

## LEGAL REPORT

### LEVELLING THE PLAYING FIELD

#### Referendum Spending Limits and the Charter

by Jamie Cameron

In early May, it was questionable whether intergovernmental bargaining would produce a breakthrough in constitutional negotiations. The federal government responded, on May 15th, with national referendum legislation. Final reading of Bill C-81 and royal assent was received on June 23.

Up to now, Prime Minister Mulroney has insisted that Bill C-81 is precautionary. In the event of deadlock, a national referendum on a federal government proposal might be held, and then only to pressure any recalcitrant provinces to pass resolutions ratifying a package of amendments, as required by the *Constitution Act, 1982*.

Whether a national referendum will be held, either alone or in conjunction with provincial referenda, remains to be seen. Meanwhile, as Bill C-81 moved through the Commons committee and the Senate, debate about the referendum was overshadowed by the struggle to close on a deal.

#### CHARTER CONSTRAINTS

In Parliament, the federal government claimed that limits on the number and expenditures of "registered referendum committees" would be unconstitutional under the Charter of Rights and Freedoms. The government then refused to disclose the legal opinions which supported that unequivocal position.

As introduced, Bill C-81 would require any person or group intend-

ing to spend more than \$5000 to be registered under the legislation. The Bill otherwise placed no limits on the number of committees which could be formed, or on their expenditures.

Opposition MPs who believe that the 1988 election was influenced by private spending in support of the Free Trade Agreement were outraged. Could the federal government be taken to court, to test the assertion that spending limits are unconstitutional?

And what was the government's real agenda? Would an open referendum campaign legitimize unlimited spending in the next federal election? And didn't that fly in the face of the Report by the Royal Commission on Electoral Reform (the Lortie Commission)?

Proclaiming that "[t]his American style of elections is threatening us," Liberal MP Andre Ouellet declared that "what is at stake here is the Canadian political culture."

#### THE AMERICAN MODEL

In the United States, a free-wheeling style of electioneering is endorsed by the Constitution. There, the U.S. Supreme Court has consistently invalidated restrictions on campaign expenditures which would "equalize" debate. That is because "there is no such thing as too much speech" in American political culture. Because government cannot be trusted to ensure the fairness of the democratic process, it is not allowed to shape political debate by "insulating the electorate from too much exposure to views."

The Charter and the government's legal opinions to the contrary, it is likely that Canadian courts would uphold some limits on campaign expenditures. Much would obviously depend on the scope of the restrictions. And, in the context of a national referendum, a mandatory

structure which would stream all expenditures through two umbrella committees might be problematic.

It is likely nonetheless that, at least in principle, the Supreme Court of Canada would follow the path of the Lortie Commission and endorse the legitimacy of spending restrictions in election campaigns.

#### UNANSWERED QUESTIONS

Aside from the Charter, a national referendum would raise other issues. What about government spending? If the federal and provincial governments could spend without restraint, what would be the point of limiting the expenditures of registered referendum committees? To be effective, limits must be comprehensive. However, both legally and politically, any attempt to impose spending limits on the provinces would be extraordinary.

Also problematic is the relationship between any national referendum and any provincial referenda which may be held. Shortly after the federal government insisted that the umbrella committee model was unconstitutional, the Equality Party initiated a lawsuit against Quebec's referendum legislation. Following the pattern of the 1980 referendum, Bill 150 channels campaign expenditures through two umbrella committees. The Equality Party's challenge is set down for hearing in Quebec Superior Court on June 29th.

#### THE \$9 MILLION CEILING

The federal government has now amended Bill C-81 to introduce some limits on committee expenditures. Without limiting the number of registered committees that can be formed, the government has conceded a spending limit which would hold every committee to 56 cents per voter in each federal riding. Under that formula, any committee which intended to be active nation-

ally would be entitled to spend approximately \$9 million in the referendum campaign.

Unfortunately, the debate on Bill C-81 failed to address vital questions of principle. In terms of democratic process, what are the differences, if any, between a national referendum and a parliamentary campaign? Are limits on participation fundamentally inconsistent with the concept of direct democracy? Does fairness mean the same thing in a vote on the nation's future as it does in a parliamentary context?

Finally, do we want a level playing field in politics? In any event, how can it be achieved? If we put limits on the use of money, why not also on the use of celebrity, reputation and status?

Referendum or not, questions which were barely articulated in the debate about Bill C-81 will require answers before the next federal election.

*Jamie Cameron is Associate Professor and Assistant Dean at Osgoode Hall Law School. Legal Report is a regular feature of Canada Watch.*



## CW UPDATE

### THE MONTH IN REVIEW

by David Johnson

#### BOURASSA REJECTS FULL SOVEREIGNTY

In media interviews published in early June, Premier Robert Bourassa indicated that his government's preferred outcome of the current round of constitutional negotiations is an agreement on renewed federalism which could be put to the people of Quebec for approval via a provincial referendum. Should such an agreement not be forthcoming, though, Bourassa indicated that the government of Quebec would still not be prepared to propose any form of "out and out sovereignty" as a viable option for the province. In reflecting on the economic uncertainties and problems which would probably ensue from a total rupture with Canada, Bourassa commented that he had "no intention, at this critical juncture in our history, of playing the sorcerer's apprentice or the kamikaze."

An option which the premier is apparently contemplating is that of holding a referendum on some form of sovereignty-association. Bourassa suggested that his government may consider pursuing an initiative designed to promote Quebec sovereignty in numerous policy fields while ensuring that Quebec remains part of a common economic association with the rest of Canada, with this association administered by a common parliament. Left unsaid, however, is the political reality that the creation of any such constitutional structure would require the agreement of the federal and all provincial governments.

#### FEDERAL REFERENDUM LEGISLATION APPROVED

On June 23, Bill C-81, An Act to provide for referendums on the constitution of Canada, received royal assent and came into force.

This legislation empowers the federal government to call a referendum, in any or all provinces. The duration of a referendum campaign ranges from a minimum of 36 to a maximum of 45 days. No referendum, however, can be officially called until Elections Canada has completed its necessary administrative preparations. This process may take 2-3 months and thus the earliest date for a national vote would be late September. Provisions concerning the establishment of campaign committees and their expenses elicited most debate within the Commons and the media. Committees will be forbidden from accepting any campaign contributions from out of country sources and they will be limited to making expenditures not exceeding 56 cents per elector per electoral district in which the committee intends to be active. This means national committees will be able to spend up to \$9 million each. However, the legislation allows for the creation of an unlimited number of referendum committees. The government argued that any limitation on the number of committees would violate the Charter's guarantee of freedom of association. (See the article by Jamie Cameron in this issue.)

#### QUEBEC REFERENDUM DATES ALTERED

On May 14, 1992, the government of Quebec introduced amendments to the Quebec Referendum Act designed to curtail the pending referendum process by four weeks.

According to Bill 150, approved by the National Assembly last June,