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C H A N C E



**HOW SCOTLAND
MIGHT ACHIEVE
INDEPENDENCE**



— THOUGHT LEADERSHIP

JULY 2021



HOW SCOTLAND MIGHT ACHIEVE INDEPENDENCE

Scotland may have voted, in 2014, to remain part of the UK, but Brexit and the SNP's persistent political ascendancy mean that the dream, or spectre, of Scottish independence remains alive. In this briefing – the first in a short series – we explore some of the legal issues that will arise and how Scotland might achieve independence – a matter probably more of politics than of law.

The Treaty of Union between England (which included Wales) and Scotland provided that the two Kingdoms "shall upon the first day of May [1707] and forever after be United into one Kingdom by the Name of Great Britain." Forever is a long time. Similar provisions in the Irish treaty of 1800 have only survived for six out of the 32 Irish counties, and Scotland has already had one referendum on whether to dissolve the union. In that vote, in 2014, the electorate of Scotland decided by 55% to 45% to remain within the union, but Brexit and the electoral success of the SNP mean that Scottish independence remains very firmly on the agenda.

The 2014 referendum followed the SNP's winning 69 of the Scottish Parliament's 129 seats at the election in 2011. This majority in favour of a party whose *raison d'être* is independence persuaded the UK's Prime Minister that he could not deny Scotland the opportunity to decide whether or not it wished to remain within the UK.

The SNP might have lost the ensuing referendum, but it regards Brexit (which 62% of the Scottish electorate opposed) as having changed everything, and it continues to enjoy enviable electoral success. The SNP won 64 Scottish parliamentary seats in the elections of May 2021, but the Green Party, which also supports independence, won a further eight seats, bringing the number of pro-independence MSPs to 72; more, even, than in 2011.

Independence, should it happen, will affect anyone who does business in or with Scotland. Scotland can be part of the United Kingdom or it can be an independent country, but moving from the former status to the latter is highly complex both for the Governments

concerned and for everyone else.

The rest of the United Kingdom (rUK) could not ignore Scotland's democratic will, but nor could Scotland dictate the terms on which it seceded from the union. The negotiations between representatives of rUK and of Scotland to establish the terms upon which Scotland should become an independent country would unquestionably affect the way business is carried on both north and south of the border, as would the choices made by Scotland as an independent country.

Now might not be the time for full-scale contingency planning for Scottish independence, but it is certainly the time to consider how a (second) Scottish referendum, followed by independence, might affect the organisation and conduct of business. If independence were to occur, the planning horizons could be uncomfortably short, still more so the time available to execute any plans.

A second independence vote could be followed swiftly by actual independence, even though unpicking the relations between Scotland and England, Wales and Northern Ireland will make Brexit seem like a trivial undertaking. A divorce would, however, have profound implications for anyone doing business in or with Scotland, and there may not be much time to explore those implications after a vote.

This is the first in a short series of briefings exploring some of the legal issues that will arise, including the potential impact of separation on businesses. This briefing looks at how Scotland might achieve independence – a matter probably more of politics than of law. Subsequent briefings will look at:

- The effect of Scottish independence on Scotland's international status, laws, people and companies.
- The division of assets and liabilities between rUK and Scotland, what currency Scotland might use (the most complex issue likely to face Scotland on independence) and the effect of independence on contracts.
- The implications on tax and pensions regimes and financial services, as well as the consequences if Scotland were to join the EU.

Achieving independence

As mentioned above, the Scottish independence referendum of 2014 followed the SNP's triumph in the 2011 Scottish elections. This persuaded the UK's then Prime Minister, David Cameron, that he could not, consistently with democratic principles, resist an independence referendum in Scotland. As a result, the Edinburgh Agreement of 15 October 2012 between the Governments of Scotland and the UK provided for the transfer to Scotland of the power to hold a referendum. This was done formally by an order in council under section 30 of the Scotland Act 1998. The object of the referendum was, according to the Edinburgh Agreement, to "deliver a fair test and a decisive expression of views of people in Scotland and a result that everyone will respect."

