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SECESSION DOES NOT SUIT THE MEDIAN VOTER

BY STÉPHANE DION

The notion of the "median voter," which the American economist Anthony Downs popularized at the end of the '50s, appears to be especially appropriate to the context of the Quebec referendum.

Downs's concept relies on two rather down-to-earth observations. First, he argues that, in most concrete situations, voters hold moderate and centrist views. This is true also in the centre of the political spectrum where one finds the undecided—those whose opinions are most likely to change.

Downs also observes that when a party runs in an election, it tones down its ideology in order to reach the average and undecided voters who play a pivotal role in the election. As a consequence, the policies of competing political parties often become almost interchangeable.

The first idea perfectly applies to the context of the Quebec referendum. The second idea appears less suitable. Although many Quebec voters express their preference for a centrist solution, they are required to side with only one of two very distinct options: separating or not separating from Canada.

THE AVERAGE QUEBEC VOTER

Public opinion polls reveal that Quebeckers are seduced by moderate options such as asymmetrical federalism, greater provincial rights, greater powers, and a distinct status for Quebec. For most of them, such moderate options sound more reassuring and fair than the constitutional status quo. Likewise, sovereignty association has always been more popular than outright independence or separation.

According to a February 1995 Crop-Environics-SRC-CBC survey, Quebeckers are divided thus: 35 percent favour Quebec being granted greater powers, 33 percent choose sovereignty association, 21 percent favour the status quo, and 7 percent opt for a sovereign and totally independent country. About two-thirds of voters want moderate solutions.

For this specific reason, Parizeau and Johnson have been under pressure to move toward median-voter opinion. Bouchard and Landry have convinced Parizeau to consider the idea of a political and economic partnership with the rest of Canada and to unite with the "Parti de l'action démocratique." Under pressure from his advisers and the young Liberals, Johnson became the advocate for Quebec being granted a constitutional veto and the status of distinct society. At present, the sovereigntist leader

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FRAUD, SHAME, INJUSTICE

BY GUY LAFOREST

In the first few weeks of 1982, the federal government put into action the machinery that would eventually lead to the proclamation of the new constitution by Her Majesty, Elizabeth II. The Queen was formally invited. Buckingham Palace confirmed in early March that she would, indeed, come to Ottawa. That month, close to $10 million was earmarked for an immense fanfare of publicity that would surround her visit, highlighting the dawning of a new era that was symbolized by the *Charter of Rights and Freedoms*.

Nationalism, as Renan believed in the 19th century, and as Ramsay Cook recently restated, is as much about forgetting as it is about remembering. Well, current Canadian nationalism must be really potent because a lot of people have forgotten a number of things in a very short period. How many Canadians, how many Charter patriots, applauding every time the editorialists of *The Toronto Star* and *The Globe and Mail* trumpet their fiery brand of nationalism, remember that while these offi-

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LET'S TALK: THE QUEBEC REFERENDUM AND THE FUTURE OF CANADA *from page 11*

posed on the Aboriginal peoples without their consent, discontinuing and outlawing their forms of self-government. The Charter was imposed in 1982 without their full consent and it discontinued their laws and ways. Like Quebeckers, the Aboriginal peoples protested and suffered a series of unsuccessful negotiations from 1983 to 1992.

In 1996, the Canadian Royal Commission will ask Canadians to recognize and modernize this treaty federalism, the oldest of the forms of association that constitute the Canadian association. If the Royal Commission waters down its final report, or if Canadians refuse recognition, then the Aboriginal peoples will protest and continue to demand it. The immensely expensive and damaging failure to face this injustice will continue, just as it did in the case of a similar refusal with respect to Quebec. Conversely, if Canadians initiate negotiations to reach agreement on a modern form of accommodation of Aboriginal sovereignty association, they should, by the application of the same constitutional conventions, act consistently with respect to Quebec. If they recognize one but not the other, the blatant injustice will fuel another secession movement. Therefore, for reasons of justice and interest, Canadians should recognize these two demands through constitutional negotiations in 1996.

Many countries face analogous demands for recognition. Under the deadly presumption that a constitutional association must be a uniform nation, most demands are dealt with by repression, secession, and war. Canadians have the opportunity to show that such demands can be handled by dialogue rather than war. This would not be an insignificant contribution to peace on our culturally diverse planet.

