

Hon. J. Brown
29.5.18
JB

LEGISLATIVE BRIEF

Electoral System Referendum Act

The *Electoral System Referendum Act* ("the Act") was developed to encourage and guide the orderly undertaking of a referendum on Prince Edward Island's electoral system.

The question of whether to change Prince Edward Island's electoral system is historic and the importance of this issue cannot be underestimated. The method by which we elect our representatives goes to the very heart of our democracy. It is therefore essential that the process and oversight leading up to the vote be carefully designed so as to ensure Islanders are well informed on the issue. As stated by the Supreme Court of Canada, a "... referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves."¹ The objective is to create a process which enables Islanders to make a clear and informed choice.

Background

It is important to review and consider the process that has brought us to this point.

In July of 2015, the Government released a White Paper on Democratic Renewal. As stated in the June 2015 Speech from the Throne, the White Paper was designed to "initiate and support a thorough and comprehensive examination of ways in which to strengthen our electoral system, our representation, and the role and functioning of the Legislative Assembly." The White Paper was followed by the work of the all-party Special Committee on Democratic Renewal, which held consultations with Islanders and made a number of recommendations which in turn led to a Provincial Plebiscite in the Fall of 2016. Five options were offered on the Plebiscite and voted on by way of a multi-stage, preferential ballot. Mixed Member Proportional Representation ("MMP") received the highest number of votes, with a total of 36.5% of eligible voters casting ballots and 19% of eligible voters supporting MMP. Unfortunately, the result did not produce a clear expression of the democratic will of a clear majority of Islanders. Government subsequently committed to a binding referendum with a clear question to take place in conjunction with the next general election.

The Act

At the outset, it is important to emphasize that this is a unique piece of legislation. Although referenda have been held in various provinces on various topics including electoral reform, there are few precedents for a vote on electoral reform being held on the same day as a general election.

Holding both votes on the same day brings certain benefits and challenges. The principal benefit of this approach is a higher voter turnout for the referendum. As noted at the outset of these comments, changing your electoral system is of fundamental importance to a democratic system. It is therefore essential that a referendum produce a result that clearly expresses the will of the people. By holding the vote in conjunction with a general election, a higher voter turnout for the referendum will be achieved, thereby increasing the likelihood of achieving a result that clearly expresses the view of Islanders.

At the same time, holding the referendum and general election at the same time brings certain challenges which this legislation attempts to address. Fundamentally, the merits for and against

¹ Reference Re Succession of Quebec [1998] 2 SCR 217

electoral reform should not be drowned out by other issues. As a result, the legislation aims to establish a special and level playing field for those opposing and supporting electoral change. This level playing field is fostered by, among other things, providing equal funding to organizations and by limiting spending on paid advertising.

Equal Funding to Registered Organizations

The provisions of the legislation dealing with equal funding to registered organizations show respect for the importance of this referendum. Quite simply, the legislation ensures that one side does not win or lose simply because they have more or less money than the other. It is not for wealthy individuals, corporations or organizations to determine our system of government.

Similarly, outside influence should not determine our system of government. That is why the legislation imposes restrictions on funding by non-residents. It is essential that Prince Edward Island's electoral system be determined by Islanders.

Limiting Spending

The legislation also proposes to place reasonable limits on paid advertising. Again, the objective here is to reduce the ability of money to determine the outcome of the referendum. Affluence has been recognized as a primary obstacle to democratic participation and so the legislation takes a balanced approach to limiting spending while, at the same time, respecting the freedom of all citizens to express their views. Significantly, no limitation is placed upon personal social media expression, debate, editorial comments, speeches, interviews or newspaper columns.

Four other matters merit comment: (1) the Referendum Commissioner; (2) the threshold for change; (3) the referendum question; and (4) the timeframe.

