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Par Stephen A. Scott

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An Uncertain Sound

A decennial review, requested by the Government of Quebec, of my observations presented on 26th November 1991 to the

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An Uncertain Sound

"For if the trumpet give forth an uncertain sound, who shall prepare himself to the battle?":
***Corinthians* 14:8**

I. Recapitulation of the 1991 study

Secession under constitutional and international law. In my 1991 study, I addressed Quebec secession both as a matter of Canadian constitutional law and as a matter of contemporary international law. As a matter of *Canadian constitutional law*, independence could only be achieved in one of two ways: either, on the one hand, in compliance with the Canadian constitution and Canadian laws, or, on the other, in violation of them,– that is to say, by means which were necessarily revolutionary, whether or not this revolution was accompanied by violence. So the first question to be asked was whether any given steps towards independence were being taken within a process of constitutional legality.

A distinct,– and in some sense parallel,– question was that presented by *international law*. Does contemporary positive public international law confer upon a part of the population of Canada a right of secession from the Canadian federation against the will of the people or institutions of that federation, with the correlative or consequential right to withdraw with them some part of Canadian territory?

Right to secession under international law. In addressing the question of a right to secession under international law, I quoted from some leading international instruments dealing with "self-determination" in international law, and from a few authors. I concluded that the right of self determination in international law, so far as it was relevant to the territorial integrity of a state, belonged *to the whole people of a sovereign state* and to *colonial peoples*. International law does *not* confer on *groups of people*, whether or not concentrated in particular parts of a country, and regardless of ethno-linguistic attributes, the right to dismember the state. So the population of Quebec has no right of secession in international law. And even if a contrary conclusion were reached, that would still leave questions as to the divisibility of Quebec itself; in other words (1) whether other groups within Quebec enjoyed a similar right of secession (i.e., from the seceding entity), and, indeed, (2) what territorial redistribution would or should occur within the boundaries of the present province.

Necessity of constitutional amendment. As to Canadian constitutional law, I argued that from the standpoint of the Constitution of Canada, the secession of Quebec, if is to take place lawfully, can only be accomplished through the procedures established by that Constitution for its amendment. The vast juridical transformation of institutions, powers, and territory, referred to as "access to sovereignty", indeed constitutes *one of the greatest conceivable* changes in the Constitution, and the Constitution plainly requires that the amendment-procedures be employed to achieve it.

Choice of amendment formula. Nevertheless, though a constitutional amendment is clearly necessary, it is not possible (I argued) to choose with certainty,– as amongst the several constitutional-amendment processes established by Part V of the *Constitution Act, 1982*,S the one or more mechanisms to which one *may*, or to which one *must*, have recourse to enact the necessary amendment.

Which one or more amendment procedures is, or are, necessary and sufficient to bring about Quebec's independence? On the one hand, one can argue that recourse to s. 41,– which requires *inter alia* unanimous consent of *all* provincial legislative assemblies,– is necessary, on the grounds that matters governed by that section would inevitably be affected by an amendment effecting secession of a province. At the other extreme, one might conceivably defend the thesis that section 43 of the 1982 Act allows the change, in any manner whatsoever, of the extent of the territory of a Canadian province, so long as one obtains the assent of both Houses of the federal Parliament (or of the Commons alone if the Senate does not consent within 180 days), as well as the legislative assembly of every province whose territory is affected,– in this case, Quebec alone; and that it would then be possible for the Parliament and Government of Canada unilaterally to confer independence upon the territory formerly constituting the province of Quebec. Between these two extreme theses, the

intermediate thesis would have it that it is necessary and sufficient to employ the formula laid down by s. 38 of the 1982 Act,– the "general" procedure,– requiring, in addition to the federal houses (or the Commons alone, without the Senate, after 180 days), the legislative assemblies of two-thirds of the provinces having in the aggregate at least one-half the population of all the provinces.

Right of Canadian people as a whole; mode of exercise. Still, whichever be the relevant constitutional-amendment procedure, it remains the case that *any* decision to permit or to refuse the secession of Quebec *belongs to the people of Canada as a whole*, which may *speak* directly through a referendum, but which must *act* through the constitutional amendment processes, which at present prescribe amendment through federal and provincial representative legislative bodies. The Canadian population has the right, through its constitutional-amendment procedures, to say "Yes" or to say "No" to the dismemberment of Canada, or *to say* "*Yes*" *but upon such conditions as it thinks proper.* There is *no* right of unilateral secession: *not* as a matter of constitutional law; *not* as a matter of international law.

Consent to secession on terms and conditions. Territorial conditions. Northern Quebec. In particular, the Canadian people may refuse to agree to the secession of Quebec, save on the basis of territorial changes, such as removal from Quebec, and retention within Canada, of the territories added to Quebec in 1898 and 1912,S these having been added to Quebec in order to be governed *as part of a Canadian province*. I noted that, long before the cession of New France in 1763, the French Crown, by the Treaty of Utrecht on 11th April 1713, had renounced all claim to the territories surrounding Hudson's Bay (encompassing what is now the northern part of Quebec). These territories,– largely explored by the English Crown,– had indeed had no connection with New France or its people, nor indeed with France itself, save for the brief occupation of certain forts. Quite apart from the will of the population now inhabiting these territories, Canada would (in my view) be insane to agree to allow these territories to be torn away from her.

Quebec's territory. Territorial changes. So long, then, as Quebec remains a province of the Canadian federation, the Canadian Constitution (in particular, sections 41 (e) and 43 of the 1982 Act) unquestionably protects Quebec's territorial integrity, and prevents any part of her territory from being removed without the consent of her legislative assembly. If, however, it is Quebec itself which seeks a change in the constitutional and international status quo, Canada is entirely free (*both* as a matter of its own constitution *and also* as a matter of international law) to refuse the necessary constitutional change,– to refuse independence,– without such territorial changes as Canada thinks appropriate. Given the enormous extent of these territories, and their limited population, Quebec, even if it attempts to achieve independence by revolutionary means, is in no physical position to employ the force necessary to remove these territories from Canada without Canada's consent,– to change by force, in other words, the status quo, under which these territories form part of Canada.

Divisibility of Canada and Quebec. Whether as a matter of constitutional or international law, or even as a matter of simple morality, no double standard could (I argued) be acceptable on the divisibility of Canada. Any argument whereby Canada was divisible must make Quebec divisible also. And any argument whereby Quebec was indivisible must make Canada indivisible too. If there is a "Quebec people", defined by ties of language, culture or history, there are equally, within

Quebec, other "peoples" defined in the same manner. If some were said to have rights of "self-determination", others must have them equally and in the same manner.

Sovereign rights of self-determination. Political subdivisions of states. Canadian provinces. But ultimately both constitutional and international law create only one relevant constituency for the assertion of sovereign rights of "self-determination" (in the sense of maintaining or dismembering a state). That constituency is the people of the state as a whole. Territorial subdivisions exist within states for many purposes. The fact that, within a state, a boundary line is drawn on the ground in itself proves nothing as to the rights or powers of the unit so established, or of the people within it. Their rights or powers are those conferred at any given moment by the Constitution and laws: no more; no less. In particular a Canadian province has no existence, no rights, and no powers, beyond or outside the Constitution of Canada. *The population of a province has the right, and only the right, to govern within the Constitution, respecting the Constitution, and in exercise of the powers given by the Constitution. No more; no less.*

Use of force; force is the original sin of states. *Force is the original sin of states.* In the last resort every government must have recourse to it to enforce its laws. The governments of Canada and Quebec do so daily. Any attempt to overthrow constitutional authority by revolutionary means is, in law, not only null and void, but criminal as well. Any unilateral declaration of independence, whether by members of a provincial legislature or government , or by anyone else,– with or without a referendum, and whether in their own names or in the names of existing institutions,– would have exactly that character. Such steps would indeed almost certainly constitute treason or steps towards treason; and the treason would be complete once force were used to resist the authority of the government and laws established by the Constitution. The institutions of the Canadian state, and the Canadian people as a whole, would be fully justified in employing force to resist revolutionary change. Doing so would, indeed, be no more than legitimate self-defence: meeting force by force.

