

# André Lecours

## Legal mechanism for any independence referendum inquiry

Québec and Canada have arguably the most experience of any established liberal-democracies with self-determination processes featuring referenda. Twice, in 1980 and 1995, has the Québec government consulted Quebecers on the political and constitutional future of the province, and the Parti québécois (PQ), currently leading in the polls with a provincial election less than one year away, has promised to hold a third referendum on independence if it forms a majority government. Hence, the case of Québec and Canada represents a significant international example, and precedent, for thinking about mechanisms leading to independence referenda and examining the political discourse around such mechanisms. The striking thing about the two Québec independence referenda, from a comparative perspective, is that the Québec government did not seek to strike an agreement with the federal government on the parameters of the referendum, nor did the federal government actively look for input into such parameters. Of course, Canada is a federation, that is, a state where sovereignty is divided and the distribution of powers constitutionalized. This simple fact helps explain the peculiarity of the Québec and Canadian case, albeit only partially since independence referenda and the possibility of secession would most likely trigger successful constitutional challenges in many, if not most, federations (for example, the United States).

### **The 1980 Referendum: The Gradualist Approach.**

The 1980 Québec referendum occurred in the context of significant socio-political change in the primarily French-speaking province. The so-called Quiet Revolution that started in the 1960s involved a transformation of nationalism in the province that featured a re-territorialization of the nation away from the pan-Canadian notion of French-Canada and towards the idea of a Québécois nation. It also involved efforts at accelerating economic development, and in particular at boosting the social-economic mobility of Francophones, in part through legislation on the use of French in the public sphere and at the workplace. For the PQ, such tasks involved Québec possessing all the powers of a sovereign state. After it formed a provincial government in 1976, the secessionist party sought to make good on its promise to hold a self-determination referendum in its first mandate.

The PQ's central concept was 'sovereignty-association.' Sovereignty was not an incorrect term to reflect the quality of statehood pursued by the PQ and it also had the advantage of being 'softer' and more palatable for greater number of Quebecers than 'independence'. The 'association' part was largely undefined but responded to the widely shared notion that a majority of Quebecers wanted to retain some type of link with Canada. It was also coherent with the so-called gradualist (étapiste)

approach to self-determination. Indeed, the PQ government specified that its 1980 referendum would be, in the event of a 'yes' result, the first of a pair. In that first referendum, Quebecers were asked if they agreed to give the PQ government the mandate to negotiate 'sovereignty-association' with Canada. A second referendum would then be held for Quebecers to make a final determination on 'sovereignty-association' after having been presented with the results of these negotiations. The PQ government never consulted the federal government about the referendum process, the question asked, or the majority required for a declaration of independence to be put forward. It considered that Québec's parliament (the National Assembly) had the necessary authority and legitimacy to make all decisions in regard to the referendum. Interestingly, the federal government never challenged that position, perhaps in large part because the 'yes' camp was never expected to win and therefore contesting the Québec government's position might have been viewed as antagonistic by many Quebecers. In the end, the clear victory of the 'no' camp (60% to 40%) seemed to end the debate over Québec's political and constitutional future for at least a generation.

### **The 1995 Referendum: Take Two.**

The second Quebec referendum came on the heels of failed constitutional negotiations aiming at meeting the demands of a Québec government formed in the 1980s and the early 1990s by the Québec Liberal Party. The failure of these negotiations was interpreted by secessionist forces as a rejection of Québec by the rest of Canada. In this context, the PQ government formed in 1994 promised to hold another referendum Québec's political and constitutional future. Consistent with the precedent of 1980, no thought was ever given by the PQ government to consult the federal government in any way shape or form on the parameters of the referendum. In contrast to 1980, the so-called gradualist approach was dropped; there would be only one vote, which could pave the way for a declaration of independence. The question, criticized by many for being overly long and complicated, referenced an offer of partnership to the rest of Canada following a hypothetical 'yes' victory (although such offer would not have been the subject of another referendum). This time again, the federal government did not object to the Québec National Assembly alone deciding on the question, timing, and majority deemed sufficient for independence being declared, perhaps in part because of the precedent of 1980 and also because it was once again expecting a fairly easy win by the 'no' side. This time, however, the 'no' side's victory was by the narrowest of margins (50.6% to 49.4%).

