BUREAU DE COORDINATION DES ÉTUDES
Fiche d'identification de la mise à jour

COMMISSION : Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté.

ÉTUDE ORIGINALE

Référence : Volume 1, pages 635 à 644

Auteur : Edward McWhinney

Titre : Les concepts de la souveraineté et de l'État à l'ère moderne

MISE À JOUR

Auteur : Edward McWhinney

Titre : Sovereignty and the State at the Opening of the new Millennium

2001-12-19

Mise à jour de l'étude intitulée

"Sovereignty and the State at the Opening of the new Millennium"

Produite dans le cadre des travaux de la

Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté

Par: Edward McWhinney, c.r., S.J.D., LL.D.
Avocat;
Professor (émérite) de droit international;
Président (1999-2001) et Membre titulaire de l'Institut de Droit International

En date du 1 novembre 2001

Sovereignty and the State at the Opening of the new Millennium

By Edward McWhinney*

Part I. Accession to Sovereignty and Recognition in International Law, revisited

My earlier legal study, "Concepts of Sovereignty and the State in the modern era", published in the Journal des débats, volume 28, 12 February 1992, was a statement of the lex lata of International Law at a point in time effectively of the close of the 20th century symbolized by the fall of the Berlin Wall in 1989 and the ending of the Cold War and the post-World War II Bipolar system of World public order. In this, still "classical" system of International Law, sovereignty and statehood were attained through legal recognition and acceptance by other, existing states in the World community. The preferred legal doctrine on Recognition, developed above all by Great Britain in its 19th century Imperial heyday when the British Navy and the British Pound Sterling were dominant instruments in international political and economic relations, was the so-called Declaratory theory. According to this theory, the established community of states should respond to the empirical facts of international life – whether a claimed new state, or new régime within an existing state, had achieved a sufficient political stability to honour existing international obligations, including protection of foreign nationals and safeguards of foreign economic investments and loans. The Declaratory doctrine was refined and systematised by the Continental European, civil law-trained British jurist, Lauterpacht, in the between-the-two-World Wars era. Lauterpacht drew source-inspiration from the detailed case load before British courts deriving from the Spanish Civil War (1936-1939). While conceding, in some deference to the alternative, Constitutive theory of Recognition, that the specific act of recognition must always be a political one, achieved by the decision of the executive arm of government, Lauterpacht made the essential bridge between law and fact (die normative Kraft des Faktischen) in postulating a legal duty of recognition on existing states where the gap between national legal policies and the elementary political facts-of-life of international society at any time would otherwise become extreme if they should choose not to recognise a claimed new international entity. He also laid down a rational process for judicial determination of whether or not, and with what modalities (territorial and other), a new state should have come into existence, by insisting that the courts, in case of doubt, refer to the executive; and if the executive response should be clear and unambiguous, then the courts must follow and apply it.

A parallel legal construct with roots, obviously, in the alternative, essentially subjective, Constitutive theory of Recognition, spoke of a legal duty of non-recognition. This was the so-called Stimson doctrine which, in its first formulation, called for non-recognition by existing states of the Japanese conquest of Manchuria and creation of the Japanese puppet state of Manchukuo. There were echoes of this Stimson doctrine after World War II, in the long-sustained policy of many states, (including Canada), of non-recognition, until the opening of the 1970s, of the People's Republic of China as the Government of China, even though the original, "parent", Nationalist government of China had been driven out of mainland China by 1948 and forced to re-establish itself in the island of Taiwan. Somewhat parallel was the near universal non-recognition of breakaway Nigerian province of Biafra in the late 1960s even though, by all

counts, it satisfied most of the established objective criteria for existence of a new state. The determining factors in these decisions on non-recognition were, clearly, subjective considerations of national political or economic self-interest, including political solidarity with allied or associated states.