The Referendum Commissioner

The Act provides for the establishment of a Referendum Commissioner to guide the referendum process. A key part of the Commissioner's mandate is to implement public education and information programs so as to ensure Islanders are well-informed on relevant issues. The establishment of a Referendum Commissioner is consistent with the objective of enabling Islanders to make a clear choice.

The Threshold for Change

The legislation states that in order for the results to be binding, more than 50% of the electors voting in the general election must also vote "no" or "yes".

In many contexts, a bare majority is not considered sufficient to justify significant change. Most changes to the constitution of Canada, for example, are subject to an amending formula requiring 7 provinces representing more than 50% of the population of Canada. The referenda on electoral reform held in British Columbia in 2005 and 2009 required 60% overall voter approval and 50% approval in at least 60% of the province's electoral districts. Requiring that 50% of voters in a general election vote "no" or "yes" on the referendum question is also consistent with legal authority requiring a "clear result" in order to implement a referendum decision.

The Referendum Question

The ordering of the options is not motivated by a political agenda on the part of Government and is consistent with the 1988 plebiscite held on the Fixed Link and 2005 PEI referendum on the Mixed Member Proportional System.

Timeframe

The legislation provides that the "referendum period" runs from the date the legislation comes into force and ends on the ordinary polling day. A timeframe that is as long as possible increases the opportunity for meaningful and substantive debate and engagement. Although advertising is constrained during this period, significant exceptions to the definition of "referendum advertising" ensure Islanders remain able to express their opinions.

Legal Analysis

As part of this exercise, Government has sought legal advice on the proposed legislation and, in particular, advice on its compliance with the Charter. Attached to this Legislative Brief is a summary of legal analysis received (Appendix A).

Summary

In conclusion, the Act is a unique piece of legislation carefully designed to create and ensure a level playing field. The objective is not to pre-determine a result or to favour one side over another. The objective is to establish a process that facilitates expression and allows for meaningful debate, thereby enabling Islanders to ultimately make a clear choice on a clear question. In particular:

- The Bill seeks to create a fair starting point for Islanders. Everyone will be held to the same standards.
- It is important to regulate referendum spending to ensure that all Islanders have an equal opportunity to participate in the process.
- Regulating spending helps to ensure that voters hear all points of view.
- Regulating spending helps to maintain the integrity and confidence of the referendum process.
- The Bill seeks to ensure that all Islanders will respect and have confidence in the referendum outcome.
- An equal process is crucial to ensure that all Islanders are informed about this important public issue.
- The Bill establishes a Referendum Commissioner to guide the process, including the implementation of public education.
- The Bill encourages participation by all Islanders so that everyone can exercise their right to vote in a meaningful way.
- The Bill promotes equality and fair participation in three ways:
 - first, it gives financial resources to ensure meaningful debate;

- second, it limits expenditures in order to ensure that one voice is not drowned out by the other; and
 - third, if someone does not identify with a particular point of view or wants to participate on their own, they are still allowed to do so.
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- Without these regulations, it would be possible for better-resourced groups to monopolize the conversation.
 - The Bill prevents one group from having a monopoly in this important conversation around electoral reform.
 - A well-resourced group or person should not deprive other people or groups of the opportunity to share their views.
 - Voters must not be deprived of their right to be informed. They are entitled to have access to different points of view.
 - Political processes should not be dominated by a wealthy few. The Bill allows all stakeholders to disseminate their points of view.
 - The spending limits mean that voters will have access to information so that they can make an informed choice.
 - The spending limits mean that the committees will have an equal opportunity to present their views to Islanders.
 - There are no restrictions on using social media, editorials, columns, debates, and speeches to talk about this important public issue.
 - The Bill only limits advertising that is purchased in order to advocate for an outcome.

APPENDIX A

LEGAL CONSIDERATIONS

INTRODUCTION

The very first provision in the *Canadian Charter of Rights and Freedoms*¹ recognizes that reasonable limitations can be placed on rights and freedoms. The burden rests on the government to demonstrate that these limitations are justified. In order to do so, the court requires that:

- the legislation have a pressing and substantial objective;
- there be rational connection between the objective of the legislation and the provisions contained within the legislation;
- the legislation impair rights and freedoms as little as is reasonably possible; and
- the benefits of the legislation be proportional to its effects.²

These considerations are summarized as follows: (1) valid objective; (2) rational connection; (3) minimal impairment; and (4) proportionality.

