



Coming to Terms with Plan B: Ten Principles Governing Secession

by

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The preferable solution to Canada's constitutional conundrum is for the federal and provincial governments to accommodate the needs and desires of Quebec within Confederation. In the event that approach fails, however, Ottawa should have a contingency plan ready to use if the next Quebec referendum ends in a "yes" vote. The goal of such a plan must be to set clear ground rules for Quebec secession in advance to ensure that it respects the rule of law.

Secession of a province is legally possible under Canadian law, but it must be achieved through a constitutional amendment and supported by a consultative, province-wide referendum on a clear question conducted fairly and transparently. A "yes" vote by a simple majority (50 percent plus one) would trigger secession negotiations. In them, Canada should be represented by a special negotiating authority comprising federal and provincial appointees plus representatives of aboriginal peoples. Any negotiated agreement

must respect the fiduciary obligation of the Crown to the aboriginal peoples and should allow for the possibility of a democratic partition of Quebec.

A negotiated agreement would then require ratification by a definitive referendum in Quebec and acceptance in a constitutional amendment in the rest of Canada.

The legal questions about the secession process should be put to the Supreme Court of Canada as soon as possible. These include whether a majority vote in a referendum in Quebec would entitle it to secede under either domestic or international law, which constitutional amending formula would apply (provincial unanimity or seven provinces containing at least 50 percent of the population), whether aboriginal peoples would have to provide consent or meaningful consultation, and so on. The federal government should then enact contingency legislation defining the framework for a secession process.

Main Findings of the Commentary

- The silence of the federal government during two Quebec referendums has left the Parti Québécois free to describe how it would achieve secession. Maintaining this silence is irresponsible and will lead to chaos if Quebec tries to declare independence unilaterally.
- The Parti Québécois's claim that Canadians outside Quebec have no right to participate in establishing ground rules for the next referendum finds no support in the laws and practices of other states that have dealt with secession.
- A sensible approach to the situation is for the federal government to take a leadership role in setting clear ground rules in advance of any future referendum. These rules should be based on the following (condensed) principles:
 - Secession is possible under Canadian law if it is done so as to respect the rule of law.
 - Secession can occur only if it is supported by the province's electorate in a consultative referendum on a clear question conducted transparently and fairly. A majority of 50 percent plus one is sufficient to trigger secession negotiations. Any negotiated agreement should be ratified by the relevant provincial population in a second referendum.
 - Partition is legally and logically compatible with secession and should be possible if residents in a defined area express a desire to remain part of Canada.
 - The fiduciary obligation of the Crown to the aboriginal peoples of Canada must be respected. They should be directly represented in any secession negotiations and entitled to remain within Canada if they desire.
 - A secession would necessitate some immediate constitutional changes, but otherwise the existing Constitution should remain intact. (In other words, reorganization of the country's institutions should not be attempted simultaneously.)
- The federal government has several options for ensuring the application of these principles, including:
 - Referring the issue of secession and its process to the Supreme Court of Canada for a ruling on constitutionality.
 - Asking Parliament to enact contingency legislation setting out ground rules for a secession process. This legislation should, among other things, establish who would negotiate on behalf of Canada. A special negotiating authority could be set up comprising, say, 21 persons, nine appointed by the federal government, nine by the provinces, and three by the aboriginal peoples. To avoid chopping up the complex tradeoffs of a negotiated settlement, Parliament and the provinces could agree ahead of time to consider it without amendment.
 - Asking a blue-ribbon panel of Canadians and non-Canadians to draft this legislation.
 - Obtaining a mandate for its actions from the Canadian people, preferably through an election (rather than a national referendum or a constituent assembly).
- All of these recommendations offer pitfalls. But to make no plan would leave Quebecers with no clear idea of the consequences of a "yes" vote in a sovereignty referendum and the Canadian government without a strategy or a mandate for responding to a majority "yes" vote.

The debate over Quebec's place in Canada assumed a new urgency on the evening of October 30, 1995. Before that date, it was plausible for the prime minister to refuse to answer "hypothetical" questions about how Ottawa would respond if a majority of Quebecers voted to secede from Canada. According to Jean Chrétien, no matter how many referendums¹ the Quebec government held on the issue, Quebecers would always choose to remain in Canada.