The issue of admission to, and continuing membership in the United Nations and related international organizations emerged historically, separately and distinctly, and later, than the doctrines on State recognition. In the very early Cold War years, the rival political blocs, Soviet and U.S., tended to apply vetos, on purely ideological grounds, to each other's preferred candidate-states for admission to the U.N. Following on the so-called "package deal" on U.N. membership of late 1955, which ended almost a decade of political stalemate on admission of new states to the U.N., the practice became one of virtually automatic entry once the traditional, "classical" criteria of existence and political viability of candidate states had been demonstrated. Although the terminology has not been commonly used in a United Nations context, one might fairly say that the U.N. law after 1955, followed closely on the facts, in the full spirit and letter of the Declaratory theory of Recognition.

Part II. Post-Cold War developments in International law doctrines on Recognition

The decade of the 1990s, for International Law and for the special company of lawyers who develop it, doctrinally and jurisprudentially, has been dominated by the problems of State succession with the emergence of new states in the post-Cold War Balkans, with particular reference to Yugoslavia. The multi-cultural kingdom of the Serbs, Croats and Slovenes had been put together by the victorious allies from World War I in the Versailles Peace treaties settlements of 1919, with some disregard for strict principles of ethno-cultural self-determination. It had been continued after World War II, with some subsequent deliberate modifications of internal regional administrative frontiers made by Marshal Tito. It had been predicted that Tito's reconstructed Socialist Federal Republic of Yugoslavia (SFRY) might not long survive his own demise, which occurred in 1980. And so it proved to be, although the disintegration of Tito's federal republic may have been triggered or accelerated, by Germany's "premature" recognition of the independence of two of its internal units or constituent republics, Slovenia and Croatia, and Germany's simultaneous sponsorship of these two new entities for fast-track admission to the United Nations. According to the tenets of the Declaratory school of recognition, recognition of a breakaway segment of an existing state before the position of the original, parent state has become beyond political-military redemption is itself a breach of International Law. Although these unilateral German initiatives may have been influenced by long-range political history and inter-European rivalries going back through World War II and World War I to the Balkan Wars of 1912-13, the fact remains that the German lead was soon followed and adopted by other main European Community states. From this European collective action ensued a series of "European", regional international law acts that may be seen as essays in the definition of a contemporary, post-Cold War code of legal principles on accession to sovereignty and statehood and on admission to the United Nations and other key international arenas.

European Community Guidelines, 1991

Foremost among these European acts was one adopted at an Extraordinary EPC Ministerial Meeting at Brussels on 16 December 1991 – the Declaration on Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union. As adopted by the European Community Foreign Ministers, the Declaration was designed to serve as a European Community common position on the process of recognition of the new states emerging from the collapse of the erstwhile Soviet Union and the related Cold War-based public order system in Eastern Europe. In international legal terms, the most interesting innovation is the doctrinal-legal bridge, consciously made, between the essentially objective, law-as-fact criteria to which the Declaratory Theory on Recognition responded, and the far more subjective, value-oriented tests put forward under the Constitutive theory, at least in its Stimson doctrine variant. The Preamble to the Guidelines affirms the European Community states' attachment to the principle of self-determination and those European states' readiness to recognize the new states – "subject to the normal standards of international practice, and the political realities in each case". It is followed by a detailed enunciation of normative standards of conduct to be required of any new state entities as pre-conditions of any recognition by European Community states: -

(i) respect for the United Nations Charter and for the Helsinki Final Act of 1975, especially with regard to the rule of law, democracy and human rights;
(ii) guarantees for the rights of ethnic and national groups and minorities in accord with the framework of the CSCE (Conference on Security and Cooperation in Europe);
(iii) respect for the indivisibility of all frontiers which can only be changed by legal means and by common agreement;
(iv) acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation, as well as to security and regional stability;
(v) commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes.

The Guidelines concluded with the statement that the European Community and its member-states – "will not recognize entities which are the result of aggression"; and that the E.C. and its Member-States will – "take account of the effects of recognition on neighbouring states".

