divided based on provincial territories, a recognition of the legitimacy of the sovereignist option, the creation of an obligation to negotiate on an equal footing, and an admission that, in the case of bad faith on the part of the federal government, international recognition of a sovereign Quebec would be facilitated.

Today, the federal government is asking you, members of Parliament, to blot out its mistake by rewriting the opinion. The sponsor of Bill C-20 has also strongly em-

phasized respect for the rule of law. Yet the true rule of law precludes resorting to arbitrary power. As it stands, Bill C-20 is a monument to the use of arbitrary power. It aims to empower the House of Commons to declare a question unclear on the basis of "any other views it considers to be relevant". Whose views are we talking about?

Likewise it would empower you to assess a requisite majority in light of "any other matters or circumstances that you may deem relevant". What are the criteria for relevance? What will the new rules of the game be if the 50% plus one rule no longer stands? Fifty-five percent, 60%, 65%? Faced with such random guidelines, how are citizens to conduct themselves? The message that Bill C-20 sends to electors is that votes only count when you decide to recognize them.

Bill C-20 creates illusions: that the territory of Quebec would be divisible and that votes may be counted according to ethnic, linguistic or geographic criteria. This is just plain false.

On the day Quebeckers decide to form a new country, Bill C-20 will not stand in their way. You are deluding yourselves if you think otherwise. The Soviet Union tried this in 1991 and the rest is history. Not only is Bill C-20 unacceptable for Quebec, but it is also unacceptable for all parties represented in the National Assembly.

The Quebec government does not recognize any legitimacy on the part of the federal government when it comes to such interference in Quebeckers' right to decide for themselves what their future will be. The National Assembly will adopt the question it wants to adopt. As in the past, the Quebec people alone will decide what constitutes clarity. The victorious option will be the one that wins 50% plus one of validly expressed votes. Who fears Quebeckers' democratic determination?

I remain firmly convinced that in the wake of a positive result, voices will resound throughout Canada for respecting Quebeckers' decision and the need for negotiations carried out in good faith in the best interest of all parties.

Claude Ryan: I have always attached the utmost importance to the defence and promotion of Quebec's interests, the success of Canadian federalism and respect for democratic principles. The reason I am before you today is because Bill C-20 concerns me with regard to those three elements.

From the outset, I must recognize that preserving unity is a major responsibility of the central power in any federal system of government. If I express some criticism regarding Bill C-20, it is not because I deny the federal government any responsibility with regard to the possible secession of Quebec, but rather because the bill is generally based on an attitude of distrust and fear which, in my opinion, does not reflect the best the Canadian spirit has to offer. In the bill, this attitude results in certain proposals that are highly questionable in light of the federal principle and the democratic principle and that could poison the relationship between Canada and a large number of Quebeckers.

As for the requirement for clarity in the referendum question, clause 1 of the bill seems to go against the federal principle. Under our system, each level of government is deemed sovereign within its own jurisdiction. Generally it means that each level of government, as long as it acts within its own jurisdiction, can be free from interference from the other level of government.

In the third "whereas" of the bill, the federal government, in accordance with this principle, recognizes that "the government of Canada is entitled to consult its population by referendum on any issue and is entitled to formulate the wording of its referendum question". However, it contradicts this statement by including in the bill a clause giving the Parliament of Canada the power to interfere directly in the referendum process at a stage where, according to the federal government itself, that process is under the National Assembly's jurisdiction.

The authority to determine the clarity of the question that would be given to the Parliament of Canada would mean it would obviously interfere with an ongoing referendum campaign. Such interference would be all the more improper as it might result, even before the vote took place, even before the people had their say, in a formal order from Parliament to the federal government not to enter into any negotiations on the result of a possible referendum, no matter what the result might be.

The bill sets several criteria, two of which should guide Parliament when determining the clarity of the question. By enshrining such criteria in an act, Parliament and the federal government would interfere, at least indirectly, with the wording of the question. This is no longer true federalism, but a trusteeship system.