The events of October 30 shattered that strategy of studied indifference, at least for the foreseeable future. The razor thin majority secured by the "no" forces and subsequent opinion polls indicating that a majority of decided Quebec voters support sovereignty have made it impossible for the prime minister to continue to claim that a "yes" vote is purely hypothetical and therefore unworthy of his consideration. Canadians recognize that their country survived a near-death experience on October 30 thanks more to happenstance than to a coherent strategy. Increasingly, voices in all parts of the country are calling for the federal government to begin planning now for the next referendum.² Part of that strategy must be a contingency plan to use if the referendum is lost and a majority of Quebecers vote to secede from the federation.

This *Commentary* is an attempt to set out the main elements of such a contingency plan — sometimes referred to as Plan B (see Box 1). The key assumption underlying our analysis is that it is imperative that Canada attempt to set down the ground rules governing secession of a province well in advance of the next referendum. We describe what these ground rules might contain and suggest how the federal government might go about implementing them.

Why Ground Rules?

The existing Constitution says nothing about how — or whether — a province can secede from the federation. This silence should be no comfort to federalists (who might mistakenly imagine that the absence of a constitutional

procedure for secession makes such an outcome "impossible"). Rather, it is a cause for deep concern. Canada is a democracy whose ultimate legal and political foundation is the consent of Canadians to be governed under the Canadian Constitution and Canadian law. If a sufficiently large and determined majority of Canadians in a particular province withdraw that consent, then the absence of appropriate legal wording to achieve secession will not prevent them from realizing their goal.

Thus, the absence of an agreed procedure to govern secession will lead to confusion and conflict over the legitimacy of any proposed secession. This confusion will, at a minimum, produce political and economic uncertainty. Accordingly, this *Commentary* proceeds on the premise that it is in the interest of all Canadians, including Quebecers, that such an outcome be avoided to the extent possible.

Many thoughtful and responsible Canadians recognize the dangers inherent in a situation in which there is no consensus over the ground rules that would apply in the event of an attempt by a province to secede. Yet they continue to resist any initiative designed to bring clarity to the situation, thinking that any attempt by the government of Canada to define the rules of the game would be seen in Quebec as unduly provocative; such provocation could boost support for sovereignty and thus, paradoxically, serve to reinforce the very outcome that federalists wish to avoid. Others argue that federalists should avoid venturing onto this terrain since to do so would be unduly defeatist, amounting to giving sovereigntists a blueprint for achieving the dismemberment of Canada. Needless to say, federalists should be wary of Trojan horses of their own making.

Doubtless, any open discussion of the process governing secession could backfire easily. Yet the question is not whether such a discussion is risky but, rather, whether any alternative strategy appears more attractive. The main alternative — a continuing refusal to contemplate the possibility of secession — was the centerpiece of the referendum campaigns in 1980 and 1995. The results on October 30

Box 1: *Plan A and Plan B*

The terms *Plan A* and *Plan B* are fairly new to the Canadian constitutional debate. An early appearance seems to have been in February 1996, when the *Globe and Mail* reported:

"There is no Plan A or Plan B," Mr. Chrétien said...."You formulate the plan as being Plan A and Plan B," he said, less than 24 hours after...Stéphane Dion identified Plan A as reconciliation terms and Plan B as the terms of secession.*

Somewhat earlier usage had been *Track 1* for a conciliatory approach to Quebec and *Track 2* for a hard line.

* Susan Delacourt, "Chrétien steps back from unity issue," *Globe and Mail* (Toronto), February 3, 1996, p. A1.

conclusively demonstrated that this strategy no longer makes sense. Its main byproducts have been confusion and disorder in the federalist camp, while giving sovereigntists a free hand in defining the rules of the game to their advantage.

The danger in further waffling is obvious. The longer the federal government waits before beginning to systematically contradict misleading sovereigntist claims the more it appears to be giving tacit approval to them. To take but one example: the fact that the federal government has participated in two campaigns conducted on the premise that there were no special requirements, such as a qualified majority, to achieve an affirmative answer to the referendum questions makes it much more difficult to claim that a different rule should apply in any future referendum.

Some media commentators have dubbed any attempt to set down ground rules for secession as taking a "tough love" approach, casting the federal government in the role of a stern but loving parent and Quebec as a spoiled adolescent who must be brought back in line through the belated and reluctant application of strict disciplinary measures. In our view, however, this scenario totally misconceives the purpose and nature of the exercise we propose. The federal government must attempt to deal

with the consequences of secession for the simple reason that failing to do so would be morally and politically irresponsible. Governments may wish for the best, but they have an obligation to prepare themselves and their citizens for the worst. The results of the October 30 referendum make it crystal clear that support for sovereignty in Quebec is sufficiently strong that Canadians elsewhere can continue to ignore it only at their peril.