II. Major developments since November 1991

Opinions reaffirmed. Nothing that has occurred since November, 1991, alters the opinions which I then expressed and which I have summarized above. I reaffirm them entirely. Indeed, events to which I shall refer below appear to me to have vindicated my opinions in important respects. But, in all that has happened in the last decade, three major legal developments appear to me to stand out and to call for some attention when one addresses the legal issues which I considered then.

Secession Reference. Of these, the first is the decision of the Supreme Court of Canada, on August 20th, 1998, in the *Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada* (commonly called the "*Secession Reference"* or "*Quebec Secession Reference"*, or *"Reference re Secession of Quebec"*)**,** Record No. 25506, reported *inter alia* at 161 D.L.R. (4th) 385.

Federal "Clarity Act". The second is *An Act to give effect to the requirement for clarity set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference,* commonly

known simply as the *Clarity Act,* which is an Act of the Parliament of Canada which received royal assent on 29th June, 2000, as 48-49 Eliz. II, *Statutes of Canada* 2000*,* chapter 26.

S.Q. 2000, c. 46, sur «l'exercice des droits fondamentaux». The third is the *Loi sur l'exercice des droits fondamentaux et des prérogatives du peuple québécois et de l'État du Québec*,– entitled, in English, *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State,*– being Bill 99 of the First Session of the Thirty-sixth Legislature of Quebec, and which received royal assent on 13th December, 2000, as *Statutes of Quebec 2000,*chapter 46, and whose provisions have since been brought into force in conformity with the terms of the Act.

Other events. In selecting these three I do not mean to disparage the interest and importance of many other events of the past decade, including, for example, the October 30th, 1995, referendum in Quebec (with its preliminaries and its *sequelae*), as well as various Government and Opposition motions, amendments, and resolutions both in the National Assembly of Quebec and in the House of Commons of Canada; not to mention ministerial statements and counter-statements; public debate in the media and elsewhere; and the like. Indeed, many of these result from,– or are themselves the causes of,– the three developments mentioned above, or, at any rate, they go far in explaining or illuminating them.

General perspective. I am tempted to say at the outset that the forces of Quebec nationalism have in my view, played with boldness and determination a weak, or even hopeless, hand (weak or hopeless, that is , at least from the juridical perspective of constitutional and international law). By contrast,– for the most part, and particularly until the *Clarity Act,*– the forces of Canadian federalism have shown weakness,– even cowardice, S confusion, irresolution, and disarray, in playing what, at any rate from a legal perspective, is a winning hand. Particularly has this been evident in the postures of the present and the two preceding leaders, not to mention the caucus members, of the present Opposition party in Quebec. In Ottawa, the same seems to me to have been true in the case of two of the three "federalist" Opposition parties. Whether in Quebec City or in Ottawa, these "federalists" all have found it difficult or impossible to affirm such elementary propositions as the right of the Canadian state (like virtually any other state),– constitutionally and under international law,– to preserve its existence and territorial integrity, and, therefore, to reject any claim by any province, or by the people of any province, of any right to secede from Canada.

If, then, at least until very recently, federalist forces and institutions, including the Parliament and Government of Canada, have feared to try to "bell the cat", it can be no surprise that the judiciary has been grudging and evasive when asked to do what should have been the work of the executive and legislative branches, and of the citizenry at large. Thus the judiciary,– whilst finally asserting the essential position that there is no right of secession in constitutional and international law,– has done so apologetically and with circumlocution , and has sought to ease or soften the law with factitious gestures, both cosmetic and substantive, plainly designed to placate proponents of secession and to make the indisputable law,– constitutional and international,– palatable to them. Hence my title, *An Uncertain Sound.* The judiciary thus does not show more resolve than does the country at large, or (in particular) than do federal political institutions. Perhaps

it cannot realistically be expected to do so, whatever might be appropriate in point of pure principle.
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I shall address each of the three major developments in turn; the most important being the *Secession Reference*.

1. The Secession Reference

The decision in *Secession Reference* is in many respects quite straightforward and easily read. I wish to call attention to certain of its aspects rather than to rehearse or review it at length. Indeed, it has itself generated a considerable literature.

The reference, the questions, and the answers. The federal government's reference to the Supreme Court of Canada asked three questions:

> 1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
>
> 2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
>
> 3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada.

The Court in effect answered the first two questions in the negative, and declined to answer the third on the ground that there was no conflict between domestic and international law to be addressed in the context of the reference. The Court's answers were, however, to be understood in the context of its decision as a whole.

In sum and substance, then, the Court rejects any right, whether under the Constitution of Canada or in international law, to unilateral secession on the part of Quebec, or for that matter, on the part of any other province or part of Canada. Though the Court's answers reject any such right on the part of Quebec's political institutions, namely the "National Assembly, legislature or government of Quebec",– which are those referred to in the questions,– the reasons make it clear that the *population* has no right of secession, whether or not it acts through Quebec's institutions.

The Court's answers are given by reference to the Court's reasons, and it is in those reasons that some novel elements,– in particular the constitutionally-implied "duty to negotiate",– are found. Of these I shall say something in due course.

It may be noted that the Court could perfectly well, had it thought fit to do so, have answered the third question as well as the first two. The orthodox answer to Question 3,– at least in systems

whose public law is derived from English law,– would have been that, within a state and in that state's courts, international law has only such effect as the domestic law of the state gives it; and that therefore, in Canada, the Canadian Constitution would prevail in any conflict with international law. It is not clear whether there is any special significance in the Court's declining to answer the third question beyond the fact that, indeed, it was not, in strictness, necessary to do so.

Another course, too, might have been, but was not, taken by the Court. The Court, having answered the first question (on the constitutional position) as it did, could then have answered the third question to the effect that the Canadian Constitution must prevail in Canada in any conflict with international law. It could then have concluded that, this being so, it was unnecessary to answer the second question about international law. (This, however, would clearly have been unsatisfactory.)

Let me say that immediately that the Court's conclusions against the existence of any right of unilateral secession (1) under the Constitution of Canada, and (2) under international law, are, in my opinion, utterly unremarkable.

As to the first, it must in my view be obvious to anyone capable of reading and understanding legal instruments (i) that Quebec's secession would involve profound constitutional changes; (ii) that only recourse to the procedures for constitutional amendment could bring about the necessary changes in the terms and operation of Canadian constitutional texts; and (iii) that the constitutional-amendment powers of the Quebec legislature, set forth in s. 45 of the *Constitution Act, 1982*, are not even arguably,– not even remotely,– adequate.

As to the second,– the Court's treatment of secession under international law,– this seems to me to be a thorough and workmanlike review and exposition of the relevant authorities, and in fact to be the part of the decision least open to dispute even on matters of form and expression.