Opinions of the Badinter Commission, 1991-2

The European Community had already on 27 August 1991, some months before adoption of the Guidelines on Recognition, convened a peace conference on Yugoslavia, composed of representatives of the European Community and its member-states as well as representatives of the Presidency and the Government of the then extant Socialist Federal Republic of Yugoslavia (SFRY) plus the Presidents of the six internal, constituent republics within the Socialist Federal Republic of Yugoslavia. As an integral part of that peace conference, the European Community, on the same date, created a special Arbitration Commission of five members, chosen from the Presidents of Constitutional Courts in European Community member-states, to which differences among the contending parties could be submitted.

The Arbitration Commission, known as the Badinter Commission after its first (French) President, began to issue a number of Opinions which served to flesh out the meaning and application of the high-level general propositions of the European Community Guidelines, in the concrete fact-situations of the State Successions to the Socialist Federal Republic of Yugoslavia.

In its Opinion no. 1, issued on 29 November 1991, the Badinter Commission took note of desires for independence expressed by four of the six constituent republics of the Socialist Federal Republic of Yugoslavia (Slovenia, Croatia, Macedonia, Bosnia and Herzegovina). The Commission concluded that the various federal organs of the Socialist Federal Republic of Yugoslavia "no longer meet the criteria of participation and representativeness inherent in a federal State"; and that, in consequence, the Socialist Federal Republic of Yugoslavia was "in the process of dissolution".

In its Opinion no. 2, issued on 11 January 1992, the Badinter Commission while conceding that – "international law as it currently stands does not spell out all the implications of the right to self-determination", nevertheless concluded:

> "It is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of the independence (uti possidetis juris) except where the States concerned agree otherwise."

In its Opinion no. 3, again published on 11 January 1992, the Badinter Commission addressed the question whether the purely internal, regional boundaries established for the constituent republics of the Socialist Federal Republic of Yugoslavia under the SFRY Constitution, could be regarded as frontiers in terms of public international law. The first part of the Commission's response was uncontroversial: that all external frontiers must be respected, in line with the principle that the Commission found to be established in the United Nations Charter, in the U.N. General Assembly Declaration of Principles of Friendly Relations (UNGA Res. 2625 (XXV) of 1970); the Helsinki Final Act, and the Vienna Convention of 1978 on the Succession of States in respect of Treaties. In its second response, the Commission ruled that the internal, regional boundaries of the constituent republics under the SFRY Constitution might – "not be altered except by agreement freely arrived at."

It was in the third part of the Commission's response to the question that an inductive leap into new international law, not covered by pre-existing doctrines or jurisprudence, may be thought to have occurred:

> "Except when otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of uti possidetis."

Territorial frontiers issues: internal as well as external frontiers?

The fourth part of the Commission's response is a reiteration of the first part of the response with the addition of the principle of the Non-Use-of-Force. It relies on the same general legal authority (the U.N. Charter; the U.N. General Assembly's Friendly Relations Declaration of

1970; the Helsinki Final Act), namely that – "the alteration of existing frontiers or boundaries by force is not capable of producing any legal effect."

The Commission's overall reasoning, is elliptical. Its first response speaks of "external frontiers", where its fourth response moves on to apply the principles of its first response to simple, un-prefixed "existing frontiers or boundaries". The extension might well be warranted, de lege ferenda, but it really would have benefited from some supporting argumentation and justification in positive law terms if presented as part of the process of progressive development of international law in accordance with the U.N. Charter.

Part of the problem inherent in the jump from purely internal, regional boundaries within a federal or plural-constitutional state that are sanctioned, as such, under the Municipal, constitutional law of the state concerned, to external frontiers of a state sanctioned as such under Public International Law, may be found in the special nature and composition of the Badinter Commission. Its five members' special legal expertise of course lay in Municipal, national constitutional law, without any obvious claims also to authority in international law.