In short, these unpleasant realities must be confronted for their own sake. This realization is distinctly liberating. If Canadians begin to discuss these issues for the simple reason that not doing so would be irresponsible (rather than as a strategy to win the next referendum), they can break the long-standing taboos that have stifled and sterilized this debate. It should finally be possible to initiate a frank and open dialogue on issues that have always remained just below the surface but have never been broached for fear of offending listeners in various parts of the country.

A Role for All Canadians

Some, no doubt, will denounce any attempt by Canada to participate in the process that will determine its own territorial integrity. In fact, it is entirely normal and appropriate in a democratic society for all citizens to have a say in the future of their country.

This point becomes obvious when one contemplates how the government of an independent Quebec would react if, following accession to sovereignty, it were faced with secessionist demands from minorities within its own population. Quebec would undoubtedly reject any claim that only the members of the dissentient minorities had a right to determine whether their secessionist claims should be recognized and assert, instead, that it and the entire Quebec population had a right to participate in decisions that affected Quebec's territorial integrity.

Aside from these considerations of democracy and fairness is a more pragmatic reason for recognizing the right of all Canadians to participate in this debate. Quebec sovereign-

tists have always argued that the costs of achieving sovereignty are minimal and have labeled suggestions that sovereignty will impose economic costs on Quebecers as economic terrorism. Yet the only possible way to minimize the transition costs is to permit Canadians from all parts of the country to discuss the issues openly. Out of this dialogue may come some measure of consensus on the ground rules that ought to govern any future secession referendum and the process leading out of a majority "yes" vote. It is therefore in the interest of everyone — even the sovereigntists themselves — to recognize the right of Canadians from across the country to participate in a process designed to establish ground rules for secession.

Of course, some Quebecers may not see it that way. But it is probably impossible to predict with any certainty precisely how Quebecers will react to an open and honest debate of the secession issue. For every voter who takes offense there may be another whose perspective and understanding are broadened. And surely the results of the last referendum have exposed the folly of trying to keep Canada together on the basis of timidity about the capacity of adult citizens in a democracy to debate their own futures maturely and intelligently. In short, Canada should enter the debate directly, rather than through hushed diplomacy and confusing innuendo.

Outline of the *Commentary*

Even if readers accept our initial premise — that the federal government and all Canadians have a role to play in this process — the question that immediately arises is what is the nature of that role? Moreover, on what should the federal government ground its Plan B — what principles should govern the secession process?

We believe that the answers to these questions can be found, at least in part, in the international experience with secession in the recent past. A comparative analysis is useful since it illuminates the practical advantages and disadvantages of different sets of decision

rules. By examining the international experience with secession movements and identifying commonly accepted approaches that have produced peaceful and democratic outcomes, Canadians can move past rhetoric and begin to focus on approaches that will be in everyone's best interest.

We turn to this task in the first section of this *Commentary*, reviewing the extent to which the constitutions of various nation-states provide for the possibility of referendums on secession. One obvious point that emerges from this review is that such provisions are extremely rare; given the primordial character of the principle of territorial integrity in international relations, the vast majority of states do not explicitly contemplate their own dismemberment. Nevertheless, a number have made provision for secession, usually because of the existence of significant secessionist movements within their borders.

The second section builds on this comparative analysis, setting out ten principles that we believe ought to govern the secession of a province from the Canadian federation. The key principle, which underlies our entire analysis in this section, is that any secession should respect the principle of the rule of law — that is, it should be achieved through a duly authorized amendment to the Canadian Constitution, rather than through a unilateral declaration of independence (UDI) by the Quebec government. We also propose rules to deal with issues such as the majority that must be obtained in the referendum, the manner in which border questions should be resolved, and whether a referendum should be held nationally or only in the province of Quebec.

In the third section, we consider how the federal government might implement the principles we propose. After examining a number of possible options, we recommend combining elements of several, rather than pursuing one or another in isolation from the others.

The key principle, we suggest, is the need to build consensus and find common ground, rather than dictate outcomes. Indeed, we believe that any attempt to impose conditions

