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NEGOTIATING QUÉBEC SECESSION

BY

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I. — INTRODUCTION

On 20 August 1998, the Supreme Court of Canada delivered an advisory opinion concerning the unilateral secession of Québec (1). The Governor-General (in Council) had referred to the Court on 30 September 1996 three questions of law, discussed in detail below, concerning the ability of Québec to secede unilaterally under the Canadian federal Constitution and under international law (2). Over the course of 1997, the federal government filed written argument and an expert's report dealing with issues of international law. The Province of Québec refused to participate. It filed no written brief and did not make any submissions (3). The Court, however, appointed an amicus curiae (from Québec) to represent the competing, secessionist interest. Two of the ten current provinces (4), the two territories (5), four separate representatives of aboriginal interests, two special interest groups (6), and three sets of private individuals were all granted standing to intervene in the proceedings and also filed written argument. The Court heard argument from 16 February to 19 February 1998. Some six months later, it released its opinion. Put simply, the Court rejected the right of Québec to secede unilaterally under both the Canadian Constitution and international law. Given these answers, the Court declined to answer the third question of reconciling a conflict between national and international law in these circumstances. Secession represented an amendment to the Canadian Constitution, and was accordingly to be a negotiated

(1) *Reference re Secession of Québec*, [1998] 2 *Supreme Court Reports* (« *S.C.R.* ») 217 and via the Internet at [www.scc-csc.gc.ca] ; hereinafter, the « *Québec Reference Case* ».

(2) Formally, the Governor-General is the representative of HM Queen Elizabeth II in Canada. Effectively, it is the current federal government which drafts and puts the questions before the Court. The Court's reference jurisdiction is outlined briefly below.

(3) The Québec government taking the public position that the secession issue was purely political, and not justiciable before the courts.

(4) Manitoba and Saskatchewan.

(5) Northwest Territories, Yukon Territory.

(6) The Minority Advocacy and Rights Council and the Ad Hoc Committee of Canadian Women on the Constitution.

process. All constitutional participants had a binding, constitutional duty to negotiate, but this duty did not entail negotiating only the details of eventual secession nor even that secession itself would occur.

This article proposes to outline and discuss briefly the reasoning of the Supreme Court of Canada in the *Québec Reference Case*. Before addressing those questions and the Court's opinion, however, I propose to give in Part II some general background to the origin of these rather unusual court proceedings. Part III will outline the decision. The structure and approach herein will follow that of the Court's opinion itself in dealing with each of the three questions in turn. Part IV will offer comments and criticism. Part V will conclude the article.

II. — BACKGROUND (7)

In a 30 October 1995 referendum, the Québec electorate narrowly defeated — by a margin of some 50.48 % — the provincial government's proposal for Québec separation (8). Specifically, the Québec government, under the premiership of Parti Québecois leader Jacques Parizeau (9), sought popular confirmation for its draft Bill respecting Québec independence (10). Under such Bill, the Québec government proposed to declare Québec sovereign and undertake negotiations for a new « economic and political partnership » with Canada. While by no means certain or agreed, it can be reasonably assumed that a bare majority in favour of the Bill would have satisfied the Parizeau government.

These actions by the Québec government were subjected to two court challenges by a Québec lawyer, Guy Bertrand (11). In the first case (12), Bertrand sought (prior to the referendum) and obtained a declaration

(7) R. HOWSE & A. MALKIN, « Canadians Are a Sovereign People : How the Supreme Court Should the Reference on Québec Secession », (1997) 76 *Canadian Bar Review* (« *C.B.R.* ») 186 and H.W. MACLAUCHLAN, « Accounting for Democracy and the Rule of Law in the Québec Secession Reference » (1997) 76 *C.B.R.* 155, two articles commissioned by the Canadian Bar Association prior to the Court hearing, provide a helpful summary and discussion of the background and issues. The former is remarkably close to the Court's own approach on the points of federalism, democracy, the rule of law and the protection of minorities.

(8) This was the second referendum of its kind, the first occurring on 20 May 1980, and it was defeated by a majority of 59.5 %.

(9) Recall that the Canadian political system is based on the English system of parliamentary majorities and on direct, and not proportional, representation.

(10) Le Projet de loi no. 1 « Loi sur l'avenir du Québec », 35th Legislature, 1st Session, 7 September 1995 ; see also the earlier version, the *Act respecting the process for determining the political and constitutional future of Québec*, Statutes of Québec (« S.Q. ») 1991 c.34, tabled 6 December 1994.

(11) Dr. Singh (a Québec resident) and six others brought a similar action against the same draft Bill and the referendum.

(12) *Bertrand v. Québec (Attorney General)* (1995) 127 *Diminion Law Reports* (« *D.L.R.* ») (4th) 408 (Que. Sup. Ct.), regarding the *Act respecting the process for determining the political and constitutional future of Québec*, S.Q. 1991 c.34.

against an earlier 1994 version of the draft Bill on the basis that it was a serious threat to his rights under the Charter of Rights (13). An injunction preventing the referendum was refused as doing more harm than good. The Québec government attempted but failed to strike the action as non-justiciable. It withdrew thereafter from the proceedings. Following the referendum, Bertrand amended his action, this time for a declaration that unilateral secession was unconstitutional and contravened his rights under the Charter. The federal government intervened. The Québec government moved to strike the action as non-justiciable, and lost (14). Thereafter, it also withdrew again from these proceedings, maintaining that the secession issue was purely political.

In the course of his reasons in the second Bertrand case dismissing the Québec government motion, Pidgeon J. identified certain constitutional and international law issues which he considered important for resolution (by the judge ultimately hearing the substance of the case), namely :

1. Le droit à l'autodétermination est-il synonyme de droit à la sécession ?
2. Le Québec peut-il unilatéralement faire sécession du Canada ?
3. Le processus d'accession du Québec à la souveraineté trouve-t-il sanction dans le droit international ?
4. Le droit international a-t-il préséance sur le droit interne ? (15).

Taking its cue from this, the federal government decided to refer those issues as a separate case to the Supreme Court of Canada for its legal opinion (16). Under its statutory reference jurisdiction (17), the Court renders advice and direction on points of law or legislation without there necessarily existing a controversy or dispute among parties (18). As merely advice and directions, the opinion of the Court is merely persuasive, rather than binding precedent throughout Canada (19). But in practice this is very much a distinction without a difference (20). Hence the reasons and principles stated by the Court in this Reference case will have immediate and

(13) The Charter of Rights is a constitutional, entrenched guarantee of certain basic rights of persons, which was enacted into Canadian constitutional law in 1982. It joined the existing body of human rights law — treaties, statutory (but not entrenched) Bills of Rights and judicial precedent.

(14) *Bertrand c. Québec (Procureur général)*, (unreported, 30 August 1996, Que. Sup. Ct., Pidgeon J.).

(15) *Bertrand c. Québec (Procureur général)*, para 135.

(16) Statement of the Minister of Justice, Allan Rock, to Parliament, *Hansard* (House of Commons Debates), 26 September 1996, and Open Letter from Allan Rock to Paul Beguin, Minister of Justice and Attorney General of Québec ; see also MACLAUCHLAN, *op cit.*, pp. 161-7.