These steps put the legality – and the binding nature – of the 2014 referendum beyond doubt. The outcome of the referendum was not the one the SNP had hoped for. In 2017, following the Brexit vote, Scotland's First Minister, Nicola Sturgeon, asked the UK Prime Minister Theresa May for another section 30 order giving the Scottish Parliament power to call a second referendum. That request was refused on the basis that the UK's impending withdrawal from the EU gave the UK and its Government more than enough to occupy its time without also contemplating another Scottish independence referendum.

The success of the SNP and the Green Party in the May 2021 Scottish elections makes it inevitable that the First Minister will again demand a section 30 order to enable a second referendum to take place. A White Paper from the Scottish

Government before the elections said that a referendum should take place in the first half of the current Scottish Parliament's term of office, which runs to May 2026, suggesting a referendum before the end of 2023.

The SNP Government in Scotland will, in practice, want to ensure that independence formally occurs at the very latest before the next Scottish parliamentary election. If it did not, the 2026 election could offer opposing parties the opportunity to reverse the initial decision, particularly if the preparations for independence, including negotiations with rUK, were not going well. At the time of the first referendum, the SNP anticipated that it would take 18 months of negotiations between Scotland and rUK after a vote in favour of independence to put in place arrangements sufficient for independence (though many regarded that as a very optimistic timetable). Given that a referendum and its campaign will also take time, this indicates that the First Minister does not have long before she must push the issue, though the timing is complicated by the COVID-19 pandemic.

Prime Minister Boris Johnson has said that he will refuse any request for a section 30 order, but he would need to consider the politics of refusal at the relevant time. If he were to refuse, the Scottish Parliament could contemplate itself legislating for a new referendum, though First Minister Nicola Sturgeon has generally been reluctant to take legally doubtful steps towards independence. As explained below, it is unlikely that the Scottish Parliament currently has the necessary powers to call a referendum.

The Scottish Parliament's powers

The Scottish Parliament was established by the UK Parliament's Scotland Act 1998. It has limited legislative competence, and anything done outside that competence is not law (section 29(1)). A measure is outside the Scottish Parliament's competence if it "relates to" a reserved matter (section 29(2)(b)). Reserved matters include "the Union of the Kingdoms of England and Scotland" (paragraph 1(b) of Schedule 5). Measures can be taken under section 30 to enlarge



If independence were to occur, the planning horizons could be uncomfortably short



the powers of the Scottish Parliament. This was done in order to enable the Scottish Parliament to call the 2014 referendum, but that enlargement of the Scottish Parliament's powers was time-limited and has now expired.

Would a referendum on Scottish independence called by the Scottish Parliament, without a section 30 order, "relate to" the union of England and Scotland? The predominant view is that it would, not least in the light of the draft Scottish legislation published in March 2021 in which the Scottish Government proposed that a second referendum should pose exactly the same question as in the first referendum ("Should Scotland be an independent country?"). Some argue, however, that there is nothing to stop the Scottish Parliament legislating for an advisory, or consultative, referendum which, unlike the 2014 referendum, would not be accepted by the UK Government as binding. This is not convincing. A referendum asking whether Scotland should be an independent country relates to the union of Scotland and England whatever the legal or political status of the outcome.

If the Scottish Parliament were to seek to legislate for an independence referendum without securing a section 30 order, the question of the Scottish Parliament's competence to do so would have to be resolved by the UK Supreme Court. There are various means by which a challenge to Scottish legislation could reach the Supreme Court, including a direct reference by a UK or Scottish law officer or through the normal litigation process, but there would need to be a definitive legal answer.

If the Scottish Government did not want to legislate unilaterally for a referendum, there could still be legal challenges, for example to the refusal by the UK Government to grant a section 30 order, but the key is likely to lie in politics, rather than the law. The first referendum was said by the SNP's leaders to be a "once in a generation" opportunity for independence, and that generation has yet to pass. But since the first referendum, Brexit has taken place, against the wishes of the Scottish electorate, and the SNP continues to dominate Scottish politics. Can a UK Government refuse a second referendum

without significantly exacerbating resentment in Scotland towards rUK (generally referred to derogatorily as "London" or "Westminster") and strengthening the SNP's hand? An enhanced sense of bitterness towards rUK might help the SNP, but the SNP must also get the timing right. Will its electoral dominance continue? Even if it did, to lose one referendum may be regarded as a misfortune; to lose two in relatively quick succession would surely bar the issue for at least a generation.