From the standpoint of democratic principles, there is another major problem with clause 1. It could very well be in fact that a House of Commons' resolution stating that the question is not clear enough was approved by a majority of members from outside Quebec, whereas a majority of members from Quebec would hold the opposite point of view. Thus, even before the referendum, the

federal government would be prohibited by a majority of members from outside Quebec to enter into any negotiations whatsoever with the Quebec government the day after a yes vote in a referendum on sovereignty. Indefensible in terms of democratic principles, the situation thus created might be untenable in political terms. It might even push Quebec public opinion in a direction opposite to the one the federal government or Parliament had intended.

> ***If the National Assembly has the right to consult its population on a proposal to secede, it must be able to do so free from any constraint or interference from another parliament.***
>
> *Claude Ryan*

Still in political terms, it would be unrealistic and dangerous for the federal government to have its hands tied by a resolution from Parliament as to what course of action to follow the day after a yes vote in a referendum on secession. Indeed, no one can predict with any certainty what kind of situation would prevail at the time. Instead of having its hands tied by constraints defined in a totally different context, the federal government should have enough flexibility to set the proper course of action in such a situation.

In addition, clause 2 opens the door to a denial of democracy. It gives Parliament the authority to determine, the day after a yes vote in a referendum on sovereignty, the validity of the result, and I see nothing wrong with that. However, the bill goes on to state that Parliament shall take into account the size of the majority of valid votes cast, the percentage of eligible voters voting in the referendum, and any other matters or circumstances it considers to be relevant.

The first criterion is self-evident. However, the other two might allow Parliament to interpret the result in a manner that might negate or weaken the scope of a majority result in favour of secession. Without saying so explicitly in the bill, the federal government maintains, as we all know, that a majority of 50%-plus-one in favour of secession would not be sufficient for it to find the result acceptable. This position per se is not unreasonable. Indeed, there are in Canada many exceptions to the rule of the arithmetical equality of the vote which are not considered a breach of democratic principles. For instance, currently the Party Québecois holds the absolute majority of seats in the National Assembly, but it only got 43% of the votes in the 1998 elections. The division of the electoral map results too in many distortions with regard to the rule of the arithmetical equality of the vote. The fact that such distortion does not create any major rift is due to the existence of a consensus among the population and the major players to the effect that the practical benefits found in our system of representation, however imperfect it might be, far outweigh the contradictions it creates.

In this case, we are dealing with a referendum, not an election. If my memory serves me right, the 50% plus one rule has always been applied to the result of any referendum held until now. In view of what I have just said, one might rightly argue that it should be changed in the case of a referendum on secession. However, the Parliament of Canada would be ill-advised to try to unilaterally impose its point of view on this matter before a referendum. As long as it is acting within its own jurisdiction, it is up to the Quebec National Assembly to make such a decision. If one wants to change this particular rule, action should be taken at this level, either through negotiation, or through pressure on the public opinion. It would be just as ill-advised for Parliament and the federal government to take it upon themselves to change this voting rule unilaterally after a referendum. If it is reluctant to do it before, it certainly should not do it after, for obvious reasons: there would be two different sets of rules, at two different stages of the game, which would be a total contradiction in itself. This is precisely what this bill intimates.

In conclusion, I wish that any provision that could lead to the unwarranted interference of the Parliament of Canada in the referendum process, and the unilateral imposition of a new rule to interpret the referendum result, be removed from the bill. However, I would find it quite appropriate for Parliament to demand of the federal government, by law if it so desires, that, in the event of a yes vote in a referendum on sovereignty, it promptly convenes a meeting of Members of Parliament, provincial and territorial premiers and aboriginal leaders to consider the proper course of action.

Finally, I submit that rather than multiplying confrontations which drive the parties further apart instead of bringing them closer, and which help create a distorted image of democracy in Quebec, it would be more constructive for the federal government and Parliament to take advantage of the relative lull we are currently enjoying to put the renewal of Canadian federalism back on the agenda in keeping with the many requests by Quebec and the other partners in the federation.