(17) s. 53 *Supreme Court of Canada Act, Revised Statutes of Canada* (« *R.S.C.* ») 1985 c.S-26.

(18) In a wide sense (and with some hesitation), this competence is akin to, but certainly not equivalent nor co-extensive in limit or substance, with the legislative functions of the Conseil d'Etat / Raad van State under Art. 160 of the Belgian Constitution, as of 1998, and the Co-ordinated Law of 12 January 1973 concerning the Conseil d'Etat / Raad van State.

(19) *Ontario (Attorney General) v. Canada (Attorney General)*, [1912] Appeal Cases (« A.C. ») 571.

(20) See P. HOGG, *Constitutional Law of Canada*, (2d) (Carswell, 1985, Toronto) p. 180.

significant impact on the development of Canadian constitutional law in the courts and in the political sphere (21). With this short background to the origins of the questions and the jurisdiction of the Court, we can now turn to the questions themselves.

III. — The Court's Opinion

A. — *Preliminary Objection*

Before addressing the three questions, the Court first disposed of a preliminary objection to its jurisdiction raised by the Québec amicus curiae. The grounds of this objection challenged the validity of the Court's reference jurisdiction and the justiciability of the questions themselves. The objection was dismissed. The federal statute conferring the original jurisdiction was within the constitutional power of Parliament. In particular, the Canadian Constitution did not insist upon a strict separation of powers nor incorporate a « case or controversy » doctrine, as in US constitutional law (22). Nor did the Court's capacity as a general court of appeal limit it or render contradictory its performing other legal functions, such as advisory functions, in tandem with its judicial duties.

As to justiciability, the questions did not require the Court to assess issues not having a sufficient legal component and thereby pull the Court out of its own self-assessed role in the Canadian constitutional framework. Here, the questions were strictly limited to the legal framework in which democratic decisions were to be made. Nor did the questions require the Court to usurp the function of an international legal tribunal, but rather consider only the application of international law in the Canadian legal order. Lastly, no other more practical grounds existed, such as ambiguity in the question, imprecision or insufficient information to support argument, answer or both, so as to cause the Court to decline to hear the matters at hand. And with these preliminary matters out of the way, the Court began its consideration of the reference questions themselves.

(21) All the more so since the opinion is given on behalf of the « Court » sitting en banc (all nine judges present), without being attributed to any one judicial author and without dissenting or separate reasons — not uncommon in a reference or any SCC case.

(22) The US doctrine of « case or controversy » arises from that phrase as found in Art. III of the US Constitution, and is understood in general terms to restrict the US Supreme Court to those cases involving an actual or threatened legal infringement of recognised rights, or some other legal issue between parties having legal personality and legal status. This is due in part to a more strict observance of the separation of powers in the US. Whilst a reference power technically exists under US constitutional law it is circumscribed by the « case or controversy doctrine ». See generally, L. Tribe, *American Constitutional Law* (The Foundation Press, 1978, NY), pp. 52-60, 71-78.

B. — *Question 1*

Under the Constitution of Canada, can the National Assembly, legislature, or government of Québec effect the secession of Québec from Canada unilaterally ?

Briefly, the Court's answer is, « No. » In order to arrive at this answer, however, the Court first identifies and discusses at length four fundamental, unwritten principles of Canadian constitutional law — federalism, democracy, rule of law/constitutionalism and protection of minorities — posited as relevant to the issues at hand. The Court uses this general theoretical framework to give substance to and develop its treatment of secession as a constitutional act of amendment, where the Canadian Constitution contains no express provision for secession of a province.

Such judicial consideration of « constitutional principles » is common in Canadian constitutional reasoning, particularly at the level of the Supreme Court. Indeed, the Canadian Constitution (being a compilation of certain statutes accepted as having constitutional force, cases, conventions and other rules and practices) invites judicial comment on the underlying systematising or co-ordinating principles tying the whole bunch together. As the Court remarked, the combination of written and unwritten rules was critical for the endurance of the Constitution over time, so as to provide a comprehensive set of rules and principles capable of providing an exhaustive legal framework for a system of government. The text of the Constitution was primary, but relied on the other principles and conventions to fill out the gaps in its express terms. These principles emerged « ... from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning (23) ». One principle did not trump another ; some wielded significant legal force and could well establish obligations and duties binding on governments alike, of varying degrees of particularity.

(i) *the four basic constitutional principles*

The first of these principles, federalism, underscores for the Court Canadian unity, as a political and legal response to, and reconciliation of, the reality of social and political diversity (24). The distribution of powers between the larger federal and smaller provincial elements facilitated

(23) *Québec Reference Case*, para. 32.

(24) Namely the effective duality of the French and English (cultural and linguistic) majorities in 1867 at the time of Confederation. In the late 20th century, the distribution of Canadian society can be effectively broadened so as to speak of English, French, aboriginal, Chinese, East Indian, Caribbean, German, Italian and other significant ethnic communities. But the constitutional and political axis remains predominantly French-English (linguistic, above all) ; although aboriginal (or 'First Nations') interests have achieved significant weight.

democratic participation in levels of government most suited to achieving the relevant social objectives. The provinces, maintaining an independent and autonomous existence under the Crown, were able to develop themselves in their respective spheres of jurisdiction, pursuing those goals by transforming cultural and linguistic minorities into provincial majorities. Thus the unity and stability of Canada, so it would follow as an unexpressed conclusion from the Court's reasoning, relies on observing and maintaining the distribution of powers (and therefore their limitations).

The second principle, democracy, does not mean simply a political system of majority rule, involving at the institutional level, parliamentary supremacy, representative and responsible government, and universal suffrage. The Court emphasises that the expression of the majority's will must occur within the limits imposed by other institutional values and principles. This means an accommodation of cultural and group diversity. It also entails the observance of the rule of law, whereby majority and minority alike are bound to respect the law. Lastly, no one majority, at a federal or provincial level, may necessarily trump the other. Thus it would follow as an unexpressed conclusion that the 'other principles', an open-ended concept allowing for a good deal, are the critical feature, for they determine how far the democratic will may have force and effect.

Moreover, implicit in a functioning democracy is the continuing process of discussion, negotiation and compromise, in order to build the necessary majorities, whilst acknowledging and addressing the « dissenting voices » in the laws of the community. Since each participant in the Constitution (viz., the provinces) may initiate constitutional amendment process, that right (so the Court holds) imposes a corresponding duty to engage in constitutional discussions to acknowledge and address the democratic expression for a desire to change. This co-ordinate right and obligation will play a central role in the Court's approach to secession. But the Court gives no authority for this proposition (25). Nor is it clear how the Court comes to this concept. It may follow loosely from the juridification of « democracy » and « the interaction of the rule of law and the democratic principle » ; but this is mere implication. At best, it may be an unexpressed implication from the Constitutional amending formulae requiring certain levels of provincial and federal consent : without negotiation, there can never be consent. But this obscurity recalls the earlier comment about a prudent judicial appreciation of the dividing line between the political and the legal.