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FRAUD, SHAME, INJUSTICE *from page 1*

cial and costly preparations were under way, the court system was still studying whether Quebec had a right of veto according to Canadian laws and conventions?

PATRIATION REVISITED

It was on April 7, 1982, only after the Queen had officially confirmed the principle and details of her trip, only after the federal government had put the last touches on the ceremony, that the Quebec Court of Appeal decided Quebec had no right of veto. In the hours following the judgment, the government of Quebec announced that it would launch an appeal to the Supreme Court of Canada. This had no influence whatsoever on the proceedings in Ottawa. The Queen crossed the ocean and, just like Prime Minister Trudeau, she signed under the approving eyes of, among others, Jean Chrétien, André Ouellet, and Michael Pitfield.

I have argued frequently in past years that this ceremony and this picture mark the end of a certain Canadian dream in the hearts and minds of many Quebeckers. In early December 1982, almost eight months after the law had been in force, the Supreme Court confirmed the judgment of the lower tribunal. A right of veto for Quebec had never existed.

In the early '80s, the whole patriation exercise was criticized harshly by many commentators. For Gérard Bergeron, it was a legal "coup d'état." In the eyes of Donald Smiley, it was a fundamental breach of convention. For Philip Resnick, Trudeau's crusade was a form of constitutional Bonapartism. I suspect that these writings do not figure prominently in the academic manufactures of Charter patriots across the land.

It seems to me that if an impartial body of observers were asked to evaluate the 1982 affair, they would seriously question a number of its dimensions. The whole thing went against the grain of the political and juridical traditions of the British-based parliamentary liberal democracy that was *our* system before 1982. In that system, it remains improper for the government to behave as if a favourable decision had already been given by the courts. This amounts to a clear intimidation of the tribunals. There is such a thing as the honour of the Crown in our juridical and political system.

In his dealings with the Queen and her government in Britain, Jean Chrétien, who was the federal minister of justice at the time, could in no way provide guarantees that Canadian courts would not invalidate the whole matter. The only way for him to give such guarantees would have required a radical breach with a central element of our liberal democracy: the independence of the judiciary. Mr. Chrétien, at the very least, would have had to be privy to the yet unavailable conclusions of the Quebec Court of Appeal. This was unthinkable—it would have disqualified Mr. Chrétien and the federal government. Therefore, it must be said that all parties involved, including the Queen, chose to place the courts in an impossible position. This renders quite disgraceful the last chapter in the history of the British colonial experience in Canada.

THE COSTS OF UNILATERALISM

Having some distance, we can now reconstruct what occurred in the spring of 1982. With formidable political pressure on their shoulders, two benches of justices, all unilaterally nominated by the Canadian prime minister and his predecessors, chose to confirm the legal validity of a reform whose chief characteristic would be to reinforce, through the enshrinement of a charter of rights and freedoms, their own power in the institutions of the land. On a matter of fundamental importance for the history and future development of the federation, substantial disrespect was shown for the idea of due process.

In juridical and social science circles, the constitutional judgments of 1981–1982 produced a huge secondary literature. Some doubts have been expressed about the way the courts defined a constitutional convention and the relevant criteria to ascertain its existence. At least twice in the '60s and early '70s, the machinery of constitutional reform was stopped because Quebec had expressed its sole dissent.

The dominant opinion for the courts was that this did not amount to a clear, explicit recognition that Quebec had a

veto. This remains highly questionable. What about the idea of a statutory veto?

Sam LaSelva, a political theorist from the University of British Columbia, argues convincingly that the logic of s. 94 of the *Constitution Act, 1867* gives a clear right of veto to Quebec. Section 94 deals with the standardization of legislation pertaining to property and civil rights in all the common law provinces that existed at the time—Ontario, Nova Scotia, and New Brunswick. Section 94 rules that such standardization cannot occur unless it has been expressly and legally approved by the relevant provincial legislatures.