Some underlying implications. But it may be asked, what is the condition of a state which requires such a Reference to its Courts? A Reference to ask questions,– questions whose answers are already self-evident and in large measure *even textually self evident*,– questions *inquiring of the Courts whether there is a right, on the part of the people or institutions of particular political subdivisions, to tear the state apart?* What is the quality of political leadership, in such a state, which brings it to a condition where such questions must be asked, as if their answers were, in any plausible way, genuinely debatable? What sort of state is this? And perhaps the answer is, "A state where the centrifugal forces are barely under control, and whose will to survive is, or has been, in question; where for much of the population and of the élites,– and (as we shall see) possibly even for those in charge of the judicial branch of the state,– there are more important values than the preservation of the state's authority and territorial integrity, even against overthrow, or secession, by revolution."

The opening words of the Court in its decision are these (para. [1]; 161 D.L.R. (4th) 385 at p. 393):

> This reference requires us to consider momentous questions that go to the heart of our system of constitutional government. The observation we made more than a decade ago in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1 (*Manitoba Language Rights Reference)*, at p. 728, applies with equal force here: as in that case, the present one "combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity."

Let me acknowledge at the outset that the members of the Court carry very heavy burdens and tirelessly discharge offices of great difficulty with complete dedication to the public good, as they see it, honourably and to the best of their abilities. But this cannot excuse members of the profession, and the public at large, from the duty to scrutinize, closely and candidly, the exercise of public authority. Especially is this so on matters of great import. My observations proceed in that light. And as I shall indicate, several aspects of the Court's decision (where it ventures outside the strict scope of the questions and answers already quoted) give me great difficulty.

Even this rather portentous initial paragraph of the Court's opinion, seemingly innocuous at first glance, appears to me in truth exceptionable. In opening his argument for the Attorney-General of Canada at the hearing, her counsel cited the quoted passage from the *Manitoba Language Reference*. I myself represented a number of individual interveners in the *Reference.* In an early draft of my notes for oral argument, I cited it too, in my opening remarks, but then submitted that, by contrast with the Manitoba case, the questions in the present Reference, though obviously of great importance and sensitivity, presented neither subtlety nor complexity, nor indeed real difficulty of any kind. Partly to avoid seeming facetious,– partly simply to save time,– I deleted these remarks from my draft. But the Court's observations, just quoted, do seem to me, with respect, misconceived. For they appear calculated to suggest genuine room for debate on issues where in truth there is none and was none. Certainly none as to a province's power, under the Constitution, to secede. None, really, on a right of secession under international law. Those Reference questions were and are, in my view, truly "open and shut". That is exactly why the need for the Reference was so striking. To believe otherwise is (I think) to suffer misapprehension. To assert otherwise is, to me, an exercise of rhetoric.

The "cosmetics" of the decision. Before addressing certain aspects of the substance of the decision, I wish to speak briefly of what I call its "cosmetics". The effort to express the decision in conciliatory terms is carried at times to great lengths in the Court's choice of language, even at the expense of linguistic accuracy.. Particularly is this evident in its use of the word "negotiate" and its variants as verbs or nouns. The word is apparently perceived as a "soft" or comforting term,– one to be used as often as possible in the Court's decision, even inaccurately.

Consider, for example, the Court's conclusion (para. [97]): "Under the Constitution, secession requires that an amendment be negotiated."

In ordinary language one would speak of "*enacting*"a piece of legislation,– "enacting" a statute, say, or a constitutional amendment,– when one was referring to making it law. Negotiations might or might not occur before the legislation was made, or whilst it was being made. *But to make legislation is to "enact" it, whatever might or might not occur by way of negotiation.* Nor could it be doubted that, so long as a constitutional amendment was made in compliance with the

requirements of Part V of the *Constitution Act, 1982*, it would have the force of law, whether negotiations had, or had not, previously occurred. Indeed, legislative bodies may well authorize the enactment of an amendment without ever dealing with other participants in the amendment process,– leaving it to those other participants to reach their own decisions as to whether or not to authorize the amendment in question. Had clear and accurate expression been its object, the Court would have said, "Under the Constitution, secession requires that an amendment be *enacted*". Perhaps (for example) "be *made*" would also have been an apt, though softer, phrase, than "be enacted". At all events, "negotiated" may be *intelligible* in this context as a synonym for "enacted", but it is highly inapt.

This is not an isolated instance. Again (at para. [86]): "Rather, what is claimed by a right to secede "unilaterally" is the right to effect secession *without prior negotiations with the other provinces and the federal government* [my emphasis]". Or again (at para. [104]): "Accordingly, the secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature, or the government of Quebec unilaterally, that is to say, *without principled negotiations*, and be considered a lawful act." [The emphasis is mine.]

Clearly,– as the Court itself says plainly,– what is needed for secession is *a constitutional amendment*,– not merely *negotiations, however successful,* towards one. Since an amendment is indisputably needed, all the negotiations in the world, by themselves, will not suffice to accomplish a lawful secession. In both these instances, then, the word "negotiations" is used by the Court,– inaptly,– as a synonym for "constitutional amendment". And examples might be greatly multiplied.

Furthermore, even where the term is, in *linguistic* terms, *properly* used, it is employed by the Court,– even superfluously,– at every opportunity, to soften the legal result. The Court even finds it difficult to refer to the need of a constitutional amendment without immediately referring also to negotiations; for example, at para. [84]: "The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation." As a practical matter, negotiations would almost certainly be needed; but as a legal matter they are not required: for an amendment effecting secession, enacted in accordance with the terms of Part V of the 1982 Act, would plainly be valid whether or not negotiations had occurred.

I cannot dismiss these "cosmetic" gestures on the part of the Court as merely innocuous. What they seem to compromise, at very least in appearance, is the Court's ability to decide fearlessly and speak clearly, without shrinking from confrontation with, and without need of propitiating, any force in the federation, however powerful it might be,– to adjudicate, not rudely, but without need of diplomacy or circumlocution.

The "fundamental and organizing principles" and the duty to negotiate. Beyond its analysis of the formal requirements for constitutional change to effect secession, and of the international law relating to secession, the Court addresses a number of broader themes, notably constitutional legitimacy as opposed to legality, and underlying constitutional principles. An exercise of this sort is particularly challenging, as it calls for distillation of a vast range of primary and secondary sources, and a concise summary or encapsulation. When one bears in mind the

Court's large and complex caseload, the challenge is easy to see. The saying that one does not have the longer time required to write a shorter letter,– attributed in various forms to Pascale and to Mme. de Staël,– captures accurately, I think, the problem of reducing a great deal of matter to a succinct, yet accurate, and polished, summary. In this instance, there is the additional fact that the Court seems to have expended considerable effort at making its decision readable by the general public. All this being so, it may seem churlish to observe that here the Court's writing on these general themes seems to me (with respect) rather uneven,– often in matters of expression rather than on points of substance,– and indeed, in particulars which might be considered innocuous if they did not detract from the polished work appropriate to the highest appellate court. But I shall proceed to some major points of substance.

Four principles. The Court identifies (para. [32]): Afour fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities." Later (para. [49]), speaking of "the underlying constitutional principles": "These principles inform and sustain the constitutional text; they are the vital unstated assumptions upon which the text is based". And at para. [54]: "Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations .... These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments."

Operation of the four principles with s. 46(1) of the Constitution Act, 1982. Resulting duty to "negotiate" or "discuss". In Part V of the *Constitution Act, 1982*, entitled "Procedure for Amending Constitution of Canada", section 46(1) (enumerating the "bilateral" and "multilateral" constitutional-amendment procedures) provides: "The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or House of Commons or by the legislative assembly of a province."