(25) The Federal Government and several other intervenors had submitted in their respective facta that any secession must be accompanied by negotiations led by the Federal Government (with the provinces arguing for a right of direct participation). But no one required that such negotiations be a duty ; instead, negotiations were understood merely to rationalise the territorial, fiscal and financial split in some ordered fashion, following naturally from the amending formulae which specified certain levels of federal and provincial consent.

The Court relies on the third principle, the rule of law and constitutionalism, to establish limits on the democratic principle. In other words, government and individuals actions are subject to laws and rules. The exercise of all public power must have as an ultimate source a legal rule. Constitutionalism sets up as the supreme and ultimate rule a written constitution whose provisions determine the extent of parliamentary and government sovereignty. Thus the principle provides a sense of orderliness, stability and accountability. A constitution is entrenched so as to place it beyond the reach of a mere majority and so to protect rights, freedoms and minority interests. The constitution establishes rules binding its federal, provincial and other relevant constituents by defining the majorities to be consulted in order to effect fundamental change in the political and legal order of the country. For this reason, concludes the Court, a majority vote in a province-wide referendum is neither a legitimate nor sufficient basis for secession.

The last principle referred to by the Court is the protection of minority interests, itself a principle which has developed alongside Canadian history and as a product of historical and political compromise. The other three fundamental constitutional principles fill out its scope and operation.

(ii) *answering Question 1*

On the basis of the above principles, the Court finds that (an attempt at) unilateral secession by Québec is not a lawful act under the Canadian Constitution and would violate Canadian legal order. No province may secede unilaterally from the Canadian federation as a legitimate legal and constitutional act. The argument is, briefly, as follows. Secession, regardless of the extent and profundity of change inflicted upon the current constitutional structure, is to be treated as an amendment to the Constitution. The Constitution therefore governs the process (rule of law). Governments may initiate the amending process, as instructed and guided by the relevant majority of their citizenry (democracy). But in any event a constitutional amendment requires consultation and negotiation with the other constitutional parties (democracy, federalism). It is after all, according to the Court, a corollary of a legal attempt to seek an amendment to the Constitution that all parties have an obligation to negotiate, as an acknowledgement of and as respect for the clear expression of a clear majority of their democratic will. Unilateral secession seeks constitutional amendment without such consultation and negotiation (federalism, rule of law). As such, it puts at risk the established ties of interdependency among provinces, and undermines the stability and order guaranteed by the Constitution (democracy, rule of law). Non-negotiated secession is therefore unconstitutional.

A referendum, continues the Court, has no direct legal or constitutional effect. It has no constitutional status in Canada. On the other hand it certainly represents an expression of democratic will. A clear expression of a clear majority of the people of one province in favour of secession would confer legitimacy to a government's starting negotiations and consultations with a view to secession. But such a referendum could not dictate that secession must necessarily occur, or even will occur, since only the subsequent negotiations could determine the ultimate result.

Having thus imposed an obligation to negotiate in the amending procedure, the Court attempts next to give some content to the new concept. The Court emphasises that the negotiation process does not necessarily lead to secession. Where a government duly initiates the amending procedure to effect secession (with a clear majority clearly expressed in an appropriate referendum result) the negotiation process which follows is not directed at working out the details of separating the province from the rest of the nation. There is no legal obligation to accede to secession. There is no absolute legal entitlement to secession based on the obligation to negotiate and to acknowledge in the circumstances a supporting referendum result. Having said that, the Court then qualifies the obligations of the other participants to the negotiations. They have no right to ignore or remain indifferent to the demands of the people and their desire to secede. The negotiation process aims at a reconciliation of the rights and obligations of two legitimate authorities (26), with the negotiating process itself conducted in accordance with fundamental constitutional principles, on pain of risking its legitimacy. The negotiations themselves may not lead to any agreement whatsoever, or may lead to secession, or to some other accord.

The duty to negotiate would seem to slip easily into what that duty entails and how it is to be exercised. But here the Court stops. It takes pains to remove itself from discussing the substance and course of the negotiating, treating it instead as a political issue. The Court states that it has no supervisory role over the political aspects of the negotiation — even though the Court had noted earlier that in Canada, « legality and legitimacy are linked » (27). What constitutes a « clear » majority is subject only to political evaluation. So too are the negotiating positions of the various parties : « ... the distinction between a 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 » (28). The Court reintroduces the concepts of justiciability and judicial restraint here. For the Court, these presuppose a politician's access to information, types of

(26) In this case, identified by the Court as « a clear majority of the population of Québec, and the clear majority of Canada as a whole, whatever that may be... » : *Québec Reference Case*, para. 93.

(27) *Québec Reference Case*, para. 33.

(28) *Québec Reference Case*, para. 101.

information, relevant expertise, and resolving ambiguities which are all beyond the jurisdiction, functioning and capacity of a court. The Court recalls, however, that constitutional rules are still in play during a negotiation. A breach of those obligations and rules is not without legal consequences (whether or not a legal, as opposed to a political, remedy is better suited), nor without international repercussions.

Finally, if Québec proceeds in any event to declare itself independent, the possibility of the subsequent recognition and acceptance of the act and Québec's new status does not justify its initial, unconstitutional act. The alleged « principle of effectivity » has no legal or constitutional status, and is contrary to the rule of law. It cannot legitimate *ex ante* an unconstitutional and illegitimate *de facto* secession, in defiance of Canadian or international law. At best, it suggests only that, as a matter of fact, but not law, an illegal and unconstitutional act may ultimately come to be recognised and accepted after the fact.

C. — *Question 2*

Does international law give the National Assembly, the legislature or government of Québec the right to effect the secession of Québec 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 Québec the right to effect the secession of Québec from Canada unilaterally ?

The Court's answer here too is, « No ». Insofar as such an external right of self-determination could be said to exist in international law (and so, recognised by Canadian law), it is restricted to peoples who are oppressed by, and whose right of internal self-determination is restricted by, foreign powers. Whether or not Québec could constitute a « people » having such rights, neither its population nor its representative institutions are in the present political situation subject to such extraordinary circumstances. Accordingly, none of them possess such a right to secede under international law.

The Court's argument is straightforward and offers nothing new in its premises. It keeps to safe and generally accepted grounds. The Court relies throughout on the principle of territorial integrity as a fundamental premise. First, a component part of a sovereign state does not have the right at international law to secede from its parent state. The domestic law of the parent state controls the formation (by secession or otherwise) of new states. Second, whilst international law recognises the rights of peoples to self-determination, it does not expressly permit nor deny the right of unilateral secession. Self-determination is normally fulfilled through internal self-determination — the people's pursuit of their social, economic, political and cultural development within the framework of an existing

state. « A state whose government represents the whole population resident within its territory on the basis of equality and without discrimination and respects the principles of self-determination in its own internal arrangements is entitled to protection under international law of its territorial integrity » (29). The Court accepts that external self-determination arises at best only under three extreme but carefully defined circumstances (30). The first two instances, each clearly recognised in international law, did not apply to Québec because it was neither under colonial rule nor foreign subjugation. A third basis, where the internal right of self-determination was blocked from meaningful exercise, itself of uncertain status in international law, also did not apply to Québec. There was no supportable factual basis to suggest that Québec's internal right of self-determination, at a federal or provincial level, was in any way blocked in Canada.