There is no mention of the province of Quebec in s. 94. However, we all know that Quebec is the only civil law province, and that the jurisdiction over property and civil rights was one of the most important jurisdictions explicitly attributed to the provinces in 1867. The reform of 1982, through the enshrinement of a charter of rights and freedoms, included an important dimension of standardization in the domain of "property and civil rights." All common law provinces ultimately consented to such standardization, thus respecting s. 94 of the 1867 constitution.

However, the legislature of the province of Quebec, to this day, has not given its assent. How can it be possible that in the domain of "property and civil rights," a field that has always been considered fundamental to the nature of Quebec as a distinct society in the Americas, the province of Quebec would be ultimately less autonomous than any of the common law provinces? The economy of s. 94 allows the common law provinces, if they so desire, to standardize their traditions and practices, without being impeded by Quebec for the sake of its self-protection. Interpreted this way, it reflects the federal wisdom of the founders. Interpreted as it was by the courts in 1981–1982, it gives a very strong argument for the current generation of Quebec secessionists.

MORAL BASIS OF CONSTITUTIONAL REFORM

Charles Taylor has argued that the current Canadian constitution is morally dead in Quebec. Donald Smiley believed that, insofar as it applied the principle of symmetry to language rights, the content of the Charter was profoundly absurd. James Tully affirms that s. 1 of the Charter, the overall interpretative clause on reasonable limits to rights in a free and democratic society, changes the nature of Canada from a federation of peoples to an undifferentiated juridical society.

The idea behind the 1982 reform is a defederalizing project of nation building. Its spirit, and its letter, take no account of Quebec's unique circumstances as the only majority French-speaking society in the Americas. Justice, for Aristotle, meant treating equals equally and unequals, unequally. The Canadian Charter treats unequals in a uniform, symmetrical fashion. It treats unequals equally. It has fostered a political culture that reinforces the idea that Canada is a nation of 10 equal provinces.

Considering the nature of our legal traditions in the early '80s, the patriation exercise was accomplished in a shameful manner. The current Canadian constitutional order treats Quebec, and Quebeckers, unjustly. All in all, there is a strong moral basis for the secession of Quebec from Canada.

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THE DEFENCE OF PAUL BERNARDO: PARADIGM OR PARADOX?

BY DIANNE L. MARTIN

> "The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law."
>
> *Rule 10, Commentary 2, Canadian Bar Association, Code of Professional Conduct*

Recently, the bitter spectacle of the trial of Paul Bernardo for the abduction, rape, and murder of teenagers Kristen French and Leslie Mahaffy has focused sharp attention on lawyers, particularly defence lawyers. Even in that context, the Bernardo lawyers—past and current—have engendered more than usual controversy.

The team members who actually conducted the trial, John Rosen and Tony Bryant, attracted substantial attention for their effective defence of the seemingly indefensible Paul Bernardo—even earning praise in some quarters beyond the criminal bar itself. At the same time, that defence made us all uncomfortable by intensifying the existing doubts about the deal that the prosecution struck with Bernardo's ex-wife Karla Homolka (12 years for manslaughter in exchange for testimony against Bernardo). John Rosen's cross-examination of Homolka cast real doubt on her claim to being a battered woman and, thus, the first of Bernardo's victims. It revealed her, rather, as his willing partner and accomplice. That same cross-examination raised the possibility that Bernardo might in law be entitled to a verdict of something less than first degree murder (which was its purpose), a possibility that provoked the usual response to the bearer of bad tidings.

However, the very conflict that the cross examination exposed was one that may well have been brought about by the actions of another of Bernardo's lawyers, the original trial counsel Ken Murray. On Bernardo's instructions, Murray retrieved videotapes that recorded the rapes and assaults of both victims by both Bernardo and Homolka from their hiding place at the murder scene and retained them in confidence for some 15 months. If Homolka was granted leniency because the prosecution didn't have the tapes (the police failed to find them, although they looked) and Murray should have disclosed them, then Rosen's skillful reliance on what the tapes revealed about Homolka's actual role in the murders is a tainted triumph, savoured only by Bernardo himself.

When Murray acted on Bernardo's instructions to obtain the videotapes and retain them, his conduct seemed to many to be inexplicable negligence at best and criminal obstruction at worst. That it might also have been a legitimate choice by an ethical defence lawyer is a pos-

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