The uti possidetis doctrine

There is a similar ellipsis in the Commission's findings as to the range and reach of the uti possidetis doctrine. In classical International Law it is regarded as a special, regional Latin American International Law doctrine, with its historical roots formed over the more than three centuries of administrative governance under the Spanish and Portugese Colonial empires in the Americas. The Badinter Commission's assertion, in the third part of its response in Opinion no. 3 that – "uti possidetis, though initially applied in settling decolonisation issues in America and Africa, is today recognized as a general principle", may be too broadly stated. Outside Latin America, the reference to Africa may rest on a confusion of the political practice of the relevant regional organisation, the Organisation of African Unity, in regard to territorial boundaries inherited in the decolonisation process from European imperial powers, with a lex lata juridical category. The Badinter Commission's citation, here, of a dictum from Frontier Dispute (Burkina Faso v. Mali), ICJ Reports 1986, p. 554 at p. 565, identifies the policy considerations guiding Organisation of African Unity practice in the early decolonisation years of the 1960s and the 1970s:

> "It (uti possidetis) is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fractional struggles …"

This is true enough as a description of the high pragmatism of OAU leaders of that particular time, like Boutros Boutros-Ghali in the earlier, national, (Egyptian) phase of his career in public life. There was political consensus that it would be wise to postpone rectification of the arbitrary territorial frontiers, too often dividing members of the same African peoples, imposed by the European imperial powers at the Congress of Berlin in 1885 and later; and to concentrate instead on forging common, pan-African positions in the U.N. and other main international arenas. It would seem quite a hop-step-and-a-jump from that, legally, to postulate as a principle of

regional, African International Law, the maintenance in perpetuo of a territorial status quo that was simply a historical legacy from past imperial masters.

Part III. New thinking and new International law-making on Recognition and State Succession

Quite often, new legal principles will ride into history on the back of an original legal error. In its original formulation by the Badinter Commission, it may have been a ruling per incuriam, to extend to the purely internal, regional boundaries of a state (here of the SFRY) the legal sanctity accorded under international law to the external, international frontiers of the same state. However, once promulgated as a legal doctrine for the European Community states as to recognition of new states and of their territorial boundaries; and, thereafter, once accepted and applied in European Community practice as it was, immediately, we have a new authoritative source of regional, European international law and of the general international law that draws upon it. The same legal argument may be advanced in relation to the historical doctrine of uti possidetis and its incorporation, with the extra weight and authority of European Community doctrines and practice, into general International Law.

Accentuation of the Declaratory theory of Recognition and the claimed duty of Recognition

It may thus be suggested that the present state of general international law is one where the Declaratory theory of Recognition has been further confirmed and reinforced, with the addition (borrowed from the alternative Constitutive theory of Recognition) that claimed new international legal entities that can demonstrate their respect for the U.N. Charter and the Helsinki Final Act and related international acts with special regard for guarantees for the rights of ethnic minorities and for the stability of territorial frontiers, become the beneficiaries of a duty of recognition on the part of existing states.

Admission to the United Nations and continued U.N. membership

While admission of states to the United Nations and their continued membership therein have, as noted, always been legally separate and distinct from their recognition as sovereign persons in general international law, the practice of the European Community states in regard to the new states emerging from the break-up of the SFRY has been to merge and consolidate the two processes in a larger vindication of the Declaratory theory practiced in the U.N., since the Soviet-Western package deal of 1955. Thus Slovenia, Croatia, and Bosnia and Herzegovina were admitted to the United Nations in 1992 in lock-step with their recognition, as sovereign independent states, by the European Community concert of states. Macedonia followed in 1993, albeit with some reservations as to nomenclature (the euphemism FYROM – Former Yugolsav Republic of Macedonia – being insisted upon by some Balkan neighbours and other states as a condition of their own recognition). One exception to this must remain the special case of the rump Yugoslavia (Serbia and Montenegro) claim to continue as the old SFRY after the breakaway of the first three of its constituent republics). Both the Badinter Commission in its legal Opinion no. 1 of 29 November 1991, that the SFRY no longer met the criteria of a "state" under international law; and also the U.N. Security Council in its Resolution 757 of 30 May 1992 (adopted by 13 to 0, with 2 abstentions, including China) and its Resolution 777 of 19 September