Finally, the Court rejects the « effectivity principle » in the context of international law, as legitimating *ex ante* Québec's unlawful separation as a political reality. The Court notes that recognition in international law relies in part on the legitimacy of the process by which the emergent state is pursuing or did pursue separation. Such states which disregard legitimate obligations binding in their previous situations may put at risk that international recognition. The Court re-iterates the argument of its first dismissal of the principle of effectivity, that an *ex post facto* acceptance of the political fact, not itself a rule of law, cannot and does not in any way confer a colour of right or legality upon the initial illegal act.

D. — *Question 3*

In the event of a conflict between domestic and international law on the right of the National Assembly, the legislature or government of Québec to effect the

(29) *Québec Reference Case*, para. 130.

(30) The Court, whilst expressly relying in this second branch of its reasoning on A. Cassese, *Self-Determination of Peoples : A Legal Appraisal* (Cambridge UP 1995 Cambridge), also had the benefit of a report by the Federal Government's expert, Prof. James Crawford (and endorsed by Prof. Wildhaber) and a combined report, on behalf of the amicus curiae, of Profs. Abi-Saab, Franck, le Bouthillier, Pellet and Shaw. The reports were in general agreement as to the first two bases for external self-determination, but disagreed as to how firmly developed and recognised was the third. The latter reports also pushed for a much wider application of that third basis. See also N. FINKELSTEIN, G. VEGH and C. JOLY, « Does Québec Have a Right to Secede at International Law ? » (1995) 74 *C.B.R.* 223 (in line with Prof. Crawford's view) ; J WOEHRLING, « Les Aspects Juridiques d'une Éventuelle Sécession du Québec », (1995) 74 *C.B.R.* 293 (examining the aspects of a fait accompli and international recognition). Arguing for the much wider application of that third ground for external self-determination are D. TURP, « Le droit à la sécession : l'expression du principe démocratique », in A.-G. GAGNON & F. ROCHER, eds. *Répliques aux détracteurs de la souveraineté* (vlb éditeur, 1992, Montréal) and J. BROSSARD, *L'accession à la souveraineté et le cas du Québec : Conditions et modalités politico-juridiques*, (2d), (Les Presses de l'Université de Montréal, 1995, Montréal).

secession of Québec from Canada unilaterally, which would take precedence in Canada ?

Given the Court's answers to the previous two questions, there was no conflict between the two to be addressed in the Reference opinion.

IV. — COMMENT

A. — *Assessing the Answers*

The answers to the reference questions are not in themselves that surprising. I propose to consider certain salient general elements to the first and second questions, before turning to a more detailed consideration of the duty to negotiate.

The only other reasonable answer to Question 1 was « non-justiciable », namely as a political issue beyond the scope and operation of the law (31). This is the weaker answer for the same reasons that an affirmative response to the first question is insupportable. The critical premise is that secession is a constitutional amendment. As a legal, in contrast to political, issue, secession usually is a topic for public international law (32), and it is unquestionably a topic in domestic and international political spheres. The Canadian judgment brings the issue into the domestic legal order (33). Rather than accept secession as a political *fait accompli*, thereby reducing the issues to recognition and acquiescence or resistance, the critical premise is to subsume the process under general constitutional amendments (where no explicit provisions exist therefor) (34).

(31) Setting aside the jurisdictional points under Question 1.

(32) See, e.g. L. BUCHHEIT, *Secession : The Legitimacy of Self-Determination* (Yale UP, 1978, New Haven), H. HANNUM, *Autonomy, Sovereignty and Self-Determination*, (Univ. Pennsylvania P., 1990, Philadelphia), C. TOMUSCHAT (ed.), *The Modern Law of Self-Determination* (Nijhoff, 1993, Dordrecht), R. JENNINGS and A. WATTS (ed.), *Oppenheim's International Law*, (9th) (Longman, 1992, London), pp. 712-717, M. SHAW, *International Law* (2d), (Grotius, 1997, Cambridge) ; and I. BROWNLIE, *International Law* (4th), (Oxford UP, 1994, Oxford). See also S. WILLIAMS, *The International Legal Effects of Secession by Québec*, (York University Centre for Public Law and Public Policy, 1992, Toronto).

(33) This differs somewhat from judicial review of executive acts based upon « revolutionary » constitutions ; as was the case for the UK and colonial Rhodesia in *Madzimabuto v. Lardner-Burke*, [1969] 1 *A.C.* 645 (PC S. Rhod.), *Adams v. Adams*, [1971] *Probate Court Reports*, 188 (PDA Div.). In these cases, the Courts did not have to assess the antecedent questions of the process by which Rhodesia claimed its independence from the UK, and attendant questions of legitimacy. See also *Carl Zeiss Stiftung v. Rayner and Keeler Ltd.*(No. 2), [1967] 1 *A.C.* 853. *Harris* v. *Min. Interior*, [1952] 2 *South Africa Reports* (« *S.A.* ») 428 (AD) and *Min. Interior v. Harris*, [1952] 4 *S.A.* 769 (AD) not secession cases, but rather dealing with the apartheid legislation in South Africa, the sovereignty of Parliament and the relationship of Parliament to the Courts, are closer to what the Court is doing and how it is working in this Reference case.

(34) See J. WEBBER, « The Legality of a Unilateral Declaration of Independence under Canadian Law », (1997) 42 *McGill L.J.* 281 and P. MONAHAN, « The Law and Politics of Québec Secession », (1995) 33 *Osgoode Hall L.J.* 1 who examine Québec secession as a constitutional amendment under Pt. V *Constitution Act*, 1982.

Intuitively, secession in an established federal state would appear to be an amendment. It certainly alters the existing federal-provincial distribution of power in the province seeking separation. Although the distribution of powers between the federal government and the remaining provinces does not necessarily change, secession does alter the nature of inter-provincial agreements and the status of inter-provincial relations (executive, legislative and judicial). So noted the Court. It follows that secession also alters the status and rights of provincial residents in relation to the province and the federal government, as well as those of non-resident Canadian citizens regarding the provincial government. If the above changes were sought without the overlay of « secession », they would be most likely addressed through the constitutional structure. That is, a constitution organises public institutions, distributes power among them, and in so doing, regulates directly and indirectly the relationship between public institutions and the people. Changes to that structure are undoubtedly constitutional amendments. Hence the amending procedure under a federal constitution can accommodate the secession process.

Domesticating secession in this fashion is reasonable in the circumstances of a written constitution which contains no express provisions therefor. No government nor legislature exercises more or less power than is conferred by a constitution. The written document accounts for all legislative and executive power, specific and residual, distributed to the various federal or provincial constituents. Thus can a federal constitution reasonably account for all political authority, including the claim for the power to secede (35). This would apply whether the residual powers remained in the provinces or the federal government. Moreover, no one constituent may amend or change a federal constitution without the participation and consent of the others (36). Since all these principles emerge naturally and coherently from federalism and federal constitutional law, a « non-justiciable » answer would have given precedence to the political controversy and revolutionary character of secession in the face of applicable federalism principles, whilst a « yes » answer is clearly inconsistent with those federal principles.

