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# CanadaWatch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

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## SPECIAL DOUBLE ISSUE: FOCUS ON PLAN B

# THE EFFECT OF A REFERENDUM ON QUEBEC SOVEREIGNTY

BY PETER W. HOGG

### THE 1995 REFERENDUM

On October 30, 1995, the province of Quebec held a referendum on the following question:

DO YOU AGREE THAT QUEBEC SHOULD BECOME SOVEREIGN, AFTER HAVING MADE A FORMAL OFFER TO CANADA FOR A NEW ECONOMIC AND SOCIAL PARTNERSHIP, WITHIN THE SCOPE OF THE BILL RESPECTING THE FUTURE OF QUEBEC AND OF THE AGREEMENT SIGNED ON JUNE 12, 1995?

The "bill respecting the future of Quebec" referred to in the question was Bill 1, which was tabled in the Legislature of Quebec (the National Assembly) on September 7, 1995, but was not actually enacted. Among other things, the Bill authorized the National Assembly "to proclaim the sovereignty of Quebec" (s. 1). The idea was to enact the Bill after an affirmative vote in the referendum. The "agreement signed on June 12, 1995" was appended to the Bill. It was an agreement between the Parti Québécois, the Bloc Québécois, and the Action démocratique du Québec proposing a new economic and political partnership between a sovereign Quebec and Canada. The referendum was duly held, and only narrowly defeated. The "No" side obtained 50.56 percent of the popular vote, and the "Yes" side obtained 49.44 percent.

The close result in the referendum, and the fact that the separatist Parti Québécois is still in power in Quebec, makes it likely that there will be a second referendum within the next few years. The purpose of this article is to explain the legal effect of an affirmative vote in a sovereignty referendum.

### THE APPLICABLE CONSTITUTIONAL LAW

It is commonly said that the Constitution of Canada makes no provision for the secession of a province. This is true only in the sense that the Constitution makes no *explicit* provision for the secession of a province. But the Constitution does contain a general provision for its own amendment. Part V of the *Constitution Act, 1982* authorizes all conceivable amendments to the Constitution of Canada. Moreover, s. 52 of the *Constitution Act, 1982* provides that amendments to the Constitution of Canada "shall be made

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# GROUND RULES FOR THE NEXT REFERENDUM ON QUEBEC'S SOVEREIGNTY

BY JOSÉ WOEHRLING

Since the results of the October 1995 referendum in Quebec are known, many voices, inside and outside the province, have asked for some basic ground rules for secession to be set down in advance of the next referendum. In its essence, such a proposal must be welcomed. The existence of a set of clear principles governing secession will prove invaluable in reducing the risk of confusion or misunderstanding, and enhancing the chances that the process be as fair and transparent as possible. But who should define

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only in accordance with the authority contained in the Constitution of Canada." Obviously, the secession of a province is an amendment of the Constitution of Canada, which must therefore be accomplished under the amending procedures. There is nothing novel or controversial about this.

*What Bill 1 asserted, in effect, was that a majority vote in the referendum would give the province of Quebec the power to secede unilaterally from Canada and form its own sovereign country.*

The only real room for controversy involves the question of which of the various amending procedures in Part V of the *Constitution Act, 1982* is the correct one to authorize the secession of a province. The minority view among constitutional lawyers is that the correct procedure is the general (seven-fifty) procedure of s. 38, which is the residual procedure that must be used if another procedure is not specifically stipulated. This procedure involves the assents of both Houses of the Parliament of Canada and of the Legislative Assemblies of two-thirds of the provinces representing 50 percent of the population. The majority view is that the unanimity procedure of s. 41 is the correct procedure, because of the effect of a secession on the office of Lieutenant Governor, which is one of the matters listed in s. 41 as requiring the use of the unanimity procedure. This procedure requires the assents of both Houses of the Parliament of Canada and of the Legislative Assemblies of all of the provinces. The only way to eliminate the doubt as to the correct amending procedure would be to refer the issue for decision to the Supreme Court of Canada. Until this is done, it seems best to proceed on the working assumption that the unanimity procedure is the correct one.

### THE EFFECT OF A UNILATERAL DECLARATION OF INDEPENDENCE

Since the secession of a province would be an amendment of the Constitution of Canada, and since any amendment of the Constitution of Canada must take place according to the Constitution's amending procedures, it follows that a unilateral declaration of independence by a province would be legally ineffective. And yet that was exactly what Quebec proposed to do if there had been an affirmative vote in the referendum of October 30, 1995. Bill 1, which was tabled in the National Assembly on September 7, 1995 (at the same time as the text of the question was tabled), authorized the National Assembly "to proclaim the sovereignty of Quebec" (s. 1). The Bill went on to provide that, on the date fixed in the proclamation, "Quebec shall become a sovereign country" (s. 2). The Bill did authorize negotiations with Canada for an "economic and political partnership" (s. 1), but went on to say that the proclamation of sovereignty may be made as soon as either "the partnership treaty has been approved" or the National Assembly "has concluded that the negotiations have proved fruitless" (s. 26).