1992 (adopted 12 to 0, with 3 abstentions, including China and India) denying the claim of the rump SFRY to continue automatically the Yugoslav membership in the United Nations and declaring that it should not participate in the work of the U.N. General Assembly, would appear to depart significantly from classical international law doctrines. These emphasise continuity of recognition of a state and of recognition's not being withdrawn "prematurely" before the situation of that state has become beyond redemption, politically and militarily – a situation that was manifestly not the case with the rump SFRY in 1992. It is possible that the Badinter Commission and also the U.N. Security Council were influenced by concerns that the rump state (Serbia and Montenegro) might benefit disproportionately, in any legal disposition of the state assets (and especially assets located abroad) of the SFRY under the doctrine of State Succession, if the SFRY were to be allowed legally to continue in their person. The principal conclusion has to remain, nevertheless, that that European Community collective, regional action, and also the two Security Council Resolutions of 1992, involved the conscious insertion into the decision-making on recognition and admission, of subjective political criteria of the same generic character as those standards of political "good behaviour" advanced in the European Community Guidelines on Recognition of New States of 16 December 1991. In the case of the United Nations, it would represent, as a special case, a reversion to the original practice, (prior to the Soviet-Western "package deal" on new members of 1955), of applying political-ideological criteria (under the legal rubric of the "peace-loving state" formulation in Article 4(1) of the U.N. Charter), as the determinant of eligibility for U.N. membership. For general international law, it would signal an important new trend and direction towards an ever-widening embrace of minimum standards of state conduct as conditions for entry into or continued participation in the World community decision-making. The same trend can be observed in the developing practice of the European Union in the new conditions as to political as well as economic performance that it now applies to future state candidates for admission to the European Union, and that are reflected in its priority listing and ranking of such state candidates for admission to that Union.

Admission to functionally-based international or regional organizations: the new pragmatism

Some of the long-range trends and conditions, in recognition and state succession, identified in my earlier legal Opinion, published in February 1992, on "Concepts of Sovereignty and the State in the modern era", have been confirmed and accentuated by developments over the intervening decade in the two areas therein mentioned. First, is the trend to Continentalism and to supra-national political and economic integration across conventional international frontiers of states, which progressively whittles away many of the traditional legal attributes of state sovereignty and renders the concept of sovereignty increasingly anachronistic and out of date in contemporary conditions of interdependence. The second is the well-evidenced trend for governments and their executive and legislative branches and even their judiciary not to stand too much on issues of legal status in the abstract, but, instead, to try to "do what comes naturally", with pragmatic executive and administrative accommodations being made in trans-border cooperation in concrete problem-solving exercises. It is left to the lawyers to rationalise any resulting jurisdictional issues after the conceived politically necessary and useful government decisions have been made.

Admission to regional or trans-national associations of states that do not involve any onerous financial or other obligations increasingly comes as a matter of course, since these particular organizations thrive on enlarged membership. There may, as in the case of the Commonwealth (formerly British Commonwealth) now be a supplemental constitutional testing of membership in terms of conformity to contemporary international standards of "good behaviour" of states – first applied to exclude from the Commonwealth the former white minority-governed Republic of South Africa, and more recently applied to compel Nigeria to conform to internationally accepted standards of political and civil rights.

In the case of other international organizations and U.N. specialised agencies with substantive law-making agendas and competence, such as UNESCO and the new World Trade Organisation, the functional base and responsibilities, and ultimately the efficacy, of such bodies are directly linked to their representativeness, overriding conventional credentials tests of membership based on conformity or non-conformity to classical criteria of state recognition. It is hardly surprising, in this regard, granted the financial and economic weight of each entity, that both the People's Republic of China and also the Republic of China (Taiwan) should logically be included in the World Trade Organisation, even though, since its de-recognition at the opening of the 1970s, the Republic of China (Taiwan) has ceased, legally, to be a sovereign state according to the Foreign Ministries of most of the leading states of the World community. That has not, however, prevented those same states from opening well-staffed shadow diplomatic missions in Taiwan and, reciprocally, from receiving similar missions from Taiwan, nor has it prevented the according to such Taiwan representatives (styled Trade Commissioners) the privileges and immunities of diplomatic personnel under international customary and treaty law. In the Maersk Dubai case, (Re Republic of China and Romania et al., 109 C.C.C. (3d) 348), the Supreme Court of Nova Scotia in effect accorded sovereign immunity in respect to a state-owned vessel registered to the Republic of China (Taiwan), even though the Republic of China (Taiwan) was not officially recognized by the Government of Canada, with members of the ship's crew, in consequence of the court decision, being released to Taiwanese government officials in Canada for purposes of investigation and trial before the regular Taiwanese Courts, under Taiwanese criminal law.