(35) It is possible to postulate a constitution which leaves certain political powers unaccounted for, in a non-exhaustive distribution. But this seems unworkable for a federal state, since such states would likely dissolve in turmoil or ultimately distribute those powers within and subject to the federal framework. It would hardly fit the intention of constitutional framers to leave out powers without a mechanism to distribute them, the distribution of powers being a fundamental characteristic of federalism : see, e.g. D.J. ELAZAR, *Exploring Federalism*, (Alabama UP, 1983, Tuscaloosa), and K.C. WHEARE, *Federal Government* (4th ed.) (Oxford UP, 1963, Oxford). C. SUNSTEIN, « Constitutionalism and Secession » (1991) 58 *U. Chi. LR* 633, argues that express secession provisions are not suited for a constitution because its task is one of unifying a country, not harbouring the seeds of its dissolution. His argument may even be taken so far as to oppose « domesticating » secession indirectly, as under the *Québec Secession Reference*.

(36) Subject to revolution, of course, and if only prior to 1982 in Canada, to the federal government proceeding to patriate the constitution without the consent of Québec.

One principal rejoinder (and one maintained by the government of Québec) is that secession, and the process of, is a purely political act in which the courts have no competence (37). Treating secession simply as a constitutional amendment belies that fact that the amendment actually is a fundamental and wholesale change to the state architecture. Any amendment to a constitution that dissolves the current state structure is not simply an amendment to be treated in the usual fashion (38). Constitutional reform at this level is really constitution making. And this level of constitution making is, as Elazar rightly points out, the ultimate political act (39). It is, in other words, logically prior to the existence and operation of courts whose position derives from that constitutional process. When people wish to live together in the form of state, the court system which will mediate their common disputes arises from that social compact, and not before it. It follows that the courts can not assert their jurisdiction over secession through whatever control they may have (and this is disputed) over the ordinary amending procedures. Secondly and further, secession is one aspect of national self-determination which power, in a democracy, resides in the people. It is for the people to determine whether or not they wish to secede or remain. Courts, whether or not elected, are not the means of expressing or effecting democratic will : that is the jurisdiction of the legislature under the concept of the separation of powers. By virtue of parliamentary sovereignty, the courts are obligated to comply with the duly expressed will of the legislature. Thirdly, it is reasonable to assume that once the political and, frankly, common sense desire to negotiate and compromise breaks down, no quantity of judicial pronouncements, court orders or bailiff's at the doorstep will restore the status quo, nor compel people to talk. The desire to negotiate and compromise is itself not a justiciable obligation. It is simply a fact of social and political existence. To invest it with any transcendent obligatory force introduces natural law theory that really has no practical force and widespread acceptance.

This approach has much to be said for it. Now I do not propose here to analyse in depth and detail the merits and weaknesses of either position. But I suggest that one weakness to the rejoinder is its major premise that constitutional amending procedures can not in the ordinary course subsume secession. There is a confusion between the decision to secede, undoubtedly a political act, and the procedures for secession. This is a distinction also made by the Court. Apart from revolution, the legislature is unable to alter its constitutional status except in accordance with existing procedures. A

(37) See, e.g. D. TURP, *op. cit.* and J. BROSSARD, *op. cit.*, and MACLAUCHLIN, *op. cit.*, pp. 161-7.

(38) Indeed, is any amendment or amending process truly a justiciable thing ?

(39) D.J. ELAZAR, « Constitution-making : The Pre-eminently Political Act », in K. BANTING & R. SIMEON (eds), *Redesigning the State : the politics of constitutional change*, (Uof T Press, 1985, Toronto), 232, pp. 232-3.

provincial legislature is obligated by and operates under the current constitutional architecture, within its means, scope and limits. Under the Canadian Constitution, the provincial legislatures have only those powers enumerated under s.92 of the *Constitution Act*, 1867. They do not include secession. The residual power is with the federal Parliament. Nor do the provinces have the power to alter the Constitution, at least without federal consent (under the amending formula of Part V, *Constitution Act*, 1982). If a province arrogates a federal competence, or acts in an ultra vires manner, courts are certainly competent to undertake judicial review and declare the ultra vires act unconstitutional. Returning to the rejoinder arguments, the Court is not trenching upon the decision to secede, but is requiring a province to act within the law and its procedures, the Constitution itself by definition being the supreme law : s.52, *Constitution Act*, 1982. The relevant law and procedure is the amending procedure. This of course brings us back to the question of the duty to negotiate, which I examine below.

As to the second question, the answer is justifiable and reasonable on the facts of Québec's circumstances, powers and position in Canada. The Court did not therefore have to address in depth the grounds for secession. By limiting its consideration of international law to propositions generally established and widely accepted, without any broader discussion of policy and principle, the Court duly avoided creating further controversy (1) whether the Québecois are a « people », « nation », or « state » in international law ; and, (2) in giving judicial approval to the third basis for secession, where at an international level, the doctrine is neither clearly defined nor clearly beyond academic doubt (40). Both points would have further inflamed constitutional controversy in Canada (41). In so answering the second reference question, the Court rendered the third question moot, albeit the more interesting issue from an academic viewpoint. Given its complexity and sensitivity, perhaps wisely so.

More importantly, it was not necessary for the Court to address those points where the threshold issue of discrimination and oppression of Québec in the Canadian constitutional order was not made out in the first place. Québec dissatisfaction with the current state of affairs does not itself establish a *prima facie* case nor prove the existence of sufficient and necessary injury even to begin the arguments for secession. A complaint invites investigation, to determine if justly founded, but it does not mean that

(40) C. TOMUSCHAT, « Self-Determination in a Post Colonial World », in C. TOMUSCHAT (ed.), *The Modern Law of Self-Determination*, (*op. cit.*), 1, 8-10, 11-17 ; D. MURSWIEK, « The Issue of a Right of Secession — Reconsidered », *ibid.*, 21, 25-27, 35-39 ; A. ROSAS, « Internal Self-Determination », *ibid.*, 225, 227-232 ; and see also O. KIMMLICH, « A Federal Right of Self-Determination », *ibid.*, 83, and P. THORNBERRY, « The Democratic or Internal Aspect of Self-Determination with some remarks on federalism », *ibid.*, 101.

(41) And avoided on the latter point, perhaps, undesirable international repercussions.

there is necessarily anything really the matter (42). Moreover, the assessment by the Court of Québec's situation in Canada regarding self-determination does not appear to be unreasonable or self-defeating. It is no less or more objectionable or odd than the Court's exercise of its powers of judicial review over legislation or over federal and provincial executive action. The Court is competent to determine what and how international law is applied in Canada. That is what it is doing in this instance.

The difficulty with Questions 2 and 3 is that their answers can hardy determine the issue in a final and binding way for Canada or for Québec. In Canada, as a general principle, relevant international law applies in so far as it is a binding treaty obligation or, for customary law, it does not conflict with national law (43). Hence if national law addresses the constitutional problem in a manner irreconcilable to international law, the national law solution will prevail. But it says nothing about international law and international political reaction outside Canada on those same facts. Whilst the Court may suggest some impact upon 'recognition', this is no more than a prediction or guess. The Court can not pronounce law at an international level. Even its determination of « international law » brings those principles into the domestic legal order with only domestic effects. In other words, the Court's opinion on these matters can really only provide general guidance to the federal and provincial governments (apart from the issue of the reference opinion being only an advisory opinion, as opposed to a proper judgment). The Court has not and can not, at an international (legal) level, determine effectively whether in fact Québec is recognised to be oppressed in such a way to give rise to any one of the grounds for secession at international law.