However, before any government is asked to justify its legislation, an individual must first prove that his or her rights or freedoms have been restrained in some way. This is not a heavy or onerous burden – and rightly so. When legislation regulates fundraising, spending and advertising for referenda or elections, freedom of expression is engaged.³ The court has defined expression to include any activity that conveys or attempts to convey a meaning.⁴ Given the breadth of this definition, cases in this area are generally always decided on the basis of whether the legislation is justifiable as a reasonable limitation on the freedom of expression. With this reality in mind, this legislative brief assumes that a limitation has been placed on the freedom of expression and that the burden rests on the government to justify this limitation as being reasonable under the *Charter*.

Guided by the cases decided by the Supreme Court of Canada and the content of the proposed legislation, being Bill No. 38 (the "Bill"), this legislative brief reviews the relevant considerations

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 [*Charter*].

² *R. v. Oakes*, [1986] 1 S.C.R. 103 at paras. 69-70.

³ *Harper v. Canada (Attorney General)*, 2004 SCC 33 at para. 66 [*Harper*].

⁴ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 969.

for justification of the Bill as a reasonable limitation permitted by the *Charter*. This brief is not intended, however, to be exhaustive. Rather, it is illustrative and provides some examples from the Bill that bear directly on the considerations required by the court under the *Charter*.

I. Valid Objective

At the outset, it is important to note the courts have directed that governments need not provide scientific proof that harm will occur in the absence of legislative intervention.⁵ Logic, common sense, and a reasonable apprehension of harm are all sufficient to satisfy the legal test for a pressing and substantial objective.⁶ This objective may be gleaned from the Bill, its content, and the circumstances surrounding its enactment.

Here the objective is a process that allows Islanders to make a clear choice on a clear question or, as the Supreme Court of Canada has stated, "...an expression of the democratic will ... free of ambiguity both in terms of the question asked and in terms of the support it achieves."⁷

For example, section 2(c) of the Bill states that, among other things, its purpose is to establish a "level playing field for those who wish to publicly oppose or support a change to the voting system" in order to further ensure that "residents of the province have the opportunity to make a decision that is based on information from both points of view." This stated purpose is consistent with the objectives of other similar legislation in the field of elections and referenda. That legislation has been upheld by the Supreme Court of Canada.⁸ In *Harper*, the Supreme Court of Canada stated that equality of political discourse promotes "greater confidence in an electoral system which ultimately encourages increased participation."⁹ The Supreme Court of Canada also stated that the objectives of equality and democratic participation "are always pressing and substantial" in a society that operates "in accordance with the tenets of a free and democratic society."¹⁰

In summary, the Bill in our opinion gives effect to objectives that have previously been recognized by the court as being valid and capable of satisfying the *Charter*.

⁵ *Harper*, *supra* note 3 at paras. 78-79.

⁶ *Ibid.* at para. 79.

⁷ *Reference Re Succession of Quebec* [1998] 2 SCR 217

⁸ *Ibid.* at paras. 101-103.

⁹ *Ibid.* at para. 91.

¹⁰ *Ibid.* at para. 101.