What Bill 1 asserted, in effect, was that a majority vote in the referendum would give the province of Quebec the power to secede unilaterally from Canada and form its own sovereign country. This extraordinary claim was not challenged by the Government of Canada when Bill 1 was announced, and was not challenged at any time during the referendum campaign. Indeed, by participating in the referendum without any reservation as to its efficacy, and even speculating late in the campaign about whether a vote of 50-percent-plus-one would be sufficient to break up the country, the Prime Minis-

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**CANADA WATCH WELCOMES NEW CO-EDITOR**

*Canada Watch* readers will note that commencing with this issue Professor David Bell, the former Dean of the Faculty of Environmental Studies at York University, has assumed the role of Co-editor. He replaces Professor Daniel Drache, who is on sabbatical leave for the 1996-97 academic year. Professor Bell's editorial for this issue appears on the opposite page. Osgoode Hall Law School Professor Patrick Monahan will continue to serve as Co-editor for Volume 5 of *Canada Watch*, which will commence with the September-October issue.


# CanadaWatch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

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ter inadvertently lent credence to the Parti Québécois position.

Hardly less remarkable was the decision by the Government of Canada not to participate in the case of *Bertrand* v. *Quebec* (1995) 127 D.L.R. (4th) 408. That was a proceeding by a private citizen in Quebec for a declaration that Quebec had no power to proclaim itself independent in disregard of the amending procedures of the Constitution. The plaintiff did not object to the holding of a referendum on sovereignty, provided that it was understood to be "purely consultative." What he objected to was the power asserted by Quebec's draft legislation to issue a unilateral declaration of independence. This case presented an opportunity to obtain a judicial ruling that affirmed the requirements of the rule of law and denied the efficacy of the unilateralism proposed by the Government of Quebec. The Attorney General of Canada was named as a "mis en cause" in the proceedings, but he elected not to appear or be represented, and the case proceeded without any participation by the Government of Canada. Lesage J. of the Quebec Superior Court decided the case in favour of the plaintiff, holding that Bill 1's assertion of the power to proclaim sovereignty in disregard of the amending procedures was unconstitutional. He did not issue an injunction to stop the referendum, recognizing that the Government of Quebec had a right to consult the views of the people on sovereignty (or anything else). However, the decision makes clear that any secession by Quebec could be accomplished only by the amending procedures of the Constitution.

*Only if and when the Government of Canada expressly or impliedly abandoned its authority over Quebec (and assuming that there was no significant insurgency within Quebec) would the courts pronounce the secession effective and therefore legal.*

After the referendum was over, when a motion to dismiss the *Bertrand* case was filed by the Government of Quebec, the Government of Canada did finally exercise its right of intervention, and submitted to the Court that the secession of Quebec would have to take place in accordance with the rule of law. This means that, if the case proceeds up the judicial hierarchy, the task of defending the territorial integrity of the nation from an unconstitutional secession will not fall exclusively on the shoulders of Mr Bertrand, the public-spirited plaintiff, but will also be assumed by the Government of Canada. I hope that this intervention also means that the previous refusal of the Government of Canada to insist on compliance by Quebec with the rule of law, has finally been replaced by a determination to insist on compliance with the rule of law.

What if Quebec continued to maintain its position that an affirmative vote in a future sovereignty referendum entitled the Government of Quebec to unilaterally withdraw the province from the federation? Is there any circumstance in which a unilateral declaration of independence would be legally effective? There are countries that have achieved independence through unilateral action. The United States of America is the most obvious example. No statute was ever passed by the Parliament of the United Kingdom to separate the thirteen American colonies from the British Empire or to approve the constitution that the Americans adopted in 1784.

*[T]he failure of the Government of Canada to make clear in 1995 that it did not recognize the efficacy of the UDI that was openly planned by the Government of Quebec was a serious failure to protect the territorial integrity of Canada, which would have led to confusion and uncertainty had the close referendum vote gone the other way.*

But by 1784 the new government of the United States had achieved unquestioned control over the territory that it claimed to govern, and Britain, having lost the War of Independence, had ceased to assert jurisdiction over the territory. In that situation, effective control provided the legal basis for the new country. As de Smith commented, "legal theorists have no option but to accommodate their concepts to the facts of political life" [*Constitutional and Administrative Law*, 6th ed. (1989) at 68].

