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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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case of a "Yes" vote with no clear legal mandate for action in effect at once.

The other advantage would arise from the public attention that would focus on the preparation for "the worst" as the Bill goes through three readings in the House of Commons and Senate in the months or weeks before the referendum. It would be reassuring in all parts of Canada and also abroad for people to know that lawful government would continue, no matter what the result of the referendum might be. The debate would also bring some reality to the vague ideas that floated about in Quebec in the last referendum—aided by Mr. Bouchard's "magic wand" that would resolve everything with no pain or difficulty once Quebec voted "Yes."

One of the most important benefits of contingency legislation would be its insistence that Quebec must respect the rights of the Aboriginal peoples under both domestic and international law.

In view of the trusteeship obligation of Parliament under the Constitution of 1982 and our history since the *Royal Proclamation* of 1763, this cannot be ducked. Indians, including the Inuit, are the specific responsibility of the Parliament of Canada. The obligations flowing from this should be made clear before another referendum—not after. The Parliament of Canada, as trustee for the Aboriginal peoples, must also insist on respect for whatever rights they may have under various United Nations covenants, including those relating to the self-determination of peoples.

The only possible disadvantage in passing contingency legislation would be if it gave the impression that the federal government was anticipating and preparing for a defeat. However, with the criticism of the government for *not* being prepared for a "Yes" victory on October 30, this should not be difficult to deal with. The position would be that of taking no chances, and also of making very clear to the "Yes" side that it will be up against a well-prepared federal government before there is any agreement to secession by Quebec.

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SOME GROUND RULES FOR THE NEXT REFERENDUM ON QUEBEC'S SOVEREIGNTY *from page 89*

such ground rules and what should be their content?

QUEBEC SHOULD TAKE THE INITIATIVE

Under the present circumstances the best, but very unlikely, solution would be for the Canadian and the Quebec governments to design a set of rules, by mutual accord. If no such agreement is possible, the federal government could devise and announce its own rules to govern any future referendum on the sovereignty of Quebec. Many influential commentators, like former Privy Council Clerk Gordon Robertson and Professors Hogg and Monahan, are urging Prime Minister Chrétien to adopt such a course. Until now, the federal cabinet has refrained from following their advice, aware that such a policy may appear unduly provocative to many Quebeckers and thus boost support for sovereignty. But with time running out and Plan A (the renewal of federalism to defuse the separatist threat in Quebec) becoming less plausible every day, Mr. Chrétien will find it more and more difficult to resist those exhorting him to take action. For that reason, it is of cardinal importance for the government of Quebec to take the initiative and define itself the rules it will accept for the next referendum. If these rules are reasonable and can be asserted as such before the national and international public opinion, it will be more difficult for the federal government to attempt to impose more rigorous conditions on Quebec at a later time.

TWO RULES FOR SECESSION

The first rule that a Quebec government should announce for any future referendum is that all political parties present in the Quebec Legislative Assembly—the Assemblée Nationale—must agree to the question that will be put before the people. As a federalist party strongly opposed to separation forms the official opposition in Québec City, there could be no pretense that the question was unclear or ambiguous. In addition, such a solution avoids the problems that would inevitably appear if the federal government claimed the right to participate in the formulation of the referendum question.

The government of Mr. Bouchard should solemnly pledge, if it wins the next referendum, not to proclaim the sovereignty of Quebec until after a second affirmative referendum, which should be held once the results of negotiations between Quebec and the rest of Canada on the terms of separation are known.

The second, and more important, rule for any future referendum on sovereignty should be the one that René Lévesque's government had already adopted in 1980 for the first referendum on Quebec's accession to sovereignty. The government of Mr. Bouchard should solemnly pledge, if it wins the next referendum, not to proclaim the sovereignty of Quebec until after a second affirmative referendum, which should be held once the results of negotiations between Quebec and the rest of Canada on the terms of separation are known.

Only then will Quebec voters be able to evaluate the true consequences of separation on matters like retaining Canadian citizenship, the Canadian dollar as currency, the proportion of the public debt of Canada transferred to a sovereign Quebec, the economic and political ties maintained with Canada, the territorial integrity of Quebec, and so forth. If Quebec voters are made to approve a separation the consequences of which they cannot reasonably anticipate, not only will the result run against Canadian law, but it will also be undemocratic and hence indefensible before international public opinion or on the basis of international law.

Respecting these two principles will guarantee the

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democratic character of the sovereignty process. On the other hand, it does not appear necessary to require a special majority (more than 50 percent plus one) for secession to occur. Such a rule would depart from precedents, since all past Canadian referendums, as well as the two referendums that were necessary to bring Newfoundland into Confederation, have been held on the basis of the simple majority rule of 50 percent plus one.