The already observable trends of a decade ago, under the Canada-U.S. Free Trade Agreement, to allow free movement of people and of commerce across the long, Canada-U.S. common frontiers, have been accentuated, with a de facto liberal, facultative administration of the customs and immigration laws of both countries, particularly on the U.S. side, in contrast to the more draconian application of such laws at Mexican and some other U.S. international ports of entry. The common-sense and business efficacy of such bilateral, administrative cooperation between Canada and the U.S. are obvious enough, granted the enormous daily flow of people and goods, back and forth across the common Canada-U.S. border. It is likely to survive notwithstanding the heightened security impulse from the international terrorist atrocities of 11 September 2001, which has brought urgent suggestions from the U.S. Ambassador to Canada for harmonization of Canadian and U.S. laws on security controls on visitors and immigrants and refugee claimants arriving in the two countries.

Supreme Court of Canada ruling on Reference re. Secession of Quebec, 1998

The attitude of the original, parent state from which a breakaway movement may have attempted to secede, and its significance for other states in their decision whether or not to recognise a new entity as a state, is raised by the 1998 ruling of the Supreme Court of Canada in Reference re. Secession of Quebec, [1998] 2 S.C. R. 217. The federal government's decision to initiate the Reference for an Advisory Opinion from the Court, and the three questions which the federal government then framed for ruling on by the Court, were designed for internal, Municipal (Canadian) law purposes within Canada, in delayed reaction to the electoral surprise of the only near-miss victory of the federalist cause in the October, 1995, second Quebec Provincial referendum on "sovereignty-association" with Canada. Two of the questions selected by the federal Government were, in strictly legal terms, trite and self-evident, in the replies that the Court would have to give under existing Canadian Law. Could Quebec, in terms of the (federal) Constitution Act legally secede, unilaterally, from Canada? The answer, as the Court easily found, was No! In the event of a conflict between Canadian internal (constitutional) law and public international law as to whether Quebec could legally secede, unilaterally, from Canada, which of the two systems of law would prevail, legally, in Canada? Again the answer for the Court was clear enough. Since Canada, like other states, has never embraced the Monist theory of the supremacy of public international law over internal, national law before national courts and other national jurisdictions, Canadian law must prevail in the case of such a conflict.

The real controversy, political or legal, in regard to the Supreme Court and the Reference re. Secession of Quebec must concern the other question posed to the Court by the federal Government, and the detailed, diverse comments that the judges chose to make in response to it. The question: whether, under public international law, Quebec had a right unilaterally to secede from Canada; and whether, in particular, there is a right to self-determination under public international law that would allow Quebec unilaterally to secede from Canada.

The Supreme Court of Canada is not a specialised Constitutional Court, on the contemporary Continental European model, with a jurisdiction in high policy issues on the frontiers of law and politics. In the present Reference, the Province of Quebec chose not to be represented in the proceedings and pleadings before the Court and the Court itself, (perhaps too easily, in legal terms) allowed a number of marginal, fringe groups to fill the gap in legal presentations before it. This meant that the substantive legal issues of public international law– an area of law beyond the Court's normal experience and on which the Court had last ruled in 1944 (on Sovereign Immunities of visiting foreign armed forces) were carried effectively by the federal Government alone. The claimed expert legal evidence adduced before the Court was selective and limited in its range and depth, and the claims to expertise on the key issues of self-determination never tested on the voir dire. In the result, the Court's opinions on this particular question may not carry persuasive authority outside Canada in the general doctrines on public international law. For Canadian internal law purposes, however, the principal thrust of the Court's ruling and one that may not have been anticipated by the federal Government in making the original Reference, was an obiter dictum-style postulate, emerging from the Court's answer to this particular question, that "in the event of a clear repudiation by the people of Quebec of the existing constitutional order", the government of Canada would have a duty to negotiate with the government of Quebec on secession. No clear constitutional base for this asserted legal

obligation of the federal Government to negotiate in the aftermath of any future Quebec Provincial referendum in which an affirmative vote might be secured for "sovereignty-association" or some like formula, was identified by the Court.

