

**International Conference on Federalism
Mont-Tremblant, October 1999**

**Session 3A) IGR Theme Plenary: The Challenges of Intergovernmental
Relations**

"RULES CANNOT BE CHANGED IN THE MIDDLE OF THE GAME"

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Check against delivery

I am aware that my presence here today may surprise a number of you. After all, am I not a Minister in a government that is firmly committed to making Québec a sovereign state and are not you, as participants in this assembly, firmly convinced that federalism is the best of political organization?

Inevitably, we would not have enough time to say everything there is to be said about intergovernmental relations within a federation — the Canadian federation — one of whose members — Québec — constitutes the political and territorial homeland of one of the two founding peoples of this federation — the Québec people — in particular when the federal entity itself and the other States that make it up refuse to recognize the existence of this people, refuse to recognize the special role that must fall to the government of this people, unilaterally adopt the Constitution of 1982 which no Government of Québec — not even of federal allegiance — has recognized since then, refuse to honor their own commitments to constitutional reform, and finally, refuse to react to the silent tragedy of the rapid assimilation of Canadian Francophones living outside Québec.

Canada has existed for 132 years. Is it normal that a deadlock on subjects of such importance as the recognition of a people and the distribution of powers should last for so long? The standard of living in Canada and its prestige around the world must not be used to hide the fact that Canadian federalism has not succeeded in taking up the challenge posed by the existence of a Québec people within the federation.

Mr. Lucien Bouchard, Prime Minister of Québec, will deal with this subject in greater detail this evening. I also invite you to read the document entitled "Québec's Political and Constitutional Status", which the Government of Québec made public last week.

For my part, I will focus on one point. Twice already, namely in 1980 and 1995,

Québec's political status was the subject of referendums held in accordance with the democratic procedures and principles adopted by its National Assembly. The federal government participated actively and fully in these two campaigns and at the time, no one gave serious thought to calling into question the rules underlying these exercises in democracy.

In 1980, the YES side had won 40.4% of the votes. In 1995, this figure rose to 49.4%. The extraordinarily close results of the last referendum sent a shock wave through the rest of Canada, prompting the federal government to completely revise its strategy and henceforth to adopt the hard line.

In preparation for the next Québec referendum, the federal government is seeking to unilaterally change the rules of the game, by relying on three firmly entrenched sophisms. The first one maintains that the October 1995 referendum question was ambiguous and sought to confuse voters because it introduced the notion of partnership as defined by the two accompanying texts. The second sophism claims that the absolute majority of votes is not a sufficient threshold when the future of a federation is at stake, in order to ensure that "Quebecers do not lose their country amidst confusion." According to the third sophism, it is normal that in all democratic countries it is more difficult to separate than it is to unite. However, it is important to point out that nothing in the international practice of States in any way lends credence to such statements.

The referendum question

Some people maintain that if the YES side came within less than one percentage point of victory during the 1995 referendum, it was because the question was ambiguous in that it could lead Quebecers to believe that a vote for the YES option was not really a vote for sovereignty. Nothing could be further from the truth.

The first words of the 1995 question read as follows: "Do you agree that Québec should become sovereign.....". It is hard to be any clearer than that. The question then continued with the second component of the sovereigntist project, namely the offer of a new economic and political partnership made to Canada: "Do you agree that Québec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Québec and of the agreement signed on June 12, 1995?" The two texts to which reference is made consisted of a bill containing 27 sections (6 pages) which established the main democratic terms relating to Québec's accession to sovereignty, including the guarantees regarding respect for personal rights and freedoms, the integrity of Québec's territory and the rights of the English-speaking community and of the aboriginal nations. The other text, in 5 points, consisted of the agreement reached on June 12, 1995 between the three political parties making up the YES side, describing the new partnership that a sovereign Québec would have liked to reach with Canada. These

documents had been distributed to all households in Québec.

