

CONTINGENCY LEGISLATION FOR A QUEBEC REFERENDUM

BY GORDON ROBERTSON

THE COMMON INTEREST IN THE RULE OF LAW

The months following the referendum of October 30, 1995, saw a new level of discussion about the possibility of violence if the separation of Quebec from Canada were to take place. Domestic violence has rarely occurred in the last hundred years of our history. It is not a part of the tradition of Canada or of Quebec. We have adhered to the rule of law as the best means of avoiding violence in a country with many minorities of differing views and interests.

A UDI would be the worst possible result. The interest of all in avoiding one is the measure of the importance of adhering to a legal process in what would, at best, be a hazardous course, made the more dangerous by the emotions that would inevitably be involved.

If a referendum is held and if a "Yes" vote results, it will be in the interest of all Canadians to ensure that an orderly process follows, rather than a revolutionary break from our existing institutions and from our tradition of law and order.

This will not be easy.

Separation of a province from Canada is legal beyond doubt only if it follows the amending process in our Constitution. That would require the unanimous consent of Parliament and of the legislatures of all the provinces. If the possibility of such consent appears remote, the government of Quebec might decide that the only practical course is a unilateral declaration of independence (UDI).

A UDI would be the worst possible result. The interest of all in avoiding one is the measure of the importance of adhering to a legal process in what would, at best, be a hazardous course, made the more dangerous by the emotions that would inevitably be involved. This paper is, therefore, an appeal to follow the rule of law as the best means of avoiding the uncertainty and disruption that illegal action could trigger.

THE RATIONALE FOR CONTINGENCY LEGISLATION

The basic problem for Canada in the event of a majority "Yes" vote is that, as Alan Cairns has put it, the "Rest of Canada" (ROC) does not exist, as it does not have any government or a legitimate spokesperson. It is not at all clear who could, with legitimacy, deal with Quebec after a "Yes" vote on separation. While that vote would have no legal result, it would have a political and moral effect. The federal government would have to act in a situation of crisis in the financial markets. It would almost certainly have to "talk" to Quebec in some way, and do it

soon. How could it have the least assailable basis to cope?

There appears to be no effective solution *after* the vote.

Legislation by Parliament before the vote, on a contingency basis and subject to proclamation, seems the best way to make it possible to have immediate legitimacy in the hands of the Government of Canada—in conjunction with the nine provinces, where needed.

The damage to the government's status and to the legitimacy of its action will have been done, with no convincing remedy from any source *at that time*. Legislation by Parliament *before* the vote, on a contingency basis and subject to proclamation, seems the best way to make it possible to have immediate legitimacy in the hands of the Government of Canada—in conjunction with the nine provinces, where needed.

If the federal government decided to take legislative action, it would be desirable to inform the provincial governments of the plan and the reasons for it, but not to make the action conditional on agreement. The federal government has its own responsibility which, in the circumstances of a "Yes" vote, would be paramount. Provincial concerns could be taken into account before introducing the legislation, or during pas-

sage by Parliament.

WOULD THERE BE A CONSTITUTIONAL BASIS FOR LEGISLATION BY PARLIAMENT BEFORE THE REFERENDUM?

It seems clear from the judgment of the Supreme Court in the 1976 *Reference re Anti-inflation Act* that legislation by Parliament to provide for an emergency in which the interests of the people of Canada could suffer serious injury in the absence of such legislation would be valid legislation "for the peace, order and good government of Canada."

There was a preamble to the Anti-inflation Act that set out the way in which "inflation has become a matter of serious national concern." The Court relied on the preamble as indicating the judgment of Parliament on the economic crisis of the day and on the temporary measures necessary to confront it—a judgment the Court was not prepared to conclude was unjustified. A comparable preamble could set out the uncertainties that would arise after a "Yes" vote, the financial and other damage such uncertainty could do, and the need for temporary measures to avoid or limit such results.

Legislation in advance of a referendum, to be proclaimed *only* if there were a "Yes" vote on separation, and to deal with the financial and political crisis that would prevail without the legislation, would appear to come squarely within the decision in the *Anti-inflation Act* reference.