In *Madzimbamuto* v. *Lardner-Burke* [1969] 1 A.C. 645, the Privy Council recognized that effective control by a separatist government could form the legal basis of a new state. In that case, the Court had to decide whether or not to recognize the acts of the legislature and government of Southern Rhodesia after the unilateral declaration of independence (UDI) by the separatist government of Ian Smith. The Court concluded, by a majority, that the post-UDI acts were not valid, because it could not be said "with certainty" that the Smith government was in effective control of the territory that it claimed to govern. The fact that Britain was still claiming to be the lawful government of its colony, and was taking steps (not including force) to attempt to regain control, was fatal to the legal efficacy of the UDI.

The ruling in *Madzimbamuto* supplies the applicable rule for the hypothetical case of a UDI by the Government of Quebec, following an affirmative vote in a referendum on sovereignty. As long as the Government of Canada was continuing to assert its legal authority over areas of federal jurisdiction by, for example, continuing to levy federal taxes, no court would hold that a secession had been legally accomplished under the principle of effec-

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that may be caused by a unilateral secession, as it must be assumed that ROC representatives will have stressed them amply during the period of failed negotiations. Therefore, if the second referendum is also affirmative, the decision of Quebec voters will have to be considered as entirely informed and democratic. In such conditions, insisting on compliance with an amending formula that is a proven recipe for deadlock would be equivalent to a straightforward denial of the right of Quebec people to self-determination. It is also worth remembering that the amending procedures have been imposed on Quebec against the will of its government in 1982, and that no Quebec government has given its assent to the *Constitution Act, 1982* ever since.

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## THE EFFECT OF A REFERENDUM ON QUEBEC SOVEREIGNTY *from page 92*

tive control. Only if and when the Government of Canada expressly or impliedly abandoned its authority over Quebec (and assuming that there was no significant insurgency within Quebec), would the courts pronounce the secession effective and therefore legal.

The attitude of the Government of Canada is crucial to the question whether a UDI by Quebec would be effective. In my opinion, the failure of the Government of Canada to make clear in 1995 that it did not recognize the efficacy of the UDI that was openly planned by the Government of Quebec was a serious failure to protect the territorial integrity of Canada, which would have led to confusion and uncertainty had the close referendum vote gone the other way. That is why it is of the utmost importance for the Government of Canada to publicly make clear that it does not accept the efficacy of a UDI. Any public position taken by the Government of Canada should probably also be reinforced by a court ruling as to the correct legal procedure for a secession by a province. The *Bertrand* case did of course produce such a ruling, and that case may advance on to the Supreme Court of Canada where the ruling would become fully authoritative. Another option for the Government of Canada would be a reference to the Supreme Court of Canada for a ruling.

### THE EFFECT OF A REFERENDUM ON SOVEREIGNTY

A referendum on sovereignty can be consultative only, because the only constitutional way to achieve sovereignty is by the exercise of the amending procedures of the Constitution. Those procedures do not recognize any unilateral right to secede, as we have noticed, and are in any case operated by resolutions of the Houses of Parliament and the Legislative Assemblies of the provinces. Therefore, an affirmative vote in a referendum on sovereignty would not create a legal crisis or call in question the legitimacy of the Government of Canada or any of Canada's central institutions. The vote by itself would change nothing. The Prime Minister and his government would remain in office. The Parliament of Canada would retain all its members (including those from Quebec), and would continue to possess all its powers over the entire territory of Canada (including Quebec). Federal laws would continue to apply throughout Canada (including Quebec). The Supreme Court of Canada would retain all its members (including those appointed from Quebec) and would continue as the final court of appeal for the entire country (including Quebec). None of these things would change until the terms of secession had been negotiated, and the requisite constitutional amendments had been enacted.

*The problem with a single referendum in a situation like that of 1995 is that it is not at all clear what the voters who voted "Yes" have actually approved.*

### THE NEED FOR A SECOND REFERENDUM

After the terms of separation had been negotiated, the Governments of Quebec and Canada would need to satisfy themselves that the people of Quebec did indeed wish to separate on the agreed-upon terms. I believe that this would require a second referendum. This was recognized by the Parti Québécois Government of Premier Lévesque at the time of the 1980 referendum on sovereignty-association. The question in 1980 contemplated a second referendum to approve the terms of secession and the constitution of the new nation. In 1995, however, Bill 1 made clear that an affirmative vote in the referendum would provide the authority for a proclamation of sovereignty by the National Assembly. No further referendum was contemplated.