II. Rational Connection

After reviewing the objective of the Bill, it is necessary consider whether the content of the proposed legislation, namely its operating provisions, is rationally connected to its stated objectives. In other words, the court seeks to find a “direct connection”¹¹ between the objectives of the legislation and the provisions that, for the purpose of this brief, are assumed to engage the freedom of expression. For example, the Bill regulates spending on advertising in the referendum. At this stage of the analysis, a court will find that provisions which have no relationship to the objectives of the legislation are arbitrary and unconstitutional. However, it is important to note that a government need not establish an empirical connection between the provisions and the objectives. Rather, the court has found that governments are entitled to rely on reason, logic, or common sense.¹²

For example, the Supreme Court of Canada has found that restrictions on advertising expenditures in the context of a referendum are rationally connected to the objective of ensuring a fair process.¹³ In *Libman*, the Supreme Court of Canada relied on the Lortie Report¹⁴ to find that advertising expenses are related to the outcome of a vote.¹⁵ In light of this evidentiary background, the Supreme Court of Canada concluded that, as a matter of logic, equal participation in democratic government will require restrictions on advertisement spending. The Lortie Report continues to provide an important evidentiary foundation for legislation in the field of elections and referenda.

The restrictions on advertising found in the Bill are, in our opinion, connected to the stated objectives of the proposed legislation. Like the restrictions considered in *Libman*, the Bill provides for equal participation in two ways:

- first, section 16 of the Bill provides public funding in order to ensure that both sides have a meaningful voice in the referendum process; and
- second, section 17 of the Bill places a cap or ceiling on advertising expenditures to ensure that one voice does not dominate the discourse.

¹¹ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 111.

¹² *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 181, per Iacobucci J. [*RJR-MacDonald*].

¹³ *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 at para. 57 [*Libman*].

¹⁴ Canada, Royal Commission on Electoral Reform and Party Financing. *Reforming Electoral Democracy: Final Report* (Ottawa: Minister of Supply and Services Canada, 1991) [Lortie Report].

¹⁵ *Libman*, *supra* note 13 at para. 52.

As the Supreme Court of Canada recognized in *Libman*, provisions aimed at fostering informed choices and protecting against a discourse dictated by financial resources are important objectives in the context of a referendum.¹⁶

Section 8 of the Bill also imposes restrictions on spending by third parties. Again, this restriction appears to be rationally connected to the stated objectives of the Bill. The Supreme Court of Canada has previously explained that, in order “[f]or spending limits to be fully effective, they must apply to all possible election expenses, including those of independent individuals and groups.”¹⁷ By way of example, the Supreme Court of Canada, relying on the Lortie Report, found that restrictions on third-party spending are necessary and rational because they protect against registered committees or groups circumventing the legislated spending caps.¹⁸

In summary, the provisions contained in the Bill appear, in our opinion, to have a rational connection, as a matter of reason and evidence, to its stated objectives. This connection is necessary in order to satisfy the *Charter*.

III. Minimal Impairment

At this stage of the analysis, it is important to emphasize that the court has confirmed that governments are not required to present definitive proof of minimal impairment.¹⁹ Government is not required, for example, to demonstrate that the provisions contained in the Bill are the least intrusive options available to accomplish the objectives of the proposed legislation. Rather, the *Charter* requires that government demonstrate that the legislation falls within a spectrum of reasonable options.²⁰ In other words, governments and the Legislature and legislatures enjoy a margin of appreciation.

It is also important to note that the Bill must be considered as a whole. Some provisions in the proposed legislation may mitigate any impact on the freedom of expression that may be caused by the restrictions found in other provisions of the legislation. Indeed, the court will generally consider the legislation as a whole in order to determine the real impact upon the guaranteed right or freedom. For example, in *Harper*, the Supreme Court of Canada found that the impact on expression satisfied the threshold for minimal impairment because the legislation did not

¹⁶ *Ibid.*

¹⁷ *Ibid* at para. 48.

¹⁸ *Harper*, *supra* note 3 at para. 109.

¹⁹ *RJR-MacDonald*, *supra* note 12 at paras. 137-138, per McLachlin J. (as she then was).

²⁰ *Harper*, *supra* note 3 at para. 110.

restrict election advertising in its entirety.²¹ The legislation in question only applied to advertising that was associated with a particular candidate or party.