Of course, the wording of the question was not what the adversaries of sovereignty would have liked. But the project submitted to the referendum was not their project. Indeed, in its formulation, the 1995 question was as clear as — and even clearer than — was the question that the French people were called upon to answer in relation to the Maastrich Treaty: "Do you approve the bill submitted to the French people by the President of the Republic authorizing the ratification of the Treaty on the European Union?" (our translation). This question made no reference to the impacts of the planned European union on French institutions and referred voters to two legal texts, one of which, the Treaty on the European Union, raised highly complex political and legal points.

The wording of the 1995 question also resembled the question asked within the framework of the May 22, 1998 referendum on the Belfast peace accords in Northern Ireland and which read as follows: "Do you support the Agreement reached in the multi-party talks on Northern Ireland and set out in command paper 3883?" It should be noted that this question also makes direct reference to negotiations and an agreement between parties, something Canadian federalists criticized in the Québec question.

Within a Canadian context, the October 1995 question was comparable in its wording to the question asked in 1995 within the framework of the simultaneous Canada/Québec referendums on the Charlottetown Accord. This question was as follows: "Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?" The question made no mention of the scope of the constitutional amendments proposed and referred voters to the text of the agreement which contained some 60 sections, and the legal text of which was only made public half-way through the campaign. Yet no one contested the results by alleging that the question was ambiguous.

The wording of the 1995 question also compares advantageously, in terms of clarity, with the questions asked during other referendums that have marked the Canadian landscape. The 1942 referendum which sought to institute Canada-wide conscription for military service overseas was based on a question drafted in at the very least sibylline terms: "Do you agree to release the government from every obligation resulting from previous commitments restricting the methods of mobilization for military service?" Similarly, in 1948, the citizens of Newfoundland were called upon, in two consecutive referendums, to renounce a status equivalent to that of a country to become a simple Canadian province on the basis of two referendum questions, the wording of which was extraordinarily laconic. The Referendum Act, as it was called, stated the formulation and the order of the questions that would appear on the ballot: "1 Commission of government for five years; 2 Confederation with Canada; 3 Responsible government as it existed in 1933". For all intents and purposes, Newfoundland voters were left in the dark. This did not prevent Mr. William MacKenzie King,

Prime Minister of Canada at the time, from considering that Newfoundland would have the right to be part of Canada to the extent that its decision is "clear and beyond possibility of misunderstanding." (The Gazette, July 31st, 1948, p. 1)

Moreover, it is interesting to note that in the opinion handed down on August 20, 1998 by the Supreme Court of Canada concerning the unilateral secession of Québec, the Court did not criticize the wording of the October 1995 referendum question, the effect of which was to destabilize the adversaries of the sovereigntist project who found themselves reduced to making a detailed analysis of each and every word and comma of the Court's opinion with a view to trying to have the Court say what it had deemed inappropriate to say. Finally, it is important to note that the turnout for the 1995 referendum was 93.52%, the highest ever recorded for a referendum in Canada. Hence, the stakes were clear and understood by all.

Absolute majority rule

The federal government is also seeking to give credence to the idea that at the time of the next referendum it is necessary to establish a majority threshold that is greater than that of the absolute majority of votes (50% + 1). Yet, in other countries facing similar situations, no one has dared do such a thing. And I am speaking here of States whose democratic tradition is similar to that of Canada: the United States, which in 1998, had to envisage the possibility of a self-determination referendum for its territory of Porto Rico; France, which in 1998, had to face a self-determination referendum in its overseas territory of New Caledonia, a referendum that dealt with the terms of the Nouméa Agreement liable to lead to the complete sovereignty of this archipelago as early as the year 2013; the United Kingdom, which in 1995, had to come to terms with the self-determination referendum in its autonomous territory of Bermuda; and Jamaica, which in 1961, held a self-determination referendum that led it to secede from the Federation of West Indies, even though the latter dissolved a few months prior to the date for the proclamation of Jamaican independence. In all of these cases, and these were not the only ones, the rules adopted with a view to holding these referendums had two basic points in common: accession to sovereignty was one of the choices proposed to voters and the results had to be interpreted according to the absolute majority rule. Hence, it is false to claim that the absolute majority rule is applicable solely in cases of union and that it does not apply in cases of secession. International practice clearly shows that such is not the case. Indeed, we only know of a single case, namely that of the referendum held in 1998 on the small islands of St. Kitts and Nevis, where the rules provided for the application of a qualified majority for the interpretation of the results.