The Court, at para [69], after discussing the underlying constitutional principle of "democracy", holds: "The *Constitution Act, 1982* gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance." More commonly, the Court speaks, as in para. [104], of "the constitutional duty to negotiate" (a stronger term, it seems, than "discuss").

A highly radical constitutional inference . It is necessary to attempt an analysis of this implied constitutional duty to *discuss* or *negotiate* (the Court's more commonly-employed term), and to try to ascertain its specifics (for example, its scope and its precise incidents),– and indeed its implications. But before doing so, I feel obliged to examine the basis of the duty. Considered as an inference from a constitutional text,– and even summoning the assistance of underlying

constitutional principles, themselves of course also derived by inference,– this judicial assertion of a duty to discuss, or to negotiate, seems to me to be, at best, a highly radical judicial act.

I accept readily that it lies, unquestionably, within the Court's jurisdiction to do what it did. And, as the Supreme Court of Canada is the final arbiter of the law in Canada, it must be taken as the operative legal rule in Canada, unless the Court itself repudiates the rule, or unless it is abrogated, either for the future or *ab initio*, by constitutional amendment.

For my own part, with respect, I consider that,– there being (in my view) no sufficiently compelling basis for so radical a determination,– (1) it is mistaken, and (2) it ought to be repudiated by the Court, or to be abrogated *ab initio* by constitutional amendment.

I am not certain that I would go so far as to call it *indefensible*, but I think it clearly mistaken. One can look upon Part V of the 1982 Act as creating (given the present ten provinces) a sort of twelve-house super-Parliament for enacting constitutional amendments. In bicameral Parliaments in Canada, and in other jurisdictions with subjacent English public law, I do not think that the comity due as between Houses can be,– or has ever been,– thought to amount to a duty, *imposed by law* upon them, to discuss their differences, or to settle them by negotiation: not even under compulsion of the fundamental principles of "constitutionalism" and "democracy".

I find nothing, either in the law relating to constitutional amendment in Canada, or in the international law relating to secession, which requires to be legitimated by such radical expedients as those employed by the Court in order to qualify the constitutional or international law, and make it acceptable or palatable to all or any part of the population of this country.

The parties to the required negotiations. Since the duty to negotiate appears, in the Court's reasoning, to be founded upon s. 46(1) of the 1982 Act (quoted above),– empowering the federal Houses and provincial assemblies to initiate bilateral and multilateral amendments,– one might infer that *only* the federation and the provinces,– in their character as "parties to Confederation" (para. [88]); or "participants in Confederation" (para. [150])– are parties to the negotiations. (I put aside for now the question of which specific governmental institutions may or must participate.)

Although the Court refers (see paras. [96], [151]) to some of the categories of persons having *special interests* in secession negotiations,– e.g. "linguistic and cultural minorities, including aboriginal peoples",– it is not clear that the negotiating table must constitutionally include, *as necessary or proper parties*, any of these, or indeed any other persons or institutions than the appropriate organs of the federation and the provinces.

Here and there, however, in the Court's opinion may be found language which might be invoked as implying that there *may*, or *must*, be parties to negotiations other than federal and provincial governmental institutions. For example, in para, [92], the Court speaks of "the interests of the federal government, of Quebec, and the other provinces, *and other participants*, as well as the rights of all Canadians both within and outside Quebec." [The emphasis is mine.]

Institutions responsible. As to which are the institutions upon which this special constitutional responsibility lies, it must be observed that only in the case of the federation are *both* executive institutions *and* legislative institutions formally involved in the enactment of bilateral or multilateral amendments. It is, of course, the federal and provincial *legislative bodies* which may *initiate* such amendments, and whose *resolutions of authorization* (in various numbers and combinations, according to circumstances) *are required in order that the amendment may be made*.

The negotiations have as their explicit or implicit object the reaching of agreement on the terms of constitutional amendments, and, in due course, enactment of those amendments. Though the usual premise is that negotiations of this sort are executive business, even the ordinary assumptions about responsible parliamentary government cannot guarantee that governments can carry with them the houses to which they are, by convention, responsible, or, in the case of the Senate, which the federal executive would also "represent" (though s. 47 of the 1982 Act, which allows the consent of the Senate to be dispensed with after a specified time, makes this less important). Moreover, on matters so sensitive as constitutional changes, a government's ability to secure and retain a parliamentary majority is (as our constitutional history has, in fact shown) much less certain than it usually is,– even apart from the matter of changes in the membership or political complexion of the house. In sum, the executive, whatever its role, is not the House in other dress.

One might perfectly well argue, then, that the duty to negotiate *must*, or *may*, involve *the legislative bodies* themselves (whether alone or in addition to the executive authorities); though this simply raises the same difficulties in another form. A whole legislative body can scarcely sit at the table, and would have to deal through committee. This judicial artifact is, clearly, a work in progress.

Duty to negotiate: generality; symmetry; reciprocity. Focus if you will on s. 46 of the 1982 Act, or focus instead on the four "underlying and organizing principles". These are the joint bases of the duty to negotiate; and both s. 46 and the "fundamental principles" are perfectly general in scope. On any view, it would scarcely be *fair*,– or, for that matter, even *plausible*,– to confine the duty to negotiate (assuming that it exists) either only to *one sort of constitutional change*,– secession,– or *only to one actor proposing change*,– Quebec. It seems, indeed, that the duty to negotiate is general in its scope, symmetrical, and reciprocal. It covers (it appears) constitutional proposals of *any* kind; applies to *all* actors in the same way; and imposes the *same rights and duties* in favour of, and against, all.

This emerges rather clearly from the Court's summary in para. [150]: "Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address ***any legitimate initiative to change the constitutional order****."* [The emphasis is mine.] Or, in the body of its opinion, (para. [88]): A ... The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table."

Role of referenda. It seems clear that the Court felt compelled to integrate, in some way, the role of referenda into its scheme. A referendum of the provincial electorate is, after all, the accepted, the favoured, and perhaps the indispensable, method on the part of proponents of Quebec secession to establish the legitimacy of a secession proposal and to create the momentum for its successful enactment and implementation. Yet the "duty to negotiate" is built by the Court upon the power of the legislative bodies within the federation to initiate constitutional amendments; and in the amendment processes established by Part V of the 1982 Act, referenda (as the Court acknowledges) play no part.

As regards the Court's constitutional recognition of its relevance to the duty to negotiate, the role of the referendum is, it seems, to add legitimacy to the proposal. But it is not at all clear what actual additional impact (if any) on the duty to negotiate follows from an amendment proposal,– passed, we assume, by a legislative body and s*upported* by an affirmative vote in a referendum,– as compared with one passed by a legislative body *without submission to a referendum*. (*Quaere* a resolution passed before, or in defiance of, a negative referendum result.)

It is in connection with the legitimacy of steps ***to pursue*** (though, as the Court makes clear, without an entitlement ***to achieve)*** secession that the Court enters into a discussion of referenda specifically on secession, and on the need of what, in our public discourse, is now universally known as a "clear question" and a "clear answer". The Court, in para. [87], writes:

> Although the Constitution does not address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession. Our political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means. In this context, we refer to a "clear majority" as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and it terms of the support it achieves.

What "triggers" the duty to negotiate? If the Court's scheme is to be coherent with the Court's rationale, it would seem that an affirmative referendum result,– on secession or on anything else,– cannot by itself "trigger",– i.e., bring into operation,– a duty to negotiate; not even if it is followed by a demand from the relevant executive government.