B. — *Assessing the Duty to Negotiate*

The most interesting and problematic feature of the Reference opinion is its introduction of an obligation binding constitutional participants to negotiate when one or more wish to initiate constitutional change. How might this concept be understood ? A short overview of Canadian constitu-

(42) If the Québec government believed seriously and reasonably in the oppression of the residents of Québec under the present constitutional structure in Canada, then it could have presented its arguments to the Court rather than refusing to participate in the reference procedure. The objective would be to establish a constitutional procedure to deal with those concerns, and with eventual secession. Yet Québec has always maintained that secession is a political, an a-constitutional, act of primordial self-determination. Further, if Québec did make such arguments, so what ? The Court could not remedy any oppression, nor even deal with statutory measures since they were not before the Court. What counts is international reaction, and the Court's decision is only one factor in the overall equation.

(43) See, e.g. *Reference re Ownership of Offshore Mineral Rights of British Columbia*, [1967] *S.C.R.* 792 and *Reference re Newfoundland Continental Shelf*, [1984] 1 *S.C.R.* 86 ; and D.P. O'CONNELL, *International Law*, (Stevens & Sons, 1972, London), pp. 53-79, and BROWNLIE, *op. cit.*, p. 44ff.

tional affairs will set the necessary context for understanding the Court's opinion and the new duty to negotiate in Canadian federalism, and developing a critique of the duty.

(i) *constitutional background — the amending clause*

The primary text of the Canadian Constitution is a statute. Until 1982, this was the *British North America Act 1867* (the « BNA Act »), enacted by the imperial (UK) Parliament at Westminster (44). And until 1982 the UK Parliament retained the formal *de jure* power to pass amendments to the Constitution — as a UK statute — albeit upon the request of the Canadian government. Since the *Statute of Westminster* (1931) (45), the UK Parliament had declined to legislate for Canada (and other former colonies) directly and actively via imperial statutes, thereby recognising the *de facto* separation of the Canadian and UK legal orders (46). But s.7(1) of the Act excluded the BNA Act from these newly conferred legislative powers. In recognition of the special constitutional effect and status of the BNA Act, the concern (primarily of the provinces) was naturally that the federal government unilaterally could amend the BNA Act, as imperial legislation, without provincial consent as would ordinarily be required under a federal constitution (47).

So as to avoid conferring implicitly a unilateral power of amendment upon the federal government (contrary to the federal character of the BNA Act) and so as to avoid leaving the BNA Act without any possibility for amendment by Canada, it was resolved to keep the formal legislative power to amend with the imperial Parliament (48). Such power was to be exercised at Westminster only upon the receipt of the appropriate resolution and text of the required amendment from the Parliament of Canada. What amendments were sought and how the federal and provincial governments arrived at such proposals were entirely matters of Canadian political and constitutional concern (49). In 1982, the Trudeau government 'patriated' the Constitution by having the UK Parliament amend the BNA Act, authorising the federal and provincial governments to pass their own amendments to the Constitution, without the intermediation of

(44) *British North America Act* (1867), 30 & 31 Vict., c.3, as amd.

(45) R.S.C. 1970, Appendix II, No. 26.

(46) See HOGG, *op. cit.*, pp. 40-42 ; and generally, K.C. WHEARE, *The Statute of Westminster and Dominion Status*, (5th) (Oxford UP, 1953, Oxford). The *Colonial Laws Validity Act* (1865) 28 & 29 Vict. c.63 (UK) had already started this separation process, by stipulating that UK legislation would apply to Canada (and the other colonies) not presumptively, but only if expressly so indicated.

(47) See HOGG, *op. cit.*, pp. 42.

(48) There was also at the time the problem of limiting Parliamentary sovereignty and limiting its successors.

(49) See L. LEDERMAN, « Canadian Constitutional Amending Procedures, 1867-1982 », (1984) 32 *Am. J. Comp. Law* 339.

Westminster, under the *Constitution Act*, 1982 (50) . With this transfer of amending power to Canada, the UK Parliament ended its formal *de jure* ability to legislate over Canada.

Canadian governments had been working towards a domestic amending power since 1927. Serious efforts to achieve federal-provincial and inter-provincial consensus had been ongoing since 1964. The primary difficulty throughout has been the necessary majorities required to ratify and pass constitutional amendments and whether any province, especially Québec, should have a veto. Federal-provincial agreements on an amending formula in 1964 and in 1971 foundered because Québec did not agree (51). In 1981 the provinces submitted a competing proposal, the « Vancouver formula » which became the basis for the current amending provisions under Part V of the Constitution (52). Although Québec had originally agreed to the Vancouver formula, it refused to agree to the substantially similar final version in the Constitutional accord. This time, however, the federal government was determined to press on, and obtained the required amendments to the BNA Act from Westminster without the consent, in the end, of Québec. Even this procedure spawned two constitutional reference cases, the one concerning the power of the federal government to proceed without unanimous provincial consent and the other, the existence of a Québec veto (53). The time and effort taken to arrive at what is a critical element to Canada's constitutional existence, demonstrates clearly the difficulties in achieving any form of consensus on such fundamental nation-building issues.

(50) In fact, and not so simply, the *Canada* Act, 1982 appended as Schedule B the *Constitution Act*, 1982, which itself added the Charter of Rights and the amending formula and also renamed the BNA Act, 1867 with its amendments as the *Constitution Act*, 1867 to 1982.

(51) See, e.g. E. McWHINNEY, *Québec and the Constitution 1960-1978* (U Toronto Press, 1979, Toronto) and M. NEMI, « The patriation of the constitution and the making of the Canadian nation », in B. DE VILLIERS & J. SINDANE (eds), *Managing Constitutional Change*, (HSRC Pub., 1996, Pretoria), 125 at p. 139ff.

(52) For a review of the history of the 1982 amendments, see, e.g. E. McWHINNEY, *Canada and the Constitution 1979-1982* (U Toronto Press, 1982, Toronto) ; BANTING & SIMEON (eds), *And no one cheered : Federalism, Democracy and the Constitutional Act*, (Methuen, 1983, New York), Hogg, *op. cit.*, pp. 51-56 ; and CAIRNS, « The Politics of Constitutional Renewal in Canada », in BANTING & SIMEON (eds), *op. cit.*, 95.