Patrick Monahan I want to deal with the following issue that has already been raised by Mr. Ryan and other witnesses: is the principle of Bill C-20, namely the principle that the House of Commons should pronounce on the

clarity of the question and should also pronounce on the majority obtained in a referendum, appropriate in a federal society?

Mr. Ryan suggested this was contrary to the federal principle, because the matter of a referendum in Quebec on sovereignty is a matter of exclusive provincial jurisdiction, and it is not appropriate for the federal government to interfere in a matter of provincial jurisdiction; therefore this bill is a violation of the federal principle.

Let me say if the referendum question in issue were dealing with a matter in exclusive provincial jurisdiction, I would 100% agree with those comments. That is to say, if the Province of Quebec wishes to hold a referendum on a matter falling within exclusive provincial jurisdiction—such as, for example, whether to increase or reduce taxes at the provincial level in Quebec, or whether to amalgamate certain municipalities or not in the province of Quebec—then the House of Commons, in my view, has no business pronouncing on the clarity of such a question. That is a matter for the Quebec National Assembly to determine.

The question, however, is whether a question dealing with the secession of a province from Canada deals with a matter within the exclusive jurisdiction of a province under the Constitution. I would have thought, that the answer to that is no.

As the Supreme Court of Canada clearly stated in its decision on the reference regarding the secession of Quebec is that secession implicates the interests of all Canadians, it implicates the interests of the Government of Canada, and it implicates the interests of other provinces, who are equal partners along with Quebec in Confederation. It implicates the interests of aboriginal peoples, who have constitutionally protected rights under our Constitution.

Therefore, it is not a matter of exclusive provincial jurisdiction. It is in fact a matter of interest to Canada as a whole, as well as to the other provinces, and it is therefore quite appropriate in those circumstances—and indeed, as the Supreme Court of Canada said, it is necessary—for the federal political actors, including the House of Commons and the Government of Canada, to pronounce themselves on issues such as the clarity of the question and whether a clear majority has been obtained.

Indeed, if you look at the Supreme Court of Canada judgment, you will see that the Court makes that quite explicit. It says there is an obligation on political actors and it defines those political actors as not simply being the Province of Quebec. It talks about the provinces and the federal government participating in negotiations. It says there is an obligation on those political actors to decide whether a question is clear and to decide whether a majority is clear.

The Supreme Court of Canada says that is something that must be decided at the political level, not at the legal level. It does not say those are issues for one political actor to determine, namely the Province of Quebec. It says that is a matter for political actors to determine, these political actors in Canada as a whole.

Indeed, it seems to me that in his own remarks todayMr. Ryan in fact confirmed that this is not a matter of exclusive provincial jurisdiction. He said that after a referendum, it would be appropriate for the Government of Canada to respond to whether there had been a clear question and whether there was a clear majority. That can only be because it is not a matter of exclusive provincial jurisdiction.

Let us go back to the issue about raising or lowering provincial income taxes in Quebec. The Government of Canada would have no more business to pronounce on the clarity of the question after a referendum on provincial income taxes than it did before, because that is a matter of provincial jurisdiction. So the argument that was raised earlier, it seems to me confirms the opposite of the proposition he put forward, which is that it is not a matter of exclusive provincial jurisdiction; it is a matter of interest to Canada as a whole.

What, then, of this argument that although it is appropriate for the House of Commons to pronounce on a question and to pronounce on the majority, this should only happen after the fact rather than before? It seems to me that this again does not withstand scrutiny.

First of all, if the House of Commons as a political actor and if the Government of Canada as a political actor have the right to make a determination independently as to the clarity of a question and the clarity of a majority, then surely they also have the discretion to determine when they are going to make that determination. The determination of whether it's in advance of the referendum or after is something for the Government of Canada to determine in its discretion and for the House of Commons to determine in its discretion. As the court said, it is an independent judgment to be exercised.

In other words, once you acknowledge that there is an independent discretion to be exercised, then the decision as to the timing of that discretion—that is to say the timing of when the House of Commons would pronounce—is a matter for the House of Commons to determine and not exclusively after the fact.

