A Long and Uncertain Road to Alberta Independence

Alienation Accelerated

Premier Jason Kenney has suggested that Canada is facing a "crisis of national unity" because Albertans, and other western Canadians, are feeling disrespected by the rest of the country.[1] Premier Kenney has cited a poll from the *Angus Reid Institute* where 50% of Albertans stated that they thought Alberta separating from Canada was a real possibility.[2] In a March 2019 poll, 56% of Albertans agreed with the statement: "Western Canada gets so few benefits from being part of Canada that they might as well go it on their own."[3] These feelings of unease led the separatist Alberta Independence Party to participate in the 2019 Alberta general election; however, the party did not fare well in result.[4]

These developments have raised the question: how could Alberta legally separate from Canada if the people of the province chose to do so? For Alberta to achieve independence from Canada, there would need to be a "clear majority" of Albertans voting in a referendum for independence. Following the referendum result, constitutional negotiations between Alberta, the federal government, and the other provinces would need to be successful.

The Legal Framework for Separation

Following the narrow defeat of the Quebec independence referendum in 1995, the federal government asked the Supreme Court of Canada [SCC] to consider how a province could legally separate from Canada. The SCC provided a road map for legal separation in a 1998 reference .[5] Following the case, the federal government enacted a law in 2000 to provide "clarity" for how the federal government would approach a future independence referendum.[6]

The Steps to Achieve Alberta Independence

The Canadian Constitution would need to be amended for a province to separate from Canada.[7] The following steps would need to be followed:

1) Decide to hold an independence referendum.

While a referendum itself has "no direct role or legal effect in our constitutional scheme," it is required to gauge "the views of the electorate on important political questions."[8] Thus, a referendum would be necessary to understand if Albertans want to leave Canada.

2) Decide on a referendum question to ask the population. The question needs to be clear.

There needs to be a clear question for Alberta's residents to vote on. The SCC stated that any referendum question must be able to gauge a "clear expression" of the will of a province's population.[9]The *Clarity Act* requires the House of Commons' input in deciding the potential question which would be posed.[10] For a question to be suitable, the House of Commons must assess if the question is direct, clear, and does not ponder "other possibilities in addition to the secession of the province from Canada."[11] In short, the question must clearly state that independence is at issue.

The *Clarity Act* prohibits the federal government from entering negotiations on separation if the House of Commons determines the referendum question is not clear.[12] For this reason, it would be important for the federal and provincial governments to agree on a referendum question prior to the start of a campaign.

3) Conduct the campaign, hold the referendum, and tally the votes.

A campaign period would be required for the pro and anti-independence activists to advocate for their positions. The campaign would likely be divisive since the referendum would have a significant impact on the future of Alberta as well as the rest of Canada.

If the pro-independence side garners the most votes in the referendum, they must have received enough votes to show a "clear expression" of the will of Albertans to leave Canada.

4) The House of Commons will decide if the majority vote in favour of separation is a "clear expression" of the will of Albertans to leave Canada.

The SCC stated that considerable weight must be given to a "clear expression" of the will of a population to separate – but neither "clear expression" nor what might form a "clear majority" were defined. A "qualitative evaluation" is required to gauge a "clear expression."[13] Similarly, the *Clarity Act* is ironically unclear about what would form a "clear majority" in favour of separation. The Act requires the House of Commons to determine whether there has been a "clear expression of a will by a clear majority of that province" to separate from Canada.[14] The House of Commons must consider the size of the majority, the percentage of eligible voters that voted in the referendum, and "any other matter or circumstances" considered relevant. Similarly, the Act requires the House of Commons to take into account the views of others provinces, the Senate, Aboriginal peoples, and all the political parties in the provincial legislature from the province voting to separate.[15] Only after weighing these factors does the House of Commons determine if the referendum result forms a clear expression of the will of that province's population.

Well-known Constitutional expert Peter Hogg has stated that "if the judgment of the House of Commons is that the majority in favour of secession is not clear, then the Government of

Canada is prohibited by the Act from entering into negotiations for secession."[16] For example, if 51% of Albertans voted in favour or independence and 49% voted against, and the House of Commons determined that this margin did not show a "clear majority," then they would be prohibited by the *Clarity Act* from entering negotiations. This would create a political stalemate and it is unclear what would happen next. Despite the SCC rejecting a "supervisory role" over political aspects of separation, it seems likely that the courts would need to resolve any uncertainties about whether or not there was a "clear majority" in favour of separation.[17]

5) Alberta, the federal government, and the other provincial governments will engage in negotiations to change the Constitution.