It would seem that, *at very least*, it is also necessary, in order to "trigger" the duty, to *introduce*, into the relevant legislative body, a motion for resolution to amend the Constitution. Yet, at least formally speaking, other legislative bodies and governments cannot assume that that motion would be passed. So the better view would (it seems) be that, after the referendum, the duty to negotiate is not triggered *until the initiating resolution has been passed*,– even though, in complex matters, an entirely new text would probably have to be passed by a sufficient number and

combination of all the relevant bodies after the negotiations (if successful) were complete. For the negotiations would probably have rendered obsolete the text of the originating resolution.

Nature and incidents of the duty to negotiate. The duty to negotiate, arises, it appears, as a matter of the law of the Constitution, and the rights to which it gives rise are legal rights. But the remedies,– at least in respect of the parties' conduct of negotiations, do not (it seems) consist of, or include, any form of recourse to, or remedy from, the courts. The courts (it seems) are not to supervise at least the Apolitical issues" *in*, or Apolitical aspects" *of* negotiations. And both **(1)** the positions of the parties, and **(2)** their pursuit of these positions, ***are*** (it seems), in the Court's view, Apolitical" and "non-justiciable". The same seems true (see para. [100]) even as to **(3)** whether the conditions have arisen giving rise to the duty to negotiate (as, for example, whether there has been a clear question and a clear majority in a referendum on secession).

Nevertheless, the Court holds, there are remedies, but they may lie through the political process. At para. [102]:

> The non-justiciability of political issues that lack a legal component does not deprive the surrounding constitutional framework of its binding status, nor does this mean that constitutional obligations could be breached without incurring serious legal repercussions. Where there are legal rights there are remedies, but ... the appropriate recourse in some circumstances lies through the workings of the political process rather than the courts.

At para. [100]:

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> The role of the Court in this Reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so. A right and a corresponding duty to negotiate secession cannot be built on an alleged expression of democratic will if the expression of democratic will itself is fraught with ambiguities. Only the political actors would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, these ambiguities are resolved one way or the other.

In particular, the parties are entitled to choose their own "bottom lines",– so to speak,– and to insist on them, without judicial interference; at para [101]:

> If the circumstances giving rise to the duty to negotiate were to arise, the distinction between the strong defence of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis. The Court would not have access to all of the information available to the political actors, and the methods appropriate for the search for truth in a court of law are ill-suited to getting to the bottom of constitutional negotiations. To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. The reconciliation of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm, precisely because that reconciliation can only be achieved through the

> give and take of the negotiation process. Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences.

Duty to negotiate as applied to secession. As applied to the particular circumstances of secession, the "duty to negotiate" involves a right to "*propose*" secession and "*pursue*" secession, but not necessarily to *achieve* secession. Thus the Court (para. [90]) rejects the proposition that "there would be a legal obligation on the other provinces and federal government to accede to the secession of a province, subject only to the negotiation of the logistical details of secession." (See, too, para. [91].) The Court also (para. [92]) rejects the proposition "that a clear expression of self determination by the people of Quebec would impose *no* obligations upon the other provinces or the federal government." It continues:

> The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally-recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of Quebecers choose that goal, so long as in doing so Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.

It is not easy to see what this means in concrete terms, but the Court insists that it is not engaged in the futile task, so to speak, of A squaring the circle". At para. [93]:

> Is the rejection of both of these propositions reconcilable? Yes, once it is realized that none of the rights or principles under discussion is absolute to the exclusion of the others ....

Of course, in the passage which I have quoted just before the immediately-foregoing words, the right attributed to Quebec, which others are required to respect, is "the right of the government of Quebec to *pursue* secession" (my emphasis). This, surely, has never been in serious question. Only a few isolated individuals ever have disputed the right of any provincial government to pursue any reform it pleased, or, for that matter, the power (under s. 46 of the 1982 Act) of any provincial assembly (or either of the federal Houses) to initiate a constitutional amendment of any kind. And Part V of the 1982 Act, as the Court makes clear (see para. [84]), allows the Constitution to be amended in any fashion through the amendment-procedures therein set forth.

Given the sensitivity of territory, it should perhaps be noted that the Court, in giving examples of matters legitimately subject to negotiations on secession, refers (para. [96]) to "boundary issues".

In practical terms, it would seem, the constitutional "duty to negotiate" leaves the political institutions of the federation and of the provinces largely,– perhaps entirely,– free to resolve their differences as they judge best, subject in point of principle, to the guiding admonitions in the Court's opinion.

Some implications of the duty to negotiate. Nothing said by the Court impairs the right of the country as a whole to maintain its "bottom line" rejecting secession, should such prove to be its will. Indeed, this is in various ways reaffirmed by the Court, not only in its insistence on the need for a constitutional amendment to effect secession, but in its discussion of the duty to negotiate, under which parties are free to choose and to pursue their positions without judicial review. Canada as a whole, then, retains the right to say Yes or No to the secession of any province; and, if it says Yes, to do so conditionally: imposing any terms and conditions,– as to boundaries or otherwise,– it thinks fit, as pre-conditions to its consent to secession.

Indeed, given the general, symmetrical, and reciprocal nature of the rules laid down, the duty to negotiate covers any sort of proposal presented by federal and provincial governments and legislative bodies. (The Court speaks at times of "legitimate" proposals; but the "legitimacy" of an amendment-proposal can hardly be matter for judicial review, given the breadth of the unreviewable discretions which the Court gives the political actors: here, *to decide whether the conditions have arisen imposing a duty to negotiate.*) Proposals for secession can thus be met, *or indeed preceded*, by counter-proposals, perhaps seeking constitutional enactments to affirm the indissolubility of the Canadian federation,– or to centralize powers,– or even to establish Canada as a unitary state. Referenda can be held, throughout Canada or in particular provinces, to establish the legitimacy of such proposals. And how indeed could these be illegitimate, if secession proposals are legitimate?

The nature of the Court's decision can arguably be held to have defused, at least for the time being, any significant degree of hostility within in Quebec to the role of the Court itself, and to the requirements of the Canadian Constitution and of international law as they relate to secession,– little or none being at present visible or audible. Yet, even if this were taken to be true, that in itself does not prove that the duty to negotiate conduces to stabilize, rather than to destabilize, the federation.

The Court's "duty to negotiate" in effect institutionalizes a contest of political wills. In a contest of political wills, the outcome is dependent on the strength of political wills and on other elements of the parties' relative strength, including economic strength, and willingness and ability to use force. The obvious lesson to be drawn by drawn by determined federalists is to build both an unshakeable and irresistible political will across the country, and also the means to back it up.

More generally, and even quite apart from the secession issue, the "duty to negotiate" may perfectly well become a destabilizing, rather than a stabilizing, element within the Canadian constitutional system. For it encourages the provinces,– most likely Quebec, when in "nationalist" or even risk-taking mood, but other provinces too, and even the federation if it musters the necessary will,–

(1) to make the widest possible initial demands, even if only to give advantage in negotiations to follow, knowing that other "parties" are constitutionally obliged to sit down and address these demands formally and in good faith, and cannot, lawfully, simply defer, evade, or dissimulate;

(2) to pursue these demands as aggressively as possible, and, in particular, to buttress them by mobilizing public opinion, e.g., by holding referenda to add "legitimacy"; and

(3) to pursue these demands without end (in other words, allowing no "closure" until the electorate is exhausted,– and perhaps, even then, reviving the demands later).

And all of this extends not only to secession but to changes of any kind,– legislative powers; institutions; fiscal transfers, or anything else.