(53) Prior to 1981, the federal government did consult the provinces before submitting a joint address to Westminster, in respect of constitutional amendments affecting provincial powers. But in so far as this might have constituted some form of convention, it was neither legally binding, nor significant after 1981 when the amending power became domesticated and provincial ratification became requisite for amendments : *Reference re Resolution to Amend the Constitution*, [1981] 1 *S.C.R.* 753 (the « *Patriation Reference* »). The *Patriation Reference* case established that no constitutional law required unanimous provincial consent to an amendment affecting provincial powers or the federal-provincial division of powers. A convention did exist, arising in part from the nature of federalism, requiring substantial provincial consent to such an amendment ; but as a convention it was not legally enforceable. The *Reference re Amendment of a Canadian Constitution* [1982] *S.C.R.* 793 (the « *Québec Veto Reference* ») held that Québec had no special convention power of veto over constitutional amendments affecting the legislative competence of that province (relying on the *Patriation Reference*).

Thus after 1982, Canada had the power to amend directly its own Constitution, and has an amending « formula ». Part V of the Constitution prescribes the necessary majorities in Parliament and the provincial legislatures to approve amendments to the Constitution (54). Parliament must consent to all amendments, save those relating to provincial constitutions alone (55). The general amending procedure requires the support of two thirds of the provinces having at least 50 % of the population. Certain specified amendments require unanimous provincial support. Other specified amendments, affect some but not all the provinces, require the support of the provinces affected. But yet no formal amending process exists. That is, there exists no procedure for the initiating or conducting discussions to amend the Constitution. There is really no settled process of consultation and debate in Canada. Section 46 of the *Constitution Act,* 1982 provides that the procedures for amendment may be initiated by the Senate, the House of Commons or by the legislative assembly of a province. But this is permissive legislation granting a right, and specifies no mechanisms. Some constitutional conventions do exist (56). But these refer to consultation among federal and provincial governments, but do not specifically address constitutional amendments, nor are they legally enforceable, nor do they necessarily involve public consultation.

Moreover, the former convention or custom of provincial consent has been translated into federal statute, *An Act Respecting Constitutional Amendments* (57), whereby federal resolutions introduced into Parliament to amend the Constitution must have the antecedent support of a majority of the provinces. By s.1, the requirement for a majority of provincial support does not apply to those amendments for which the provinces already have a constitutional veto or right of dissent (ss.41 & 43 *Constitution Act,* 1982, respectively). The majority of provinces must include Ontario, Québec, British Columbia, at least two of the Atlantic provinces having at least 50 % of the population of all those provinces (Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland), and at least two of the Prairie provinces having at least 50 % of the population of those three provinces (Alberta, Saskatchewan, and Manitoba). But even this establishes no procedure : it merely sets another limiting feature as already found in the Constitution.

(54) ss. 38, 41, 42, 43, 44 and 45, *Constitution Act,* 1982.

(55) Provincial legislatures may unilaterally amend their own constitutions : s.45, *Constitution Act, 1982*. Parliament may unilaterally amend provisions dealing with the Houses of Parliament and the federal executive : s.44, *Constitution Act,* 1982.

(56) See A. HEARD, *Canadian Constitutional Conventions*, (U Toronto Press, 1994, Toronto). As to constitutional reform, these conventions relate specifically to the conferences between the PM and the provincial first ministers. The convention addressed by the Court in the Patriation Reference is likely spent, after 1981, given that it applied to the BNA Act amending procedure of a joint address to Westminster by the Canadian Parliament : see HOGG, *op. cit.*, p. 54.

(57) S.C. 1996, c.1.

The absence of an amending procedure is significant. Most constitutional proposals for amendments are developed, negotiated and agreed on an executive level without much, if any, public consultation before or afterwards (58). This applies to amendments before and after 1982. Indeed, the recent two attempts to amend the Constitution, in part to assuage Québec, demonstrate rather pointedly the « seat of the pants » approach to proposed wholesale amendment (59). The ill-fated 1987 Meech Lake Accord was concluded during a meeting of the provincial premiers and then Prime Minister Mulroney, without prior public consultation, and collapsed after failing in 1990 to obtain the required approval in the Manitoba and Newfoundland Legislatures (60). The similarly fated 1992 Charlottetown Accord, preceded by some public consultation under then Constitutional Affairs Minister Joe Clark, collapsed after rejection by a 1992 Canada-wide referendum (61). The Reference opinion may provide at least a starting point by crystallising « principled negotiations » into a constitutional obligation.

(ii) *justifications ?*

Now with this essential brief background in mind, we can turn to the so-called « duty to negotiate ». On what basis does this duty arise ? The concept springs forth with little indication of its origin or pedigree (62). It would appear a novel proposition, unsupported by any previous Canadian, British or Commonwealth authority. Indeed, the Court offers no caselaw to justify its neologism. Justification for the existence of what may appear at first sight a rather startling proposition of law (in contradistinction to

(58) See, e.g. HOGG, *op. cit.*, pp. 75-6.

(59) The Meech Lake Accord and the Charlottetown Accord generated significant amounts of academic literature, examining all facets of the two processes, but focusing overall on Québec's status, provincial autonomy and the procedures for developing constitutional change in Canada at executive and popular levels : see, e.g., RUSSELL, « Canada's megaconstitutional politics in comparative perspective » in DE VILLIERS & SINDANE (eds), *op. cit.*, 69 ; NEMI, « The patriation of the constitution and the making of the Canadian nation », *ibid.*, 125 at p. 139ff ; TUPPER, « Thinking and Writing about Meech Lake », (1991) 29 *Alberta L.R.* 310 ; CAIRNS, « Why Is It So Difficult to Talk to Each Other, », (1997) 42 *McGill L.J* 63 ; HOWSE, « Post-Charlottetown Constitutionalism : A Review Article », (1994) 26 *Ottawa L.R.* 511, and Johnston's comment thereon, (1994) 26 *Ottawa L.R.* 487.

(60) This Accord proposed in effect a number of changes to increase and improve provincial rights in certain areas, to introduce provincial veto power and to recognise Québec as a distinct society, albeit within the bilingual character of the entire Canadian federation. See n. 59.

(61) This Accord proposed senate reform, aboriginal self-government and re-iterated Québec as a distinct society, albeit as one part of a list of eight « fundamental characteristics of Canada ». See n. 59.

(62) See e.g., P. HOGG, *Constitutional Law of* Canada (4th) (Carswell, 1997, Toronto), K.C. WHEARE, *Federal Government, op. cit.* and *Modern Constitutions* (2d) (Oxford UP, 1980, Oxford) p. 83ff, D.J. ELAZAR, *Exploring Federalism, op. cit.*, and C.J. FRIEDRICH, *Constitutional Government and Democracy* (4th) (Blaisdell, 1968, Waltham), none of which refer to such a mandatory (or even conventional) duty to negotiate.

merely an important convention) can take two forms when relying on the reasons of the Court.

The first approach to justification begins, as does the Court's opinion, from the fundamental unwritten constitutional principles. Democracy and federalism require constant discussion and compromise, and a constitution based on those principles requires negotiation for stable and constant evolution. But this is hardly a legal proposition. Negotiation is a political concept ; it is a feature of all political processes unless absolute power or exclusive jurisdiction render compromise unnecessary. But it is certainly not an inherent feature of federalism, which refers to a division of political powers and to ascribing competencies to various public institutions, at least any more than it is to, say, unitary democracy or (constitutional) monarchy. Admittedly, the divisions of political competence renders federalism more amenable to negotiation policy particularly where the proposed constitutional amendments may cut across those divisions or where equalisations may be required. This would not necessarily be the case in a unitary system (such as the UK) although minority and special interest groups could just as easily be taken as negotiating constituencies in the place of provinces. But this does not render negotiation a principle of constitutional law.

