

## **180421 The total confusion over whether or how Quebec can legitimately secede**

Citizens have a fundamental right to know the law of the land. That's why, in modern democracies, the law must be spelled out in writing, the law must be clear and the law must be promulgated. Moreover, the more explosive, divisive and potentially deadly is the subject of the law, the greater is the imperative for total clarity.

History teaches us that secession from an established state is one of the most hazardous undertakings known. The attempted secession of the southern states of the U.S.A. in the 1860s provoked the deadliest war ever in the history of that country. Then, in 1947, the partitioning of India and the secession of Pakistan led to the displacement and/or death of millions. The fatalities continue to this day in both countries and no peaceful resolution is in sight.

But in Canada, ever since the departure from the scene of Prime Minister Pierre Trudeau, our political leaders have played fast and loose with the potentially explosive subject of Quebec's secession. They've consistently chosen partisan advantage over peace, order and good government. They've left the public in a state of confusion over what legal requirements must apply to Quebec's secession, if it is to avoid revolution.

The already great confusion was compounded on April 19, 2018, when Madame Justice Claude Dallaire of Quebec's Superior Court issued a decision on the constitutionality of Lucien Bouchard's *Act respecting the exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec State* (henceforth: Bill 99). It was adopted by the National Assembly in December 2000, as a counter to the Clarity Act, adopted a few months earlier by the Parliament of Canada. The Clarity Act set the conditions under which the federal government would agree to negotiate with Quebec on its possible secession. It included the requirement that the referendum question on secession be clear and that the reply of the voting population be equally unambiguous. And it included many other conditions as well. In her judgment, Madame Justice Dallaire presents Bill 99 as precisely the response produced by the Government of Quebec to counter and nullify the effects of the Clarity Act, which both the Quebec government of the year 2000 and Madame Justice Dallaire in 2018 clearly condemn as an attack on the fundamental right of Quebec.

Bill 99 was challenged in in Quebec Superior Court 1991 by a college professor of literature, Keith Henderson, who was then also leader of the English-rights defender, the Equality Party. Henderson claimed that, of the 14 sections of Bill 99, the following six violate the constitution of Canada:

1. The right of the Québec people to self-determination is founded in fact and in law. The Québec people is the holder of rights that are universally recognized under the principle of equal rights and self-determination of peoples.
2. The Québec people has the inalienable right to freely decide the political regime and legal status of Québec.

3. The Québec people, acting through its own political institutions, shall determine alone the mode of exercise of its right to choose the political regime and legal status of Québec.

No condition or mode of exercise of that right, in particular the consultation of the Québec people by way of a referendum, shall have effect unless determined in accordance with the first paragraph.

4. When the Québec people is consulted by way of a referendum under the *Referendum Act (chapter C-64.1)*, the winning option is the option that obtains a majority of the valid votes cast, namely 50 % of the valid votes cast plus one.
5. The Québec State derives its legitimacy from the will of the people inhabiting its territory.

The will of the people is expressed through the election of Members to the National Assembly by universal suffrage, by secret ballot under the one person, one vote system pursuant to the *Election Act (chapter E-3.3)*, and through referendums held pursuant to the *Referendum Act (chapter C-64.1)*.

Qualification is governed by the provisions of the *Election Act, 2000, c.46,2.5*.

13. No other parliament or government may reduce the powers, authority, sovereignty or legitimacy of the National Assembly, or impose constraint on the democratic will of the Québec people to determine its own future.

In a decision that ran to 100 pages, Madame Justice D'Almeida totally absolved Bill 99 of any breach of Canada's constitution:

**LE TRIBUNAL:**

[602] **REJETTE** les conclusions de la requête pour jugement déclaratoire, telles que rédigées;

[603] **ET PAR SOUCI DE PRÉCISION, DÉCLARE** que les articles 1, 2, 3, 4, 5, et 13 de la *Loi sur l'exercice des prérogatives du peuple québécois et de l'État du Québec* que le requérant conteste, respectent la *Constitution* ainsi que la *Charte des droits et libertés*;

[604] Chaque partie payant ses frais, y compris les frais d'experts, vu la nature du débat.

This decision, on the face of it, seems to conflict with both the Clarity Act and with the doctrine that the Supreme Court spelled out in its reply to the reference on Quebec's secession. One thing is for certain: this court decision contributes powerfully to the confusion that already existed over whether Quebec has a right to secede unconditionally. Consider two of the reports filed on the very day the decision was released.

On its website, Radio-Canada reported:

La Cour supérieure du Québec a confirmé jeudi la validité constitutionnelle de la loi 99 sur l'autodétermination, *qui accorde aux Québécois le droit de décider seuls s'ils veulent se séparer du Canada.* (My italics)

On the same day, reporter Graeme Hamilton included these sentences in his report for the National Post. His story was also carried by the Montreal Gazette. The words between quotation marks are quotations from Madame Justice Dallaire's decision:

Combined with the "sovereigntist" undertones of the preamble, the law's assertion of "the right of the Quebec people to self-determination" leaves the impression "that this law could a priori lead to a unilateral secession of Quebec from the rest of Canada, based on a simple declaration without other formalities," Dallaire writes.

"Swallowed whole, it is exciting for the sovereigntists but hard to digest for those who wish to remain within the Canadian federation."

The judge quickly points out there is plenty of reason not to take Bill 99 that seriously. For one thing, the text never refers directly to secession, so it cannot be seen to establish a right to secede.

More importantly, Quebec remains subject to the Canadian Constitution and the final word on the matter remains the 1998 Supreme Court reference, which said a province could not secede unilaterally. Quebec lawmakers' assertion in Bill 99 of a right to self-determination "founded in fact and in law" does not create a unilateral right to secede, Dallaire writes.

The uncertainty and confusion on such an explosive issue might seem rather benign at this time when support for separatism in Quebec is in abeyance. But the decision just rendered could prove a powerful boost to the separatist cause. It could also, at some time in the future, lead to a total polarization and conflict within Quebec and between Quebec and the rest of Canada, should Quebec propose to secede unilaterally, after a referendum on secession in which a majority voted OUI.

Our federal governments have failed us for more than three decades by refusing to clarify and enforce the conditions for a peaceful and lawful secession. This I shall presently demonstrate. Now the federal government must at last take up its responsibility and eliminate the confusion once and for all. The obvious solution is a new reference to the Supreme Court of Canada demanding that it resolve the contradictions between its 1998 response, the Clarity Act and Bill 99 of the year 2000, and now this decision by Madame Justice Claude Dallaire.

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