### **The Aftermath of a Close Result: Empowering the House of Commons.**

The federal government obviously did not like the close result of the 1995 referendum. The Canadian political class widely blamed what they argued was a confusing question for the strong support for 'yes'. Moreover, that political class was criticized for its apparent passivity in relation to the referendum. In order to clarify the constitutional implications of a referendum on independence, the federal government asked the Supreme Court of Canada questions on the legality of a secession declared unilaterally by Québec's National Assembly. In its famous 1998 Secession

reference, the Supreme Court of Canada states that Québec does not have a 'right' to secession either under domestic or international law but that if Québec's National Assembly were to declare independence following the expression of a clear majority on a clear question, all the partners of the federation would have the responsibility to negotiate secession while respecting the principles of democracy, the rule of law, minority rights, and federalism. The court left it to politicians to decide what constituted both a clear majority and a clear question. Then, in 2000, the federal government passed legislation that use some of the elements of the Supreme Court of Canada reference in order to frame decision-making about the parameters of any other independence referendum in the country. The so-called Clarity Act conferred responsibility to the House of Commons for judging the clarity of both a referendum question and the majority required for independence. All Québec political parties opposed the Clarity Act and, more broadly, the idea that the federal government could have any input into the parameters of an independence referendum. In 2000, the National Assembly adopted Bill 99 as a direct reply to the Clarity Act. This Bill, which states that no other parliament or government can constrain the democratic will of the Québec people, was found valid by the Québec Superior Court in 2018.

### **Towards a Third Québec Independence Referendum?**

In the last several years, polls on the question of independence in Québec show support roughly between 33% and 40%, at least 10 percentage points below the 'yes' side result from the 1995 referendum. In addition, until 2025, the PQ was struggling to show significant support in polls. In this context, much was made about the notion that the PQ was a generational party, supported primarily by Québeckers who had experienced at least the later years of the Quiet Revolution and the period of mega-constitutional politics but much less by the youth, while independence was no longer top of mind for most Québeckers, even for those sympathetic to the idea. Today, support for independence is still below 40% and polls suggest that most Québeckers do not want a third referendum on independence but the PQ, which has promised to hold such referendum if it were to form the next government, is leading in the polls with a provincial election less than one year away. Therefore, a third referendum on independence in Québec may very well happen and it is possible that the mechanism for triggering such a referendum would this time be more debated.

The key issue in this context is the Clarity Act. Would the House of Commons want to evaluate the clarity of the referendum question? Would it want to speak to the majority necessary for reaching independence? Would it feel compelled to do both of those things before the vote? In a situation where a Québec PQ government would, as is likely, choose to ignore the voice of the House of Commons if it were to make a pronouncement on the clarity of the question and of the majority, what would then happen? From a political and constitutional perspective, self-determination in Québec would enter a new terrain. A 2027 independence referendum would also involve a greater consideration of Indigenous self-determination than in the past. The plight of Indigenous peoples, who have been victims of colonial and assimilationist policies, has become a significant political issue in the last few decades. In this new context, the discourse of the PQ from 1995, consisting in saying that while Québec

could secede from Canada Indigenous nations could not secede from Québec, would not be easily tenable. The new political context also involves greater ideological differences in the secessionist camp in comparison to 1995 as well as the end of free trade as we knew it resulting from the Trump presidency, which means that for the PQ the answer to the question about the eventual commercial partners of an independent Québec could not credibly be the United States. The recent announcement by the PQ that an independent Québec would create its own currency after a-10 year transition highlights that the contemporary secessionist project might look somewhat different from what was proposed in the past.

### **Key Takeaways**

1. The case of Québec and Canada represent an international precedent, albeit in a federation, for triggering an independence referendum without consulting the central government.
2. That case shows two different referendum processes: a gradualist approach consisting of two different votes in 1980 and a single vote in 1995.
3. In both Québec independence referenda, the question featured the concept of 'sovereignty' rather than 'independence', to which was added a qualifier to refer to some continued relationship with the rest of Canada ('association' in 1980 and 'partnership' in 1995).
4. In the event of another referendum in Québec, the federal government may invoke the Clarity Act to have the House of Commons speak to both the clarity of the question (most likely pushing for a short question that would use only the term 'independence') and the clarity of the result (perhaps requiring more than 50% + 1).
5. Since the Québec National Assembly views the Clarity Act as illegitimate, considering instead that the province's representative institutions alone can set the parameters for a self-determination consultation, a serious conflict around process is not to be excluded if there were to be a third independence referendum in Québec.