Although the attitude of the original, parent government, as a determining factor for other states in their deciding whether or not to recognize a breakaway state, was dismissed rather summarily by the European Union concert of powers in their "premature" recognitions of the new succession states to the Socialist Federal Republic of Yugoslavia, it has always been one element in recognition under classical international law. The Supreme Court of Canada, in opting to pass on the inherent, prerogative powers of a coordinate arm of government, the executive, and to limit the executives full margin of discretion in response to any emerging political facts has, it may be suggested, opened the door to the Declaratory, law-as-fact theory of Recognition in Canadian, internal constitutional law.

The federal Clarity Bill, 2000

The federal Government, in the so-called Clarity Bill, enacted in the year 2000 in delayed follow-up to the Supreme Court of Canada Advisory Opinion of 1998 on Quebec secession, was designed to ensure that an "honest" (clear and unambiguous) question would be submitted to and voted upon by Quebec voters in any future referendum, rather than (as it had been suggested) the cloudy and normatively-ambiguous "sovereignty-association" formulae actually presented by the Quebec government in the earlier, 1980 and 1995 referenda.

There is nothing particularly unusual or noteworthy in the federal law, other than perhaps the timing – its belatedness in addressing a potential problem that had been there already, and addressed, for the first Quebec referendum in 1980. Prime Minister Trudeau was aware of constitutional opinion in 1980 to the effect that the federal Government always retained full constitutional powers to allow or not to allow any Provincial referendum on secession, or even to conduct the federal Government's own, preemptive, nation-wide referendum, with its own, federal Government formulated question, and beyond that, if the federal Government should opt politically to allow the Provincial referendum to proceed, that it could intervene legally to control the content or wording of any question so as to ensure that it would be clear and unambiguous. Prime Minister Trudeau opted, in 1980, to put any aside such constitutional opinion and to move, instead, on the political front and to contest and win, for the federalist cause, the Provincial referendum vote. The 20 percent-plus margin of victory for the federalist side in the 1980 Quebec referendum vote was a political vindication for this federalist referendum strategy in 1980 of choosing a political rather than a federal judicial arena to decide the issue.

During the political run-up to the second, 1995, Quebec referendum vote, a leading Opposition Constitutional critic, Stephen Harper, M.P., had directly raised the question of the federal power constitutionally to ensure a clear and unambiguous Quebec referendum question. This was in Question Period in the House of Commons on 17 October 1994; and Mr. Harper raised the issue again, after the federal Government's near-miss victory in the 1995 Quebec referendum vote, in Question Period of 13 May 1996. The federal Clarity Bill finally emerged in 2000, after non-committal federal government answers in Question Period on both occasions. The conclusion

must be that the Clarity Bill stands as a statement of federal Government intentions as to the exercise of discretionary political, prerogative powers, by any future federal executive, in any future Quebec referendum situation. It is, necessarily, limited, in its normative legal range and application to Canadian internal jurisdictions.

Résumé of conclusions in the light of new legal developments and trends in the post-Cold War era

(a) It continues to be accepted that legal Recognition by existing states of a claimed new international entity is a political act, to be determined by the executive arm of government. The trend today, however, is ever more strongly in favour of the Declaratory theory of Recognition and a law-as-fact approach whereby states will seek to bring their own national law into line with new realities in the World community.

(b) The trend to supra-national political and economic integration and trans-national association on a regional basis is continuing and being accentuated. Individual states' actions on recognition tend to be made in coordination with such regional associations and their members, as to the decision itself and its timing, (whether in a political-military or a political-economic regional body or sometimes in a combination of both).