I doubt, with respect, that the Court's finding on a duty to negotiate is sound public policy. The Court's object, plainly, is to encourage peaceful resolution of disagreements within the federation. But the mechanism which it creates to promote such resolution also creates incentives to aggressive behaviour, both in initiating and in responding to proposals for change,– predatory behaviour perhaps suitable to be televised, one might find, on a new "Constitutional *Discovery Channel*". Restraint may not always prevail.

The internationalization of Canadian constitutional disputes. Evidently to give "teeth" to its duty to negotiate,– particularly having regard to its own announced abstention from intervening in negotiations,– the Court addresses the impact of the conduct of the federation and the provinces, in particular Quebec, on the behaviour of foreign states. In particular it addresses their likelihood of recognizing an independent Quebec state if its creation were attempted by revolutionary means. Relevant observations may be found, notably, in paragraphs [93], [103], [152] and [155].

Although the Court employs descriptive language, the conclusion seems inescapable that the Court is *legitimating*, and perhaps even *inviting*, the involvement of the international community in domestic Canadian constitutional issues, at least in the special circumstances of secession. It is no distortion of the Court's language to read the Court as saying, by fairly clear implication, that if the Canadian federation does not comport itself properly in a negotiations about Quebec's secession, foreign states not only *might*, but *could quite legitimately*, recognize an independent Quebec established by revolutionary means (with all that this would entail in terms of assistance, even military assistance, to the newly-recognized régime in establishing itself, and conflict with Canada).

The Supreme Court of Canada is an organ of the Canadian state,– its highest judicial organ,– and it can only speak as such. Yet its tone in the Reference at times gives the impression that it wishes to be perceived as being, in some way, an independent third-party observer or arbiter, standing in judgment as between the Canadian state and its adversaries. Obviously, if the laws of a state, or the behaviour of its institutions and officers, offend the moral judgment of a judge, he or she is entitled,– even indeed in some cases probably *morally compelled*,– to resign; and perhaps, as an individual, Ajoin the revolution" (as it is sometimes put) if revolutionary conditions occur.

This being acknowledged, still, even to countenance,– and *a fortiori* to encourage,– the revolutionary overthrow of the state (even if only as to part of its territory, where a province's secession is at issue) appears to me to lie well beyond the legitimate functions, either of an organ of the Canadian state, or of those speaking in its name. This seems to me to be true whether one

regards the likely behaviour of the international community as a high-minded and principled assessment of the rights and wrongs of the Canadian federation and its members, or instead as a crude process where the self-interest of the foreign states is likely to be the dominant factor. I should confess here that my own view of the process of international relations is, frankly, very far from "Pollyannish".

2. The federal "Clarity Act"

The federal Act commonly known as the *Clarity Act*,– which has no short title,– is entitled *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference.* It received royal assent on 29th June, 2000, as 48-49 Elizabeth II, Statutes of Canada 2000, Chapter 26. As its title and preamble show, it is, of course, a sequel to the decision of the Supreme Court in the Quebec Secession Reference. Although, of course, it is articulated from the perspective of the federation, I do not think that the preamble is unfair in its account of the circumstances and purposes of the Act. I do not propose to offer an exposition of the Act here, but rather simply to ascertain what, in constitutional terms it does, and whether it is validly enacted (some having voiced threats of constitutional challenge). Obviously the text of the Act should be kept immediately at hand by anyone concerned with secession of a province.

Section 1 requires that the House of Commons first review,– within specified periods, and on criteria which are in part set out in the provision,– the clarity of any provincial referendum question proposing secession of a province, and then set out its determination by resolution. The section goes on to direct, or require, that the Government of Canada shall not enter into negotiations if the House of Commons has determined that the question is not clear.

Section 2 requires that, where the government of a province seeks to enter negotiations on secession following a referendum, the House of Commons (unless there has already been a determination adverse to the clarity of the question) shall consider, and by resolution determine, whether "there has been a clear expression of will by a clear majority of the population of that province that the province cease to be part of Canada." Again, the criteria for the determination of the House are, in part, set out in the provision. The section then directs, or requires, that the Government of Canada shall not enter into negotiations on the terms on which secession "might" occur unless the determination of the House is in the affirmative as to the existence of "a clear expression of will by a clear majority of the population of that province".

Subsection 3(1) affirms that there is no right of unilateral secession under the Constitution of Canada; that a constitutional amendment would be required for the secession of a province; and that negotiations would therefore be required "involving at least the governments of all of the provinces and the Government of Canada." Subsection 3(2) then prohibits a Minister of the Crown from proposing a constitutional amendment to effect secession unless certain specified matters have been addressed in negotiations.

Sections 1 and 2 thus impose statutory duties upon the House of Commons to consider and determine specified matters at specified times and on specified criteria. Although normally legislative bodies are left free to control their own business internally, statutory requirements on the conduct of legislative business are commonplace at both federal and provincial levels, and, in any case, are well within the terms of section 44 of the *Constitution Act, 1982*:

> **44**. Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

The provisions respecting negotiations by the Government of Canada are valid on the same basis, as they are concerned with the executive government of Canada. That the provisions of the Act address subjects not already dealt with in the Constitution Acts does not make them (as the authorities show) any the less laws amending the Constitution. They are clearly of a constitutional nature, both as to *the institutions which they address* and as to *what they actually do.*

Indeed, the authorities suggest that the provisions would also be validly-enacted in virtue of the residuary power; so that they would have been valid even if neither s. 44 nor its predecessor (the former s. 91.1 of the amended 1867 Act) had ever existed.

Subsection 3(1) is merely an affirmation or recital of certain matters of law, indeed reiterating what the Court had held in the Reference. Partly saving clause (meaning: Nothing as to negotiations obviates the need of a constitutional amendment), partly it is prefatory to subsection 3(2). Whatever its legal position, it is at worst innocuous. Its last phrases can be regarded as indicating that negotiations, including at least certain institutions, should in certain circumstances be held; and this, again, seems clearly valid, both under s. 44 of the 1982 Act and under the residuary power.

Subsection 3(2) does not address anyone but a Minister of the Crown. While it prohibits a Minister of the Crown, in certain circumstances, from "proposing" (i.e., introducing),– presumably in either House of Parliament (wherever the Minister happens to sit),S certain kinds of constitutional-amendment proposal, *it does not prevent him or her from voting for or against any proposal once it has been introduced*. On its face it falls well within s. 44 of the 1982 Act,– being concerned, as it is, both with the executive government (of which the Minister is a member) and the two Houses,– in one of which he or she is normally a member. (The provision is of course without application if he or she is not a member of either House.) Barring Ministerial members of either House from doing,– while they are Ministers,– certain things which other members have power to do, and are free to do, is a bit unusual (though it is not unprecedented). At any rate, it is very difficult to find any basis for saying that the provision is *ultra vires*.

The "*Clarity Act"*, in sum, appears clearly to be *intra vires*.

But it has been suggested that the *Clarity Act* is invalid on the ground that,– allegedly,– it is inconsistent with the Court's decision in the *Secession Reference.* This argument, it seems to me, is wholly misconceived, even if this assertion could be substantiated.

On its face, I do *not* indeed think that there is, in the Act, *anything at all* inconsistent with the Court's decision. Through the Act, Parliament, clearly itself a "political actor", is placing in the hands of federal legislative and executive institutions,– all of *them* Apolitical actors",– exactly what the Court has said *is supposed to be* left in the hands of the Apolitical actors".