The SCC declared that federal and other provincial governments "cannot remain indifferent to the clear expression of a clear majority" of a provincial population voting to separate – this would lead to an obligation to negotiate independence.[18] However, the SCC rejects that there would be a requirement to accept separation under any terms. The Court has stated that any "foregone conclusions" in result would make the negotiations hollow.[19] Thus, the parties would be required to negotiate separation in good faith, but there would be no predetermined result.

Constitutional negotiations with this level of importance would not be simply resolved. Important and contentious issues such as trade policy and dividing the federal government's national debt would need to be settled. In this context, Hogg has explained that "there is a serious risk the participants, even working in the shadow of the constitutional obligation, would be unable to reach an agreement" on the relationship between an independent Alberta and the rest of Canada.[20]

The SCC acknowledged that negotiations could break down, but the Court refused to speculate about what would happen if this occurred.[21] The SCC expressed a clear desire to not be involved in these political negotiations.[22] However, if the negotiations did break down, the Court would likely be called to provide insight to resolve the dispute.

6) If negotiations are successful then a constitutional amendment will be enacted, and Alberta will gain independence. The relationship between an independent Alberta and the rest of Canada would be determined by the negotiations which led to the amendment.

Conclusion: A Long Road to Alberta Independence

The *Quebec Secession Reference* and the *Clarity Act* provide the legal road map for how Alberta could gain independence from Canada. The "crisis of national unity" between Alberta and the rest of the Canada make it relevant to consider how this constitutional

change could occur, even if the idea of a province separating is currently only an academic exercise.

It is possible for Alberta to separate from Canada, but the process would be long, uncertain, and fraught with difficulty.

[1] Cable Public Affairs Channel, "In Committee from the Senate of Canada: Jason Kenney Speaks Out Against Federal Environmental Reform Bill" (2 May 2019) at 00h:05m:20s, online (video): *CPAC* <cpac.ca/en/programs/in-committee-from-the-senate-of-canada/episodes/65982332#>. For example, there is unease about the federal government's handling of Alberta's resource economy, including recently enacted laws to change the environmental assessment process for resource projects and to enact an oil tanker ban off the waters of Northern British Columbia.

[2] Angus Reid Institute, "Decades after Reform's rise, voters open to a new 'Western Canada Party'" (5 February 2019), online: *Angus Reid Institute* <angusreid.org/western-canada-separatism/>.

[3] Environics Institute, "Confederation of Tomorrow 2019 Survey of Canadians: Pulling together or drifting apart?" (22 March 2019), online (pdf): *Environics Institute* <cwf.ca/wp-content/uploads/2019/03/Confederation-of-Tomorrow-Survey-2019-Report-1-Pulling-Together-or-Drifting-Apart-FINAL-REPORT.pdf>.

[4] Elections Alberta, "Provincial General Election Results" (16 April 2019), online: *Elections Alberta* <http://officialresults.elections.ab.ca/orResultsPGE.cfm?EventId=60>. The Alberta Independence Party ran 63 candidates out of 87 electoral districts; however, the party only won 13,531 votes or 0.7% of votes cast in the election.

[5] *Reference re Secession of Quebec*, [1998] 2 SCR 217 .

[6] *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference,* SC 2000, c 26 .

[7] Peter W Hogg, *Constitutional Law of Canada (2017 Student Edition)* (Toronto: Thompson Reuters, 2017) at 5-36 [Hogg]. Hogg states: "A secession would require an amendment to the Constitution of Canada, and would have to be accomplished in accordance with the Constitution's amending procedures." It is important to note that it is not clear if this amendment would require the use of the general amending formula under s 38 of the *Constitution Act, 1982* or if it would require the unanimous consent of all the provinces, the House of Commons, an the Senate under s 41 of the *Constitution Act, 1982*. For discussion on this point, see Hogg at 5-40.

[8] *Quebec Secession Reference supra* note 5 at para 87.

[9] *Ibid.*

[10] *Clarity Act supra* note 6, s 1(1). This section states that the House of Commons will "set out its determination on whether the question is clear."

[11] *Ibid*, s 1(4).

[12] *Ibid*, s 1(6).

[13] *Quebec Secession Reference supra* note 5 at para 87.

[14] *Clarity Act supra* note 6, s 2(1).

[15] *Ibid*, s 2(2)-2(3)

[16] Hogg *supra* note 7 at 5-38.

[17] *Quebec Secession Reference supra* note 5 at para 100.

[18] *Ibid* at para 92.

[19] *Ibid*.

[20] Hogg *supra* note 7 at 5-41.

[21] *Quebec Secession Reference supra* note 5 at para 97.

[22] *Ibid* at para 100. The SCC state that they will not have a "supervisory role" over the negotiations and that only "the political actors would have the information and expertise to make the appropriate judgment" as to when the negotiations have finished.