WHAT MIGHT THE CONTINGENCY LAW PROVIDE?

Essentially, the legislation should ensure that the Government of Canada continues, for all parts of Canada, unless and until action is taken by Parliament or by the Governor

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in Council, as required, to change any law, institution, or program of the federal government.

In order that there may be effective direction and action to cope with all the problems for which action by the federal government is necessary, the Government of Canada should be given express authority to enter into discussions with the Government of Quebec on possible arrangements for changes in the Constitution that might be acceptable to Quebec and the other provinces, and thus permit Quebec to remain a part of Canada; alternatively, terms and arrangements that might permit a negotiated separation of Quebec from Canada could be agreed upon.

For the above purposes, the contingency law could contain the following provisions:

1. A unilateral declaration of independence by Quebec will not be legal and will, therefore, not be recognized by the Government of Canada, or be of any effect on the application of the laws of Canada in Quebec. (This would be purely declaratory since a UDI can have no legal basis under the law of Canada. Its standing in international law would be dubious in view of the United Nations' declaration of 1970 against "any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.")

2. If, after any unilateral declaration or without one, the Government of Quebec refuses to be bound by or to enforce the laws of Canada, the Parliament and Government of Canada and the laws of Canada shall continue nonetheless to have their constitutional authority in Quebec

and in ROC unless and until changed.

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3. All institutions of Canada shall remain unchanged in authority unless and until changed by Parliament or the Governor in Council as required under the Constitution of Canada.

4. If the Government of Quebec wishes to enter into discussions with the Government of Canada about possible arrangements for the secession of Quebec from Canada, with or without some form of association with Canada, the Government of Canada is authorized to engage in such discussions subject to:

(a) Consultation and, if possible, agreement with the governments of all nine other provinces with respect to any and all matters of provincial concern.

(b) Consultation with the heads of the aboriginal organizations of Canada with respect to all matters of concern to the Aboriginal peoples of Quebec.

(c) Certain conditions that are essential for agreement by Canada on any other matters, including:

(i) Assumption by Quebec of a share of the national debt of Canada based on the proportion of the population of Quebec to the population of

Canada;

(ii) Recognition by Quebec of the rights of the Aboriginal peoples of Quebec as recognized and affirmed by Section 35(1) of the *Constitution Act, 1982*, including rights to their traditional lands, and recognition also of whatever rights they may have under the Covenants and Declarations of the United Nations relating to the civil and political rights of peoples, together with acceptance by Quebec of the right of Aboriginal peoples resident in the areas added to Quebec by the laws of Canada of 1898 and 1912 to remain, with their lands, a part of Canada if they so wish.

5. No agreement on secession of Quebec will be concluded by the Government of Canada except with the agreement, if possible, of the other provinces of Canada.

In addition to provisions along the above lines about "continuity" and about a UDI or discussions with Quebec, there might be advantage in having the contingency law either create or authorize the creation of a "Consultative Committee on the Secession of Quebec and the Future of Canada." The best arrangement might be to authorize the Governor in Council to establish it if and when Quebec indicates it wants to enter into discussions on separation.

The Committee would consist of the Prime Minister (Chairman), Minister of Justice (Vice Chairman), Premiers of the nine Provinces, and Ministers of essential federal departments. There could be provision for the addition of the Heads of aboriginal associations and the Heads of the Territorial Governments for matters of concern to them.

One advantage in providing for the Committee in or under the contingency legislation would be to establish an instrument of unchallengeable authority to act in respect of the ROC without any doubts about its legal status.

The contingency legislation would not be a prejudgment about what might happen if and when Quebec secedes—whether the ROC would remain whole or would splinter. It would be a measure relating to the uncertain situation that might, either legally or in the public mind, prevail after a "Yes" vote and *before* conclusive constitutional steps and decisions could be taken.

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The longer-term situation could be considered with whatever priority may be necessary by having the terms of reference of the Consultative Committee extend to the "future" in a general sense.

THE PROS AND CONS OF CONTINGENCY LEGISLATION

The main advantage of contingency legislation would be in reducing the immediate uncertainty and the worry about legality or "proper authority" that would arise in

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 Quebecers 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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