Finally, it seems to me that it is entirely appropriate for the House of Commons to make this pronouncement, because this permits the opposition parties, as well as other members of the House, to participate in a debate on the clarity of the question. It is not a matter to be determined solely by the government in the secrecy of the cabinet room. There's a debate required in Parliament on the

clarity of the question, just as there will be debate in the Quebec National Assembly on the clarity of the question and a pronouncement made in the Quebec National Assembly on that issue.

Again, we do not need to wait until after the referendum has been held to make a determination as to the clarity of that question, because the wording of the question will be known. Indeed, as happened in both 1980 and 1995, the view expressed by the opposition party in the Quebec National Assembly was that the question was not clear.

> ***It seems to me that this bill is entirely consistent with the federal principle. It is a good-faith attempt, in my view, to give expression to the judgment of the Supreme Court of Canada.***
>
> ***Patrick Monahan***

I think the bill is an appropriate bill, and indeed a necessary one. I would simply say that I believe it enhances democracy to have a pronouncement in advance of a referendum on the clarity of a question and not to wait until after the fact.

In other words, if the Prime Minister and the government and the members of the House of Commons have a view before a referendum as to whether the question is clear, surely democracy suggests that this view should be communicated to the electors in Quebec, who will have an opportunity, therefore, to have in advance of the referendum an understanding of the views of other participants in Canada on this important issue.

Gordon Gibson: I begin with the presumption that this bill is well-intentioned, intended to be for the advantage of Canada and on the surface it is unobjectionable and even marginally helpful. It is also unquestionably popular in the Rest of Canada and therefore very difficult for politicians from the Rest of Canada to oppose.

But on closer examination, and as with most things constitutional, I believe that this bill, if passed, will provide a classic example of the law of unintended consequences, most of them negative. Specifically, in my view, this bill is unnecessary, will be ineffective in the real world, increases dangers of miscalculation by Quebec voters, stands as an excuse for failure to take genuinely constructive action on the unity file, is polarizing, and, for the first time, provides for separation of a province in law with dangerous potential consequences. In consequence, and after arguing the above case, my advice is simply to declare this a useful debate and let the bill die.

First, the bill is unnecessary. It adds nothing useful to the Supreme Court decision, and it clearly adds nothing to the existing powers of Parliament.

Second, the bill will be ineffective in the real world. I ask you to imagine that this bill had been law at the time of the referendum in 1995. Imagine that the referendum has passed by 50% plus 1 and you are Paul Martin telling a New York banker on the phone at midnight, when the votes are counted, that there is no problem, we have a *Clarity Act*. Imagine the politely stifled giggle at the other end and the cry of "sell the loonie!" as the phone is hung up. In other words, 50% plus 1 is important, no matter what this bill says.

Third, the Act increases the dangers of miscalculation by Quebec voters. I have argued to you that 50% plus 1 on any sovereignty-tinged motion is an item that is important and that changes the world. Ask yourself about the strike-vote scenario. This bill will make it easier for the average Quebec voter to say never mind, the federal government will make sure as a result of the *Clarity Act* that nothing happens, so I can afford to support my negotiators by giving them a strike vote. And yet, I argue that at 50% plus 1 the black hole opens, and it is more likely to open with the comfort of Bill C-20.

Fourth, the bill stands as an excuse for failure to take genuinely constructive action on a renewed federation. Several witnesses before this committee have deplored the lack of a plan A (reform of the federation). Every poll for a generation has shown that this is what two-thirds of Quebeckers want, and I have to ask, why cannot Quebeckers – and British Columbians, for that matter – hear some dialogue on plan A? The intransigent stand of Ottawa on plan A is boxing in the Liberal Party of Quebec, and it is boxing in federalist nationalists. It is even boxing in some of those sovereigntists who would just as soon see a renewed federation. Why does this kind of dialogue have to wait. Why cannot it be brought forward from this place?

Fifth, the bill is polarizing, in two ways. It is polarising the Rest of Canada versus Quebec and it is polarizing inside Quebec, with the plan B folks versus the sovereigntist folks. Both polarization's, in my view, harm Canada.

