

## Disambiguation

The Quebec Court of Appeal ruled last week on the validity of Bill 99, An Act respecting the exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec State. Justice Robert M. Mainville found that within the confines of provincial competency, the law was constitutional. So, when we read things like "The Quebec people ... should determine alone ... its right to choose the political regime and legal status of Quebec," so long as that right to choose applies to Quebec's internal constitution, there's no problem.

However, Ottawa has long felt the law's language was ambiguous and could provide "a legal underpinning for an eventual declaration of unilateral secession." Justice Mainville agreed that the Act may one day be invoked for purposes of a UDI or for "other purposes that are inconsistent with the current Canadian constitutional framework. Although the trial judge's analysis led her to conclude that this would not be the case, with all due respect, this, too, is a hypothesis on her part which does not fully consider the context within which the Act was enacted."

In paragraph [603] of her concluding order in the Superior Court, the trial judge, Justice Claude Dallaire, flatly declared the contested sections of Bill 99 to be constitutionally valid. The Quebec Court of Appeal has just revoked that clean bill of health. "However, it is appropriate to strike paragraph [603] of the trial judgment's conclusions which, [TRANSLATION] 'for greater certainty', formally declares the validity of the impugned sections." So while the Court of Appeal held that the sections were valid when operating within provincial jurisdiction, they could not be declared valid for all circumstances. Such a declaration the Appeal Court has refused to make.

No one can contend this revocation is inconsequential. For 20 years, we on the strong federalist side of things, have argued the law was problematic. Yes, we wanted it overturned, and due partly to understandable judicial restraint vis-à-vis legislative authority and the Supreme Court, such an overturning did not occur. But a serious defanging did. The Quebec Court of Appeal confirmed there could be no UDI. There must be an amendment to Canada's constitution in order to sanction Quebec's independence, a point only obliquely alluded to in Justice Dallaire's decision. From the federal government's perspective, quoted from the Clarity Act in the Court of Appeal decision, the amendment process must entail "negotiation involving at least the governments of all the provinces and the Government of Canada." Many of us know such negotiations will lead inevitably to provincial referendums, at least in the west.

The federal Clarity Act sets out Parliament's conditions for the secession process. It prompted "Bill 99" and throughout the process of Bill 99's passage in the National Assembly became the subject of constant and embittered attack on its legitimacy. As an additional gain, the Court of Appeal now treats The Clarity Act as "part of the positive law of Quebec." Moreover, should

ever Bill 99's provisions be misused, that misuse will be subject to judicial review. There will be a "judicial re-examination of the issue if the provisions of the Act were to be invoked in order to, in fact, address much more than Quebec's internal constitution within the Canadian confederation. That would be a significant change in circumstances which the judge did not take into account in her judgment."

So, the confinement of Bill 99's purview to strictly provincial matters has been effected. This is what the federal government wanted. We wanted more, but the outcome achieved is not inconsiderable. As long as Bill 99 remains within the confines of Provincial competency, the law is constitutional. However, should Bill 99 be used to justify acts outside provincial competency, the law cannot be considered constitutional. From this standpoint, we can regard the Quebec Court of Appeal judgment a major victory. Bill 99 is NOT holus bolus constitutional. Its constitutionality depends entirely on its use.

The intervention of federal governments of various political colours, more or less on our side of the affair, was much appreciated, especially given the unanimous votes of censure they had to endure from parties in the Quebec legislature. The case has highlighted a number of constitutional truths, including the importance of the amending formula, through which all Canadians participate in the elaboration of their future, the bedrock principle being that that every square inch of their country belongs to Canadians, each and every one.

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