One compromise possibility that has been raised is that a section 30 order could be conditional on varying the electorate to include not only all UK voters resident in Scotland but, in addition, Scots resident in rUK. This would be controversial (if Scots in rUK, why not Scots outside rUK too?), novel and time-consuming. Who is a Scot? Is it necessary to be born in Scotland, to have one or both parents born in Scotland, or perhaps a single grandparent (enough to qualify to represent the Scotland football team)? Or should the SNP's definition of Scottish citizenship in the event of independence (see the next briefing in their series) be adopted? Further, there is no register of such "Scots." A register would therefore have to be created, which would be time consuming and expensive, as well as raising still more issues. For example, what proof would be required, and what political or other consequences would follow if these expatriate Scots were enough to swing the vote one way or the other?

Another suggestion is that a vote for independence should require a higher majority (whether of those voting or of the electorate) than 50%+1. In a referendum in 1979, Scottish devolution was supported by 51.6% of those voting but was not implemented because the legislation required, in addition, that at least 40% of the electorate as a whole should vote in favour. The 51.6% majority amongst those who voted represented only 32.9% of the electorate. This option of entrenching the union against a temporary bare majority is, however, unlikely to commend itself to a Government that was content for Brexit to occur when supported by only a little over a bare majority of those voting.

If Scotland were to vote for independence, what then? In the remainder of this briefing and the subsequent briefings, we look at some of the issues that would arise following a successful (from the SNP's point of view) second referendum.

The timing of independence

If the SNP had won the first referendum, it wanted Scotland to become independent on 24 March 2016, the anniversary of the union of the crowns of England and Scotland in 1603 (ie the date of the death of Queen Elizabeth I of England and on which King James VI of Scotland became also King James I of England). That timetable gave 18 months from the referendum for completion of the negotiations with rUK, though many expressed scepticism as to whether that was long enough to unpick over three hundred years of intimate union. It would not be necessary for all issues between Scotland and rUK to be finalised by independence day but a sufficient number of such issues would need to be resolved for Scotland to function as an independent country. The UK and Scottish Governments may, for example, want to enter into a separation agreement (akin to the UK's Withdrawal Agreement with the EU) initially to provide for independence, perhaps with (time-limited) transitional provisions, to be followed by one or more agreements between Scotland and rUK dealing with more detailed issues. The Czech Republic and Slovakia were still negotiating almost a decade after their "velvet divorce" took effect.

The Scottish Government would, presumably, conduct the negotiations for Scotland, though it has been suggested that others could be invited to participate (the UK Parliament may also need to transfer powers to the Scottish Government to enable it to prepare fully for independence), but who should negotiate for rUK? In practice, it would be the UK Government, but it could be a group representing all the political factions in rUK.

The position of the UK Government is complicated by the fact that there will be a general election in the United Kingdom on 2 May 2024 at the latest, which is likely to be before Scotland could achieve independence even on an optimistic timetable. The election could result in a change of UK Government and therefore of negotiating position. Indeed, the identity of the UK Government could even be determined by the (currently) 59 Scottish MPs who sit in the House of Commons (e.g. at the 2010 general election, the Conservatives would have secured an absolute majority but for the Scottish MPs), though the large Conservative majority resulting from the 2019 UK general election perhaps makes this less likely than at the time of the first referendum.

Although Scotland will remain part of the United Kingdom until independence, some have questioned the continuing position of Scottish MPs in the House of Commons in the intervening period or, at the least, whether they should be able to vote on legislation only affecting England, Wales and Northern Ireland or relating to Scotland's independence (the House of Commons already has some procedures providing for English votes for English laws – EVEL). If Scottish MPs do affect the identity of the UK Government in 2024, their departure on independence day may not only reflect the creation of a new country, but it could also bring about a change of Government in the old one.

Conclusion

The route to Scottish independence, should that be the wish of the Scottish people, is not straightforward.

The Scottish Government can say that its mandate for a second referendum is stronger than the UK Government conceded for the first referendum, and it will undoubtedly want to push for "indyref2" in the near future. The UK Government probably holds the legal cards, but whether it can resist politically is a different question.



Scottish independence may not only create a new country; it could bring about a change of Government in the old one.



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