

The Special Committee for Canadian Unity Le Comité Spécial pour l'Unité Canadienne



Will it be the rule of law or the rule by referendum?

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This week's court hearings in Montreal on the constitutionality of Lucien Bouchard's Bill 99 – the Act that supposedly grants Quebec a free pass to secession – will produce one long-overdue positive side effect. It will force Quebec's political leaders and intelligentsia to confront at long last their ambiguous stance on the rule of law.

Ever since the Quiet Revolution, every Quebec premier and opposition leader has defended Quebec's right to secede when Quebecers demonstrate that such is the will of the majority. No leader recognized that secession, to be legal as defined by the Supreme Court of Canada in 1998, must be effected by amending the constitution of Canada in accordance with the amending procedures spelled out in the constitution.

Premier Bouchard, in 2000, passed Bill 99 to repudiate the stringent conditions for legal secession spelled out then by the court, and then given legal by Jean Chrétien's Clarity Act. Bouchard's legislation claimed to confer on Quebec the right to unilateral secession with a bare majority vote in a referendum with all terms set unilaterally by Quebec.

Lucien Bouchard was a separatist. But when Bill 99's constitutionality was then challenged in Quebec Superior Court, two federalist premiers, Jean Charest and now Philippe Couillard, both came to its defense before the court.

The Parti Québécois executive, under new leader Jean-François Lisée, recently published the draft of a new policy program on how the PQ party and a PQ government will pursue independence for Quebec if it wins next year's provincial elections, despite Lisée's promise not to hold a referendum on secession during a first mandate. The party will vote on this proposal at its convention in September.

But though the proposal spells out in a 3,738-word treatise its proposed trajectory to Quebec's independence, there's not one word there about legality, or about obtaining the consent of Quebec's partners in the federation, or about how precisely secession would be achieved.

Instead, the draft program offers idealistic generalities: "The Parti Québécois has as its political objectives to lead the Québécois people to its full and complete freedom through the accession to independence and the foundation of the Republic of Quebec." How will this be done? That remains in the realm of magic, a mystery.

The tradition of assuming an unqualified right to secede goes way back. In 1963, the Quebec Legislature established a Committee on the Constitution to explore what should be Quebec's constitutional future. From the start, the existing constitutional order was rejected as unacceptable. The three new options retained were special status for Quebec, a true confederation of equal states, and independence. Quebec. It was assumed, was free to choose its preferred option.

In 1966, Daniel Johnson Sr.'s Union National won election on a platform of "Égalité ou indépendance." In 1980, the Liberal Party under Claude Ryan adopted this resolution: "That the Liberal Party recognize Quebec's right to determine its internal constitution and to express freely its will to maintain the Canadian federal Union or to put an end to it." That meant secession on demand.

That doctrine obtained its first legal status in 1991 when Premier Bourassa's government adopted Bill 150, *An Act respecting the process for determining the political and constitutional future of Québec*. It stated: "The *Gouvernement du Québec* shall hold a referendum on the sovereignty of Québec [...]. If the results of the referendum are in favour of sovereignty, they constitute a proposal that Québec acquire the status of a sovereign State one year to the day from the holding of the referendum."

Rejection of the rule of law in Quebec extends beyond the issue of session. When Pierre Trudeau, following René Lévesque's failed 1980 referendum on sovereignty-association, proposed to patriate from Britain the constitution governing Canada, supported only by Ontario and New Brunswick, Quebec and two other provinces challenged it through to the Supreme Court of Canada. The court ruled in 1981 that Trudeau's proposal would be legal but would violate a constitutional convention requiring substantial provincial support, so Trudeau then convened the premiers and won the support of nine. Only Premier Lévesque dissented.

But Lévesque still would not accept it, even though it fulfilled precisely the conditions he had elicited from the court. Lévesque then challenged the 1982 Constitution Act all the way to the Supreme Court. The court's decision of December 1982 was unanimous and unambiguous: "The *Constitution Act, 1982* is now in force. Its legality is neither challenged nor assailable."

But, despite the Constitution Act's vindication by two Supreme Court decisions, neither Lévesque nor his successor Robert Bourassa, nor any premier to this day, has ever recognized its legitimacy. Péquistes and Liberals adopted unanimous resolutions in the National Assembly condemning what is now unassailably the fundamental law of the land.

All the provincial political parties paved the way for Bill 99. In Quebec, the rule of law is considered optional when dealing with the most explosive issue of all: secession. That subversive assumption will be on trial this week.