



<b>Source name</b>	The Globe and Mail (web site)
<b>Source type</b>	Press • Online Press
<b>Periodicity</b>	Continuously
<b>Geographical coverage</b>	National
<b>Origin</b>	Toronto, Ontario, Canada

Saturday, October 8, 2022  
The Globe and Mail (web site)  
• 955 words

# Danielle Smith's sovereignty act covers uncharted territory, scholars say

Some experts see the proposed law as a rejection of the original 1867 Constitution

Sean Fine

The central promise of the woman who will become Alberta premier on Tuesday represents something new in Canadian history: an attempt to ignore the country's Constitution.

Danielle Smith's proposed Alberta Sovereignty Act, as explained on her campaign website, would authorize the province to refuse to enforce federal laws, and ignore the decisions of federal regulators, when they are viewed as not in Alberta's interest or as violations of the Canadian Charter of Rights and Freedoms. In everything from vaccination programs to telecommunications to energy emissions, Alberta could assert sovereign control.

If passed, at least as outlined on the website, it would be different from everything that has gone before, constitutional scholars say. For several years in the 1980s, Quebec used the Charter's notwithstanding clause to make its laws largely immune from scrutiny under the constitutional rights bill. But that was

permissible under the Charter's own terms, and the Supreme Court of Canada mostly upheld it.

"To my recollection, no provinces, including Quebec, have ever done anything like that, adopted some kind of blocking legislation," said Daniel Turp, a pro-independence law professor emeritus at the University of Montreal.

Danielle Smith is the new leader of the UCP. Her career and campaign promises so far

The proposed Alberta law is publicly set out thus far by Ms. Smith as a series of questions and answers as well as the Free Alberta Strategy manifesto, not as a draft bill.

Peter McCaffrey, president of the Alberta Institute, which published the manifesto that initiated the proposed act, said he expects the legislation, when introduced, will be a "targeted, narrow response to specific overreaches" of the federal government, and "will be clearly constitutional."

But some constitutional scholars see it as a rejection of the original 1867 Constitution, which divided powers between Ottawa and the provinces, and of the principle that laws are presumed constitutional until a court rules they are not. In Ms. Smith's proposal, the Alberta legislature, in a free vote, would be empowered to decide what is or is not constitutional.

And if a court ultimately rules an Alberta action unconstitutional, the province could still decide to carry it forward anyway, Ms. Smith's website says.

"Structurally nonsensical" - that is Joanna Baron's phrase for the proposed law. Ms. Baron is the executive director of the Calgary-based Canadian Constitution Foundation, a group that contests government actions in court, including pandemic measures it felt went too far.

"This goes to the basic structure and basic way the Constitution works. Alberta has just said we're going to ignore it. Why? Because we feel like it, and because we think that it's in Albertans' best

interests."

A caveat: power may bring moderation, says Howard Anglin, a former principal secretary to Ms. Smith's predecessor as United Conservative Party leader and premier, Jason Kenney.

"I doubt that a Smith-led UCP would adopt the more overtly unconstitutional aspects of the original Free Alberta proposal," he says.

What it might do instead would be similar to what Alberta Justice Minister Tyler Shandro did do last month when he said police in the province, including the RCMP, would not participate in a mandatory federal gun buy-back program.

"Turning Alberta into a 'sanctuary province,' as it were, with respect to a few discrete federal laws or programs wouldn't carry the sort of risks and drawbacks of the more flagrantly unconstitutional (and, frankly, unworkable) parts of the original proposal," Mr. Anglin said in an e-mail.

Some possibilities outlined on Ms. Smith's website are well within constitutional norms, such as creating a provincial police force or pension board. Others may create financial risk, such as authorizing private or public projects to go ahead without the approval of a federal energy regulator. And still others are implausible, such as naming judges to the courts whose members Ottawa now appoints - the two most-powerful courts of the province.

"I don't think any reputable lawyer would apply to join an unconstitutional parallel court system," Mr. Anglin said, adding that he doubts the government will go ahead with the idea anyway.

"They are smart enough to know that that is a dead end and a waste of energy and money, and ... I don't think there would be sufficient caucus support for it."

Brian Smith, a former attorney-general of British Columbia, sees short-term political benefits.

"It's good politics, but bad constitutional law for sure," Mr. Smith said in an interview. But it may prove a disappointment, he said, and cost Ms. Smith politically over time - unless it brings about more favourable attitudes in Ottawa toward, for instance, transfer payments to Alberta. "The feds may wake up and decide that they do need to have some support in Alberta outside of Edmonton," he said.

Prof. Turp said if the law does prove effective, Quebec will be watching closely. "It might give ideas to François Legault," the nationalist Quebec Premier.

A wiser move for Alberta, suggests Pierre Thibault, a law professor at the University of Ottawa, would have been to hold referendums on questions important to Albertans, and then press Ottawa for constitutional changes.

The proposed law reflects a moment in Western democracies when anger, populism, the pandemic, the trucker convoy of last winter, Trumpism and its rejection of election results are in the air, analysts say.

"There are risks in and of themselves when government ... no longer regards the Constitution as effectively constraining their actions," said Eric Adams, a law professor at the University of Alberta specializing in the Constitution and

constitutional history.

Follow this link to view this story on globeandmail.com: Danielle Smith's sovereignty act covers uncharted territory, scholars say

**This article appeared in The Globe and Mail (web site)**

<https://www.theglobeandmail.com/canada/article-alberta-sovereignty-act-danielle-smith/>