[I]f the second referendum is also affirmative, the decision of Quebec voters will have to be considered as entirely informed and democratic.

Moreover, any attempt to impose a higher threshold would run into insuperable difficulties, as the choice of any percentage higher than 50 would appear to be entirely arbitrary and would likely be attacked both by the proponents of sovereignty for being too demanding, and by its enemies as being too lenient. Finally, existing international practice does not provide evidence that a super-majority is needed for a lawful secession. Among the constitutions that contemplate secession, some require a special majority, but others permit it on the basis of a 50-percent-plus-one vote in the territory proposing to secede. (For analysis of the international experience, taking 89 constitutions into account, see P.J. Monahan & M.J. Bryant (with N.C. Côté), *Coming to Terms with Plan B: Ten Principles Governing Secession*, C.D. Howe Institute Commentary, No. 83, June 1996.) [EDITOR'S NOTE: An excerpt from this study is reproduced in this issue of *Canada Watch* beginning at page 104.]

TWO PERSPECTIVES ON LEGAL CONTINUITY

Political and legal commentators in the rest of Canada (ROC), as well as opponents of sovereignty in Quebec, are insistent that the separation of Quebec from Canada can only be legally accomplished in accordance with the amending procedures contained in Part V of the *Constitution Act, 1982*. In fact, the significance of this aspect of the problem is quite different for Quebeckers and for other Canadians. Its real importance will be determined by the outcome of the negotiations on the terms of secession following a first affirmative referendum.

For the Quebec government, only the outcome of the negotiations with the representatives of ROC will really matter. If an agreement can be reached on the terms of secession, the implementation of the amending formula will be seen as a mere formality of little consequence. After all, the only effect of such a constitutional modification for Quebec will precisely be to free it from the Canadian Constitution; hence, maintaining legal continuity is of very little importance. On the contrary, other Canadians will insist that the requirements of the amending formula be complied with because they will continue to be bound by the existing Constitution and therefore must ensure that there is no break in legal continuity.

ROADBLOCK TO CONSTITUTIONAL AMENDMENT

Most legal scholars in ROC are of the opinion that of the various amending procedures in Part V of the *Constitution Act, 1982*, the correct one to authorize the secession of a province is the unanimity procedure of s. 41, which requires the assents of both Houses of Parliament and of the Legislative Assemblies of all of the ten provinces. I have argued elsewhere [J. Woehrling, "Les aspects juridiques d'une éventuelle sécessi on du Québec" (1995) 74 Can. Bar Rev. 293] that the correct procedure is the general (7-50) procedure of s. 38, which must be used for the amendments for which no explicit provision is made (this is precisely the case regarding the secession of a province). If the issue were referred for decision to the Supreme Court of Canada, it would not be surprising if the Court adopted the view which would make secession more cumbersome by ruling that the unanimity procedure applies.

But the difficulties of implementing the amending formula will not stop there. Most legal scholars in ROC are of the view that the agreement not only of the eleven governments would be required, but also that of the representatives of the Aboriginal peoples, because the fiduciary obligation of the federal Crown to those peoples requires it to obtain their consent for any amendment affecting their rights (in addition, it is also argued that a constitutional convention requires the consent of the Aboriginal peoples for amendments bearing on their rights). For some commentators, the territorial governments must also participate in the discussions. Finally, there seems to be a consensus of opinion that, because of the precedent of the Charlottetown Accord referendum of 1992, Canadian politicians of both levels of government now feel themselves politically bound to obtain the consent of the people in a referendum before amending the Constitution in any significant way (in British Columbia, Alberta, and Saskatchewan, governments are required by law to hold a referendum before ratifying any constitutional amendment.)

Consequently, all the elements for a re-enactment of the Meech Lake and Charlottetown dramas are present. Even if a negotiated settlement between Quebec and the ROC on the terms of secession can be reached, it is far from assured that all the agreements deemed necessary in order to comply with the amending formula can be obtained. In such a case, if the deal fails because of the opposition of one or more of the secondary actors, Quebec could simply declare sovereignty unilaterally, based on the conditions that had been agreed. Before international public opinion, such a unilateral declaration of independence (UDI) would be justified by the fact that ROC had been reduced to incoherence and paralysis by the unwieldy amending formula of the Canadian Constitution.

A DEMOCRATIC MANDATE FOR UNILATERAL SECESSION

Finally, if there is a first positive referendum in Quebec, but no negotiated agreement on secession can be reached, the Quebec government will have to put the question to the people again in a second referendum. This time, the voters will be very aware of all the difficulties and disruptions

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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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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