A similar holistic approach is required in the case of the Bill:

- Section 1(o) of the Bill sets out the definition for "referendum advertising." It is carefully tailored to ensure that the definition only applies to messages that oppose or support one of the possible answers to the referendum question. The definition does not include public commentary. The definition further allows individuals to express personal views by way of the internet, including social media. The proposed legislation also does not purport to regulate expression outside of the narrow question of electoral reform that is the subject of the referendum. In other words, individuals and groups are not restricted from advertising about any other issue of public interest. When all of this is considered together, the definition of referendum advertising in our opinion strikes a balance.
- Sections 6(1)(a) and 6(2) of the Bill also provide that the Referendum Commissioner must implement education and information programs related to the referendum and referendum advertising. This provision contributes to ensuring that voters in the referendum understand the referendum question and have access to independent information to make an informed choice. These provisions are also important because they allow registered committees to focus their expenditures on advocating for a particular outcome in the referendum. In other words, the voices of the proponents and opponents are strengthened by placing certain informational and educational obligations on the Referendum Commissioner.
- Section 9 of the Bill permits any eligible organization to register as a referendum advertiser. This is unlike other many other pieces of legislation on the subject of referenda. Often, the number of registered organizations or committees is limited. The Bill does not, however, impose a similar limitation. Instead, the proposed legislation places no restriction on the number of registered organizations or committees. Any organization or group that wishes to participate – and meets the relatively straightforward eligibility requirements – is

²¹ *Ibid* at para. 114.

entitled to register and participate in referendum advertising. The open-ended nature of this registration process, when coupled with the grant of public funding, encourages and facilitates more expression.

- Section 16 of the Bill states that referendum advertisers shall be provided with public funds in order to advocate their positions on the referendum question. This commitment of public funding gives effect to one of the stated objectives of the proposed legislation: equality. The provision therefore ensures that all persons – no matter their financial circumstances – have a meaningful opportunity to participate in the referendum process.

In summary, the Bill, as a whole, in our opinion, has been tailored to ensure that the freedom of expression is not limited more than is reasonably necessary in order to give effect to the stated purposes of the proposed legislation. In other words, the means chosen in the proposed legislation would appear to fall within the range of reasonable options available to a government.

IV. Proportionality

According to the court, the final stage of the analysis considers whether the benefits of the proposed legislation outweigh its effects. Legislation, however, rarely fails on the ground of proportionality. If it has already been found that legislation has a valid objective, that the legislation includes provisions that are rationally connected to that objective and that those provisions impair the right in question as little as reasonable possible, then the legislation will generally always be said to be proportional. As a matter of logic and common sense, this outcome is not surprising.

The stated objectives of the Bill ensure that both sides in the referendum are provided an equal opportunity to participate in the process and to ensure that voters in Prince Edward Island receive sufficient information in order to make an informed choice. These types of objectives have been identified by the court as being important to a democratic society and capable of justifying reasonable limitations under the *Charter*.²² In contrast, the impact on the freedom of expression appears to be mitigated when the Bill is considered as a whole. The proposed legislation limits only certain types of advertising and not all forms of expression. This limitation is also confined to a single subject and not all matters of public interest. When juxtaposed

²² *Ibid.* at paras. 101-103.

against the stated objectives of the Bill, which have previously been endorsed by the court, the effects of the proposed legislation do not appear to be disproportionate.

In summary, the Bill is crafted in a manner that, in our view, when considered as a whole, is proportional. When weighed against the impact upon expression generally, the balance weighs in favour of the benefits flowing from the objectives of the proposed legislation.

CONCLUSION

In the context of elections and referenda, the *Charter* permits reasonable limitations to be placed upon expression where the legislation has a valid objective, there is rational connection between the operating provisions in the legislation and its objective, the legislation limits expression as little as is reasonably possible, and the benefits of the legislation are proportional to its effects. The Bill includes provisions that speak to these relevant considerations. The proposed legislation also takes account of the evidence and circumstances surrounding the public interest in regulating referenda to ensure fairness, transparency, equality, and informed decision-making.