I would like to define polarization, because in British Columbia we have had polarized politics since 1933 with so-called free enterprise versus so-called socialism. In this kind of atmosphere, the middle ground is frozen out, moderate options are denied, and as the sides change from one extreme to another, you get a serious and recurring policy lurch, which is not a good way to run a government. There's a concentration on win-lose, not on win-win.

When one side gets in, the argument goes something like this. There was what we called The Coalition in British Columbia during the 1940s. The coalition was the Liberals and the Conservatives. They became extremely arrogant as a political party. They were set up to keep the NDP out and they won by massive margins. My old boss, Art Lang, with whom I first came to Ottawa, used to tell this story. There was a Coalition minister who would get up on the stage during election campaigns and say, "The issue is simple. You will have us or you will have worse." That's what you get in polarised politics. Does that sound like "You will have plan B or you'll have worse"? I think it does.

So once again, the middle ground, which is co-operation, gets frozen out. Inside Quebec, the polarisation is plan B versus sovereignty. It is a dilemma for federalists. I have visited Quebec three times, at some length, since this bill was introduced. The federalists do not dare propose constructive change in the federation for fear of rejection and therefore a loss of credibility. It is a dilemma for sovereigntist nationalists who do not dare relinquish the only real lever they have and it's a dilemma for both in the sense of not daring to co-operate.

I hope that all of this friction is what I call an unintended consequence, because any measure that unnecessarily sets one Canadian against another is bad, and that surely can't be intended – but the above polarization is a real and observable phenomenon already.

My final point is that the bill, for the first time, provides for secession in the law of Canada, with dangerous potential consequences. What is lawful becomes respectable. During my lifetime, the following were all illegal: abortion, gambling, homosexuality, and Sunday movies. The first three were not only illegal, they were seriously frowned upon. All were legalised. All became mainstream and respectable.

Was the law to some extent following society? Yes. But did change in the law accelerate the trend to respectability? Without doubt. And Bill C-20, I say, will help to make notions of secession respectable outside Quebec.

British Columbia has a small secessionist movement. At last polling, about 15% thought the province should consider the secessionist option. This is consistent with 130 years of British Columbia history. The Nova Scotia legislature did vote once for secession. The British Columbia legislature did so twice.

British Columbians love Canada, but they don't like Ottawa. On virtually every file where the national capital is involved it is considered part of the problem, not part of the solution. Ottawa only does four important things in British Columbia. First, Ottawa extracts about $20.5 billion annually and sends about $16 billion back, including paying our share of the military and embassies and so on. This is a net loss of about 4% of our GDP from a province whose GDP per capita has fallen to only 95% of the Canadian average. We are no longer a have province.

> ***Bill C-20 adds nothing useful to Canada. On the other side of the ledger, it gives some a false sense of security. It polarizes and thereby poisons the civil dialogue. It sets free unpredictable forces outside of Quebec that may return to haunt us. This is a bill best forgotten.***
>
> *Gordon Gibson*

Financials aside, Ottawa operates three major programs in British Columbia: aboriginal, fishery, and immigration. All are disasters. And of course, under our current parliamentary structure, British Columbia has virtually no clout in Ottawa as long as we are fractious enough to elect opposition members. Now, notwithstanding our view of Ottawa, British Columbians love Canada, but those ties, I suggest to you, are ties of sentiment and inertia, not practicality. British Columbia could afford independence far more easily than could Quebec. The *Clarity Act* will apply as much to British Columbia as to Quebec, but in British Columbia clarity as to wording would be no issue.

Bill C-20 adds nothing to Canada, not even in remote theory, but it subtracts something. It makes separation lawful and therefore puts it on the road to respectability. When you pass this bill, as I assume you will do, you set a time bomb ticking on Canada's west coast that we will all have to try to control – but why do you want to start the clock on the respectability of separation?

Editors Note: At the time this issue went to press the Clarity Bill had been passed by the House of Commons but was still under consideration in the Senate.