The line of argument invoked by the federal government also tries to base itself on various passages from the opinion handed down by the Supreme Court in the case of the federal referral on the unilateral secession of Québec. Contrary to what the federal government may claim, nowhere in the opinion rendered by the

Supreme Court of Canada is it written or even suggested that the absolute majority rule does not express a clear majority. In its wisdom, the Court prefers instead to leave it up to "a political evaluation" (par. 100) to determine what must be considered as constituting a clear majority. However, the Court is careful to specify that (and I quote) "In this context, we refer to a clear majority as a qualitative evaluation." (end of quote) (par. 87). The quantitative dimension, which is so dear to the federal government, is not considered essential by the Court.

50% + 1: a universal rule

As the Supreme Court has left it up to the political players to define what is to be understood by the expression "a clear majority", common sense dictates that I should look to three sources for precedents that are likely to enlighten me on this point. The first of these sources is Canadian practice. All referendums held in Canada thus far have been interpreted according to the absolute majority rule.

The second of these sources is international practice. As I established earlier, it is the absolute majority rule that wins the favor of democratic states. There are many more cases than the four or five examples that I cited earlier.

Finally, the third of these sources is the practice of the United Nations. Since 1990, the United Nations has been involved in the organization or supervision of three referendums related to accession to sovereignty. The one organized by the Government of Eritrea, a province of Ethiopia, that wanted to accede to sovereignty after more than thirty years of civil war, and which was held from April 23 to 25, 1993; the very recent case of East Timor, and the one planned for next year and which the United Nations is in the process of organizing with respect to the accession to sovereignty of the Western Sahara.

In the first two cases, the United Nations established that the results would be interpreted according to the absolute majority rule (50% +1), which they were. In the third case, it is also provided that the party who obtains the majority of validly cast votes will have won the referendum.

In short, Canadian practice, international practice and the practice of the United Nations unanimously indicate that in the matter of referendums on accession to sovereignty, the absolute majority of votes, namely 50% + 1, expresses not only a clear majority but also a rule that must be recognized as being democratic, constant and universal.

Conclusion

We should conclude from the foregoing that the main challenge of intergovernmental relations in the Canadian context is that of mutual respect.

Respect for the difference. Respect for the identity of the other people, its achievements, and its institutions. Respect for the Constitution and the distribution of powers set out therein. Respect for the decisions made democratically. The Supreme Court of Canada has understood this fact and has formulated it in these terms:

The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to the Confederation to negotiate constitutional changes to respond to that desire. (par. 88)

Those persons who are here today and who believe that a federation can only ensure its survival by endeavoring to erase identities in the name of a venture in nation building C one State, one nation C I wish to tell you that I believe that you are very much mistaken. The events currently unfolding in the United Kingdom, where officials have decided to bank on the recognition of the Welsh and Scottish peoples, appear much more promising to me. The success of a federation is better assured if there is a formal recognition of the peoples who make it up. Otherwise.....

I am profoundly convinced that the Canada of the last few decades is moving along a very different path. That is why we must understand that the centrifugal forces that are calling into question Canada's existing structure will continue to grow and that in a not-too-distant future, they will succeed, at the end of an evolution whose democratic character will remain beyond reproach, in transforming the face of Canada and in giving the Québec people the opportunity to take its rightful place among the world's other sovereign peoples.

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