But I shall suppose, for the sake of argument, that in some respect, the Act now does not,– or alternatively will not, in some eventual set of circumstances,– permit compliance with the duty of negotiation as elaborated by the Court. And I shall suppose, alternatively, that, at some time, *steps taken under the Act* will constitute breaches of the duty. What, in either case, will be the legal consequences? *Not*, surely, that the Act is invalid. *Simply that*,– the duty of negotiation having at some relevant time been breached,– *there will then flow whatever consequences, legal or political, result from a breach of a duty to negotiate.*

3. The Quebec Statute, S.Q. 2000, c. 46 ("Bill 99")

I come lastly to Chapter 46 of the Statutes of Quebec for the year 2000, still commonly known as "Bill 99", entitled *An Act respecting the exercise of the fundamental prerogatives of the Québec people and the Québec State.* Some of its provisions are already being contested before the Courts of the Province, and it is fair to state that I am counsel in such proceedings.

This statute, too, is a response to the very fact of the *Secession Reference*, and also to the Court's decision in that Reference. Although not in its terms, practically speaking it is also a response to the federal *Clarity Act.*

The statute is something of a *tour d'horizon,* dealing with a variety of topics of a broadly constitutional nature. Some of its provisions seem, at least at first glance, either to be innocuous, as statements intended to have no legal effect, or else valid as enactments in relation to the Constitution of the Province (s. 45 of the *Constitution Act, 1982)* or under other powers. Such, for example, seems to be s. 8, respecting the French language (although it is not true that *all* the "duties and obligation relating to or arising from the status of the French language are established by the Charter of the French language".

Some provisions are substantially, or wholly, accurate restatements of constitutional rules which the Quebec legislature or Parliament has no authority to enact or to amend. The first paragraph of s. 9, providing that "The territory of Québec and its boundaries cannot be altered except with the consent of the National Assembly" is, in principle, accurate, so long as it is understood to apply to Quebec as a province of Canada governed by the Constitution of Canada. Other provisions, such as s. 7 dealing with treaties, conventions and international agreements, in my opinion fail in various respects to state the constitutional position accurately.

Now, the provincial power of constitutional amendment, at present set out in s. 45 of the *Constitution Act, 1982,* is subject to various exceptions, express and implied. The most convenient and authoritative general review of its scope is to be found in the decision of the Supreme Court of

Canada in *Re Ontario Public Service Employees' Union and Attorney-General for Ontario,* (1987) 41 D.L.R. (4th) 1 (construing its predecessor, s. 92.1 of the *Constitution Act, 1867).*

Strictly speaking, provincial enactments of a constitutional nature, falling outside s. 45,– unless they are supportable under some other power,– are *ultra vires*, *however innocuous they may be.* If the law is strictly applied, it would follow that even (say) a textual re-enactment by the province of parts of the Act of 1867 now in force, but whose subject-matter lies outside provincial legislative jurisdiction, would be *ultra vires*, however innocuous the enactment might seem. Insisting upon this strict position would relieve the courts of the need to examine, bit by bit, provincial enactments, plainly outside the scope of s. 45, to see whether they accurately or inaccurately restated the law of the constitution. If this strict position is adopted, the first paragraph of s. 9 of this Act, on Quebec's territory, for example, is *ultra vires* even if it accurately states the law.

Even if so stringent a standard is not imposed by the Courts, it must still be true that any provisions, enacted by the Province beyond the powers conferred by section 45 (or other relevant powers), and *which **inaccurately** state the constitutional position*, must, in my view, be subject to court orders declaring them either altogether *ultra vires* or else without effect insofar as they misstate any rules of law lying outside provincial jurisdiction. Section 7, in my view, on international relations, falls into this category. It is not open to the legislature of Quebec to define the province's executive and legislative authority on international relations. So if it is not *ultra vires* outright, s. 7 is at least constitutionally invalid and inoperative insofar as it misstates the constitutional law. (Identifying exactly what is wrong with s. 7, and then explaining why, would be a complicated exercise, and there is no reason to attempt it here.)

This brings me to the matter of "access to sovereignty". Collectively, sections 1, 2, 3, and 5 of the Act, S.Q. 2000, c.46, are largely concerned with reiterating the position of the present Government of Quebec that public authority in Quebec does not rest or depend on the Constitution of Canada, but on the popular sovereignty of the provincial electorate, and that that electorate, acting directly or through the political institutions of the province, is entitled to make, of its own authority, any constitutional changes it may please, up to and including secession. If I am right,– *if the Supreme Court is right*,– this is not the law, and the legislature or Parliament of Quebec has no legislative authority to make it so. This much, surely, is clear from the Reference decision.

If that be true, it follows that the Courts can and ought to declare these provisions either *ultra vires*, or at least without legal effect in the relevant particulars. Whether certain clauses or certain applications may be severable, and so remain effective, is not a matter on which I can tarry now.

For example, section 1:

> **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.

might be valid and effective *if read on its own and confined to* "*internal self-determination*" (i.e., "a people's pursuit of its political, economic, social and cultural development within the framework

of an existing state"; *Secession Reference*, para. [126]). But section 1 is invalid, or constitutionally ineffective, as regards "*external self-determination*" (paras. [126] *et seq*.), which involves a potential right to secession. Sections 2, 3, and 5 of Act suggest that the latter, too, is intended to be included in section 1. The all-embracing terms of section 1 may be fatal to its survival even in part.

While the Province is at liberty to assert its beliefs on legal issues, even if these views cannot be sustained before the Courts, it appears to me that the line has been crossed where, *in matters beyond its legislative authority*, the legislature itself, in statutory form, has purported *to declare the law falsely*. So provincial enactments, like the relevant provisions in S.Q. 2000, c. 46, asserting the existence, as a matter of law, of province's right of unilateral secession, must be, constitutionally, without effect. And the courts may be expected in due course to declare this to be so, in one form or another.

III. Conclusions

No particular conclusions were offered in my observations of November, 1991, unless, implicitly, in my insisting that, if the province, its electors, its institutions and its officers, were to pursue secession from Canada at all, they do so constitutionally,– that is to say, by lawful means, through the constitutional amendment process set out in Part V of the *Constitution Act, 1982.* That conclusion would, of course, remain true.

IV. Executive Summary

As to the recapitulation of the 1991 study:

1. Two parallel sets of legal questions arise as to any proposal for Quebec's secession from the Canadian federation. Quebec. First, legality in terms of Canadian Constitution and laws. So far as the Canadian Constitution and laws are concerned, a province's independence can be achieved in two ways: either lawfully, or by means which, being unlawful are, necessarily, revolutionary. The parallel question is that present by international law. Does it confer a right of secession on some part of the territory, or population, of Canada?
2. Positive international law confers no right of secession on the Quebec, on its people or on its institutions. If it did, parts of Quebec's population would have the same right to secede from the seceding entity.

3. The Constitution of Canada requires that its constitutional-amendment mechanisms be employed to transform Quebec into a sovereign state. It is not possible to identify the required mechanism with certainty. Cogent arguments can be made (1) for the need of unanimous consent of all the provinces' assemblies; (2) for the need only of the consent of the federal authorities and those of Quebec; or (3) for the need of the consent of the federal authorities and those in two-thirds of the provinces with more than half of the population of the provinces. The people of the federation have the right, through their institutions, to say Yes or No to secession, or to consent on such terms and conditions as they please.

4. The federation may in particular refuse secession except on the basis of the partition of Quebec, for example retaining territories in Northern Quebec, transferred to Quebec to be governed as part of a Canadian province. While it remains a province of Canada, Quebec's territory is constitutionally protected. Whether one considers the Constitution of Canada or international law, the following is true: If Canada is divisible, Quebec is divisible. If Quebec is indivisible, Canada is indivisible. Provinces are political subdivisions of a Canada, with such rights and powers only as the Canadian Constitution gives them.