The problem with a single referendum in a situation like that of 1995 is that it is not at all clear what the voters who voted "Yes" have actually approved. Consider the many doubts:

1. The question specifically required the Government of Quebec to make "a formal offer to Canada for a new economic and political partnership." The terms of that partnership were proposed in a schedule to Bill 1. They involved the creation of a "Partnership Council" with an equal number of members from the two states, which would be another layer of government above the federal Parliament, and which would give to the Quebec members a power of veto over Canadian policies in a wide range of matters including customs, mobility of persons, goods and services, monetary policy, and citizenship. Despite protests by the "No" side that Canada would never agree to such an arrangement, the leaders of

*The whole thrust of Bill 1 and the "Yes" campaign was designed to present a soothing picture in which nothing of importance to Quebeckers would change after sovereignty.*

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the "Yes" side dismissed this as bluffing, and voters were urged to assume that something of this kind could indeed be negotiated.

2. Voters had not seen the constitution of the new sovereign Quebec, because it had not been drafted; Bill 1 authorized the preparation of "a draft of a new constitution," but only indicated in very general terms what would go into the new constitution. For example, although Bill 1 said that "the new constitution shall guarantee the English-speaking community that its identity and institutions will be preserved" (s. 8), it was not clear what would actually be the text of the guarantees of English-language rights.

3. Bill 1 expressly affirmed that Quebec would retain its existing boundaries (s. 10); that Quebec citizenship may be held concurrently with Canadian citizenship (s. 13); that Quebec's currency would continue to be the Canadian dollar (s. 14); and that Quebec would continue to be a party to the NAFTA and other international treaties to which Canada was a party (s. 15). None of these matters lay in the sole power of a sovereign Quebec, and obviously some or all of them were quite unlikely to be achieved.

4. The "Yes" side also made much of the cutbacks in social programs that were being undertaken federally and in the other provinces in order to get public deficits under control, and the assurance was given that social programs would be maintained by a sovereign Quebec. This ignored the terrible burden of debt that would be assumed by a sovereign Quebec once Quebec's share of the national debt were added to its existing provincial debt (which is the largest per capita of all the provinces).

It seems obvious that many of those who voted "Yes" in the 1995 referendum were not voting for the creation of a separate state with the normal trappings of such an entity, that is to say, a state with its own citizenship, currency, and normal relations with its neighbours. The whole thrust of Bill 1 and the "Yes" campaign was designed to present a soothing picture in which nothing of importance to Quebeckers would change after sovereignty. The "No" side inadvertently contributed to this misleading picture. The Government of Canada had not established and announced policies on the issues that would be presented by the departure of Quebec, and so the "No" side was in no position to give categorical answers to the assertions of the "Yes" side. If the "Yes" side had prevailed, and if the terms of separation turned out to be markedly different from its campaign assertions, then it seems obvious that the Government of Quebec or the Government of Canada would be under a moral duty to consult the wishes of the Quebec people a second time before actually putting in motion the amending procedures to lead to a Quebec separation.

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# THE POLITICAL PRICE OF PLAN B

**BY JANE JENSON & ANTONIA MAIONI**

The effort to invent a Plan B is comforting for many people outside of Quebec. Stunned by the level of support for the "Yes" side revealed by last fall's referendum and dismayed by the manifest lack of leadership displayed by the Chrétien Government, they have vowed never again to abandon the future of their country to Quebec voters and their political leaders. Initiators of the Plan B strategy claim the right to participate in any future referendum, both by setting out basic ground rules and by making it very clear that secession will be painful to all involved, but most particularly to Quebec. Federal strategists call this laying down markers to teach Quebecers that a "Yes" vote would not be quite the magic wand Lucien Bouchard suggested in the referendum campaign.

The very notion of Plan B implies that Plan A exists. The latter strategy involves initiatives which will make Canada into what the Honourable Stéphane Dion characterizes as the most decentralized federation in the world. Following the lead of the Department of Finance as much as Intergovernmental Affairs, responsibilities are supposed to be devolved to the provinces in a series of "small steps." Areas mentioned include forestry, mining, recreation, tourism, and social housing, although so far the only real movement is on labour force training. At the same time, the federal government will try to spark new enthusiasm for Canada among francophone Quebecers.

*The effect of playing to the most extreme sentiments is to silence those who must effectively deploy arguments in support of Canada between now and the next campaign, that is, the federalists in Quebec.*

These two plans are always presented as complementary strategies which can, indeed, be pursued simultaneously.

We argue here that this assumption of complementarity is misguided. Some parts of Plan B, as it is emerging, fundamentally undermine the chances of success of Plan A.

Enthusiastic discussions of Plan B are confined primarily to Canadians outside Quebec, as they prepare themselves for the next referendum. Within Quebec, sovereigntists see it as a provocation. But more damaging are its effects on many federalists in Quebec, for whom some parts of Plan B constitute a serious threat. Especially problematic is legitimation of "partition talk." The effect of playing to the most extreme sentiments is to silence those who must effectively deploy arguments in support of Canada between now and the next campaign, that is, the federalists in Quebec.

## PLAN B: THE RULES OF THE GAME

Plan B has two main components. The first is about the