(c) Such coordinated, collective acts of Recognition may be predicated upon the acceptance by any claimed new international entity of certain imperative legal principles and international acts which now have a jus cogens quality: among these, the United Nations Charter; the U.N. General Assembly Declaration of 1970 on Friendly Relations and Cooperation among States; the Helsinki Final Act of 1975; and the renunciation of the Use-of-Force as a solvent for international disputes, particularly disputes over the settlement of international frontiers. Correlatively, where such standards of "good behaviour" are demonstrably met, a duty of recognition becomes logically necessary and inevitable.

(d) For purposes of coordinated, collective decisions on Recognition by member-states of international regional associations, there is a clear trend to assimilate the act of Recognition to support, at the same time, for admission to the United Nations and to membership in those regional associations themselves with the same substantive criteria of demonstrated compliance with imperative principles of contemporary international law being used as legal tests for qualification for such Recognition or Admission.

(e) The doctrine of uti possidetis and the sanctity and inviolability of territorial frontiers existing at the time a new international entity should come into being (even purely internal, administrative frontiers within a parent state from which the new entity may have broken away) is accepted as a key legal element in Recognition of a new state and its admission to the United Nations and other international legal arenas; with such pre-existing territorial frontiers only becoming capable of legal change by subsequent agreement between all parties.

(f) By the same token, failure of an already existing, plural-national or plural-cultural state to conform to the imperative principles of international law and the international acts (jus cogens)

already cited, becomes a basis for withdrawal of Recognition of such already existing state and for its expulsion or exclusion from the United Nations and other cognate international arenas.

(g) Concurrently with the main international legal trends and conditions already cited, the world-wide movement to supra-national integration and to trans-national association on a political or economic or other basis has brought a new pragmatic realism and an emphasis on functional efficacy that worries less about a priori definitions of sovereignty, and concentrates much more upon "doing what comes naturally" in international relations. The new emphasis is upon the practical incidents and attributes of membership and participation in an increasingly interdependent international community, rather than on the elaboration of abstract theoretical constructs of state sovereignty. Juridical non-persons (in the sense of their not being formally recognized by other states), may thus find themselves accorded the privileges and immunities of a state in their direct, bilateral dealings with existing states and even welcomed into functionally-based international agencies and arenas, first perhaps as Observers and then later as members in their own right. Reciprocal self-interest and mutual advantage reinforce classical considerations of international Comity in the new, inclusive World Community of today. State sovereignty, as an abstract theoretical concept, is demonstrably of declining relevance and importance today.

(h) The Institut de Droit International, at its 70th biennial reunion in Vancouver in August 2001, adopted a new and fully comprehensive Restatement of the international law on State Succession in Matters of Property Obligations, amounting to a contemporary Code of the relevant legal principles and rules to be applied in the event of the dissolution of an existing state or the secession of one of its constituent parts. (An earlier projected Code, the United Nations Convention on Succession of States in respect of State Property, Archives and Debts, was adopted at Vienna in 1983 but has signally failed, over the intervening years, to secure the necessary minimum number of 15 state ratifications to bring it into legal effect. At the Vienna Conference which had adopted the text of that Convention by majority vote, all of the Western states represented had either voted against the Convention text, or abstained, apparently on the score that the Convention's provisions were too partial to the special legal interests of the then newly independent ex-Colonial states). The Institut de Droit International's restatement, in contrast, was adopted without any dissenting vote. In its Preamble, the Institut Resolution notes that it is addressed to new international political facts presented by the disintegration of the Soviet Union, the Socialist Federal Republic of Yugoslavia, and the Socialist Federal Republic of Czechoslovakia, as well as the unification of Germany.

---

*Edward McWhinney, Q.C., LL.M., S.J.D., LL.D., Barrister-at-Law; Barrister and Solicitor; Professor emeritus of International Law; Président (1999-2001) et Membre titulaire, Institut de Droit International.