5. Force is the original sin of states. It is employed by all governments at all times, explicitly or implicitly, to enforce the authority of their constitutions and laws. The Government of Canada is fully entitled to use force to resist any attempt at secession by revolutionary,– i.e., extra-constitutional,– means. Doing do is merely meeting force by force. It is legitimate self-defence against revolutionary force.

As to major developments since November 1991:

6. The major developments since November 1991 are the *Quebec Secession Reference* (Supreme Court of Canada, August 20th, 1998), the so-called federal *Clarity Act* (S.C. 2000, c. 26; assented to 29th June, 2000) and the Quebec statute on "l'exercise des droits fondamentaux et des prérogatives du peuple québécois et de l'État du Québec" (S.Q. 2000, c. 46; assented to 13th December, 2000).

7. The forces of Quebec nationalism have played a juridically-weak hand with boldness and determination; while federalist institutions and forces have, in general, played a juridically-winning hand with weakness and irresolution. The unwillingness of federal political institutions or federalist citizenry to affirm and defend, in respect of secession, basic constitutional principles appears to have affected the resolve of the Courts.

8. In insisting that a constitutional amendment is needed for lawful secession under the Constitution of Canada, and in rejecting any right of secession under international law, the Court's answers are entirely orthodox and, juridically, inevitable. The Court's decision to answer Questions 1 and 2, and not to answer Question 3, is of some interest, since it could also have answered Question 3 to emphasize the fact that, in Canada, the Canadian constitution and laws prevail over international law wherever they might conflict. Indeed, it could have answered Questions 1 and 3, and not answered Question 2. The Court speaks of the issues as subtle and complex, when in truth they are entirely straightforward.

9. The very fact of the need to present such a Reference to the courts is revealing as to the condition of a state which does so, and suggests that the centrifugal forces within it are barely under control; that its will to survive is or has been in question; and that, for much of the population and élites,– even possibly for those in charge of the judicial branch of the state,– there are more important values than the preservation of state's authority and territorial integrity, even against overthrow by revolution.

10. Nothing in the substance of the Court's decision,– (1) requiring that lawful secession be through constitutional amendment and (2) rejecting a right of secession international law,– requires to be legitimated to make it palatable to any part of the population. But both cosmetically and in substance, various expedients are employed with the plain object of conciliating Quebec-nationalist opinion. This puts into question, at least in appearance, the Court's ability to decide and speak fearlessly and openly and without circumlocution.

11. To distill a great range of primary and secondary sources, in order to extract, articulate, and support a number of underlying constitutional principles, is a task of especially great difficulty. With respect, the Court's results on this score,– addressing constitutional "legitimacy", and extracting four "fundamental and organizing principles" of the Constitution,– appear to me to be rather uneven.

12. Though it lies unquestionably within the Court's jurisdiction to decide as it did, its inference of a constitutionally-imposed "duty to negotiate" in response to constitutional initiatives is a highly-radical judicial act, and is, in my view, clearly mistaken, though not necessarily (in my view) indefensible.

13. It is difficult to be sure who are necessary or proper parties to the negotiations, beyond federal and provincial governmental institutions; and, as regards the latter, to be sure precisely what are the respective roles of executive and legislative organs. It is also difficult to be certain what formally "triggers" the duty to negotiate. Given the Court's stated constitutional basis of the duty, an affirmative referendum result probably does not suffice, even if followed by a demand

from the relevant executive government. A motion for a resolution to amend the Constitution must (it seems) at least be introduced into the initiating legislative body, and, probably, also passed by it.

14. The "duty to negotiate" appears, from the Court's clear language to be general, symmetrical, and reciprocal. Given its professed bases in s. 46 of the *Constitution Act, 1982,* and in the underlying constitutional principles, it could not fairly or plausibly be otherwise. If so, it thus applies not only to initiatives by Quebec,– and not only to proposals for secession,– but to any constitutional-amendment initiative, of any kind, by the federation or any province. *The relevant right in the constitutionally-required negotiations is the right to pursue one's initiative, not a right to achieve it.*

15. The precise status of a referendum result in relation to the duty to negotiate is obscure, but its function appears to be to add "legitimacy" to the initiative. In this respect, the court requires, in order that a provincial secession initiative be regarded as legitimate in the relevant sense, that there be a clear question and a clear answer on the part of the population.

16. Questions concerning (1) whether conditions have arisen giving rise to the duty to negotiate, (2) the parties' respective decisions as to their positions, and (3) the parties' pursuit of their positions in the course of the negotiations, are all questions for the Apolitical actors" themselves, and are not reviewable by the courts. In particular, the parties themselves decide on their own "bottom-lines" without judicial interference.

17. The duty to negotiate institutionalizes a contest of political wills, and does not necessarily (as is its evident object) conduce to the stability of the federation. It creates incentives to make wide demands (even if only as initial negotiating positions) and to pursue them aggressively, as by mobilizing public opinion through referenda or otherwise. It extends (as obviously it must in fairness) to proposals of any and every kind. A proposal for secession, buttressed by referendum, can be met by counter-proposals for a constitutional declaration that the federation is indissoluble, or for a centralization of powers, or even for a unitary state. The obvious lesson for determined federalists across the country is to build an unshakeable and irresistible political will throughout Canada, and also the means to back it up.

18. The Court, though it is an organ of the Canadian state (in fact, the highest judicial organ), seems to speak at times as if it were an independent third-party arbiter between the state and its adversaries. And the Court, though employing *descriptive* language, appears to *legitimate* the involvement of foreign states in Canadian constitutional questions,– at any rate, those arising in connection with secession. The Court plainly appears to imply, not only that foreign states *might*,– if the Canadian federation did not comport itself properly in secession negotiations,– but that foreign states *could quite legitimately*,– recognize an independent Quebec state established by revolutionary means (with all that this entails by way of military or other assistance to the newly-recognized régime in establishing itself). This appears to me to lie beyond the legitimate functions, either of an organ of the state, or of those speaking in its name.

19. The federal "*Clarity Act"*, S.C. 2000, c. 26, imposes various duties and disabilities upon the Houses of the Parliament of Canada of Commons of Canada and their members, and upon the executive government of Canada and its officers. The statute is validly enacted under s. 44 of the *Constitution Act, 1982,* and, probably, also under the federal residuary power. It complies with the decision in the *Secession Reference,* but would not be *ultra vires* even if it did not, since the legal consequences of its failure to do so would be those flowing from a breach of a duty to negotiate.

20. The Quebec statute ("Bill 99", S.Q. 2000, c. 46), on "the exercise of the fundamental prerogatives of the Québec people and the Québec State", has a wide variety of provisions addressing various subjects. Given the scope of the provincial legislative authority to make enactments of a constitutional nature," notably under s. 45 of the *Constitution Act, 1982*,S these provisions are constitutionally invalid or ineffective at least insofar as they inaccurately declare the law *on matters outside provincial jurisdiction.* This they do in various instances. Indeed, in strictness, the province has not the authority, *on matters outside its jurisdiction,* to declare the law *at all*, not even if the declaration be accurate.

21. The Quebec statute is constitutionally invalid, or without effect, insofar as it asserts, explicitly or implicitly, (1) that public authority in Quebec does not rest or depend upon the Constitution of Canada, but rather upon the popular

sovereignty of the provincial electorate, and (2) that the Quebec electorate,– acting directly or through the political institutions of the province, S is entitled to make any constitutional changes it may please, *up to and including secession*.

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