

## **The People's Will**

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Referendums are defining moments in a country's history. They do not resolve the past, they decide the future. On great issues they set in motion dynamic, social, political and economic forces, which are not easily reined in.

On October 30, 1995, fractions of a percentage point stood between the birth of a new country and the death of another. No one believes that the result was determinative of the issue.

It is therefore incumbent upon us to question the 1995 referendum in all its components because we are living its results, confusion and a misunderstanding about the nature of the will of the people.

For many, the 1995 Referendum has now become an historical event, embedded in the last century and not necessarily topical in the new millennium. I submit that this is the view of those who are fatigued about the issue and prefer to close their eyes and ears. Far more telling is the continuation of a party dedicated to the independence of Quebec as the governing party of Quebec and the existence of the Federal Clarity Act as one of the Federal Government's responses to the anticipated next step in our future.

Separatism may wax and wane but the relationship between English and French Canada, their links and reconciliation or alienation, are the cornerstone of this country's history and existence.

So far, only limited initiatives have been taken by the Quebec Government to expose the manner and conduct of the 1995 Referendum. One has been the inquiry made by former Superior Court Chief Justice Alan Gold, who was given a limited and constraining mandate to examine the spoiled ballots in selected ridings. His conclusions, although interesting and relevant, bear on only fragments of the larger referendum picture.

The other initiative of the Quebec Government, or more properly the Attorney General, has been the prosecution of certain individuals who are accused of purposefully and improperly rejecting ballots. Two of the accused were acquitted and all the remaining charges withdrawn. This result is hardly surprising considering both the great difficulty in proving in penal law that an accused intended to deprive an elector of a vote and the miserably inadequate fashion in which these cases were

prosecuted, as the Quebec Court of Appeal noted. In any event, the prosecution only went to the guilt or innocence of a select number of low-ranking individuals accused of rejecting valid ballots. The prosecutions are woefully inadequate to properly present the broader picture of the nature and conduct of the 1995 Referendum.

By way of private initiative, the Montreal Gazette took civil legal proceedings initiated before the Referendum Council, a Tribunal composed of three Quebec Judges seeking access to the spoiled ballots. The Gazette focused its arguments uniquely on freedom of the Press and so far, before successive tiers of Courts, has failed to make good the right of the Press to know and report on the rejected ballots.

One remaining initiative is pending before the Courts, the only one that seeks an entire exposé of the Referendum and its conduct. That is the initiative of Alliance Quebec presently pending before the Quebec Superior Court. This case is one of the leading and arguably the most important civil rights case pending before the Courts of Canada. While Alliance Quebec seeks to uphold the right of the public to have access and to inspect all of the Referendum materials without exception, including spoiled ballots and the instructions give by the Director General of Elections to the various ridings, amongst other things, at its heart this case is about the free and democratic expression of the will of the people, not only in 1995, but in the future.

Most commentators have focused on the clarity of the 1995 Referendum question, not to forget the similarly contorted question put in 1980. However, I submit, the good common sense of the people is not distracted by the vagueries of text or grammar. The overwhelming majority of Quebecers understood and continue to understand that the issue was and remains whether or not the links between Quebec and the rest of Canada should remain radically changed. In this regard it is not so much the clarity of the question that is at stake but the clarity of the will of the people.

The legitimacy of any vote of any kind rests on the legitimacy of a process by which that vote was conducted. Extraordinary levels of rejected ballots in seemingly selected ridings, problems of voter registration, line-ups and the whole litany of problems surrounding the 1995 Referendum are not mere mechanics of the voting system which need simple correction. Rather they go to a mindset that depreciates the value of the individual vote and marginalizes it to the success or failure of the central issue upon which the Referendum was held. In the scheme of things, a victory by one side or the other of fifty-one, fifty-two or fifty-three percent is far more decisive to a victory of a fraction of a percentage point.

There is much debate and comment as to whether Quebec independence can be achieved by a vote of fifty percent plus one. Whether or not one agrees with the fifty

percent plus one concept, it is equally valid to question what we should make of a result that is less than fifty-one percent.

Where victory or defeat can be decided by a hair's width every vote counts, not only in theory, but in fact.

The Alliance Quebec case has yet to be heard at trial on the merits in the Superior Court. Presently the several affiants who gave affidavits for and on behalf of the Director General of Elections in the case are being questioned under oath on their affidavits in a procedure known as examination on discovery. Court cases involving civil liberties and great issues of principle are often long and laborious and not always front page until information is released or a Court Judgment rendered.

If Alliance Quebec wins this case, the victory will be for all Quebecers. The victory will uphold and sustain the public's right to a transparent and scrupulous democracy. It will justify every text on civics taught to our school children that herald the value of our democratic process. It will be the gauge against which both sides of the Federalist/Separatist debate will conduct themselves.

At the close of Referendum day in 1980, René Lévesque prophetically and with great political acumen called on Quebecers to wait "*until next time*". His words continue to be valid today. The only issue is when and how the next time vote will be conducted.