The second approach begins from the premise that secession is a form of constitutional amendment. Part V of the Constitution establishes what levels of provincial and federal parliamentary consent are required for amending the Constitution. But Part V, nor any other aspect of the Constitution provide for any amending process *per se*. In other words, how a proposed amendment should ever come to be introduced and passed by the requisite majorities is not dealt with at all. Getting to the stage of parliamentary debate and ratification depends largely upon the good will of the parties. Nothing obliges any one province to listen to or participate in the initial discussions or even present to the provincial legislatures the proposed amendment. At best, there may exist an expectation or custom to that effect, but there is no definite convention. Now absent such a procedure for bringing constitutional participants together, the risk of a total frustration of or deadlock in an attempt to amend overall the Constitution is present (which necessarily excludes those matters within provincial control or for which a province may exempt itself). By reasoning therefore from the desire to avoid such deadlock (particularly where the politically and socially sensitive issue of secession and Québec's special status is live), the Court could engage the amending procedure in an effective way only by ensuring that the parties did indeed come to the negotiating table. Thus arises the duty to negotiate, elicited (*ex post facto*) through the broad principles of democracy and federalism. Hence the duty to negotiate is a pragmatic attempt to engage the amending process in a meaningful and effective way.

Now it is one thing to recognise the practical necessity of negotiations in democracy as a means of building by discussion and compromise the appropriate majorities to conduct political and legislative business. But it is something entirely different to invest such negotiations with legal significance by rendering it a duty or obligation in a federal democracy. Expecting people to discuss their differences is never a bad thing, but forcing them to do so involves the Courts to a degree, at least in the constitutional context, that may make the participants, the courts and the people rather uncomfortable.

It is safe to say, then, that the Court's opinion provides no satisfactory account of, or justification for, the so-called duty to negotiate. Some sort of requirement for negotiated compromise seems quite natural in federal democratic politics as a whole. But it does not go so far as to make that requirement or situation a legally binding obligation. That is not to say, however, that no justification is possible. Rather it merely relegates the duty to the status of a constitutional convention, an expanded highlighted version of « co-operative federalism. »

(iii) *a third option — federal loyalty ?*

Those aspects of the duty to negotiate, including co-operation, consultation and consensus, are reminiscent of the constitutional principles of « federal loyalty » (or « Bundestreue ») in the German and Belgian constitutional law (63). Could Bundestreue assist in setting a theoretical basis for the Canadian concept ? I intend here only to consider the application of this principle at a broad and general conceptual level, without a detailed theoretical review of the German and Belgian approaches (since this would raise many interesting but irrelevant problems (64)). Briefly understood,

(63) Also known as « bundfreundliche Verhalten ». See generally H. BAUER, *Die Bundestreue*, (JCB Mohr, 1992, Tübingen) ; J. VANHOEVEN (ed.), *La Loyauté : Mélanges offerts à E. Cerexhe*, (Larcier, 1996, Brussels) ; A. ALEN & P. PEETERS, « 'Bundestreue' in het Belgische grondwettelijke recht », *RW* (1989-90) 1122, and the review thereof by L.P. SUETENS, *ibid.*, 1157 ; SCHWARZ-LIEBERMANN VON WAHLENDORF, « Une Notion Capitale du droit allemand : la Bundestreue (fidélité fédérale) », [1979] *R.D.P.* 769 ; C. GREYWE-LEYMARIE, *Le fédéralisme co-opératif en République fédérale d'Allemagne,* (Economica, 1981, Paris), DEPRÉ, « Les Conflits d'Intérêts : Une Solution à la lumière de la loyauté fédérale ? », [1995] *R.B.D.C.* 1491.

(64) For example, Belgian constitutional reform in 1993 incorporated the principle as Art. 143 of its revised, co-ordinated Constitution, although it already had some place in the constitutional case law : see A. ALEN, *Handboek van het Belgische Staatsrecht*, (Kluwer, 1995, Deventer), para. 406 ; A. ALEN (ed.), *Treatise on Belgian Constitutional Law*, (Kluwer, 1992, Deventer), paras 263, 285-288. But its status and effect in the Belgian Constitution has, however, been limited to regulating political conflicts of interest between federal, community and regional governments, rather than as regulating device for jurisdictional conflicts : see P. PEETERS, « Le principe de la loyauté fédérale : une métamorphose radicale », *A.P.T.* (1994) 239 ; and Y. LEJEUNE, « Le principe de la loyauté fédérale : une régle de comportement au contenu mal défini », *A.P.T.* (1994) 236. As a political principle, we are then out of court ; although in Belgium, the principle arguably may still operate on that jurisdictional basis as well : see Arbitragehof / Cour d'Arbitrage no. 62/96, 7 November 1996 and A. ALEN, « De loyauteit : ondanks alles, toch een

Bundestreue is a mediating principle whereby federal (especially) and provincial executive and legislative acts are assessed on the basis of their overall good for the whole federation, specifically an abstention from acts prejudicial to the interests of the federation as a whole and those of its constituents as such. No constituent party should act in such a way to injure or imperil the federation or its members. The principle applies to acts otherwise constitutional ; that is, within the powers and jurisdiction allocated to the federal and (provincial) legislatures. Broadly, this means that parties would moderate the full exercise of their jurisdiction where other parties may be prejudiced in some way, at least without prior consultation. Bundestreue entails notions of reciprocity and proportionality with all constituent parties working together and co-operating (65). Most importantly, to give effect to and apply these aspects of Bundestreue, it requires notification, consultation and negotiation amongst the federal and various interested provincial governments.

It might be argued then, that the Supreme Court has autonomously and independently generated a Canadian version of Bundestreue, or « federal loyalty » (66). Thus where a province has the necessary popular support and good reasons for constitutional change, it can not undertake them alone, but must consult with the federal government and the other provinces. The other provinces and the federal government must reciprocate by consulting and negotiating with that province. The whole process therefore operates on the basis that one party to a federation must account for the interests of the federation, as much as its own, where it wishes to alter the basic arrangements of that federal association. Whereas the principle commonly applies to conflicts of jurisdictionally permissible acts which adversely impact upon other federal constituents, the Canadian version would seemingly apply (and only so) to the extreme occasion of constitutional

bevoegdheidsverdelend concept ? », in *La Loyauté : Mélanges offerts à E. Cerexhe, op. cit.*, 19, at 27-35.

(65) See W. Van Gerven & H. Gilliams, « Gemeenschapstrouw : Goede Trouw in E.G. Verband », *R.W.* (1989-1990) 1159, and the review thereof by J. Gijssels, *ibid.*, 1170, identifying the three basic elements to « federal good faith », in the EU context, as no misuse/abuse of process and position, an obligation to work together in good faith and an obligation (in certain circumstances and on certain conditions) for solidarity. It is relevant to note that Van Gerven & Gilliams speak of « obligations ».

(66) « autonomously and independently » since there were no materials before the Court referring to the principle, nor did the Court cite any. See G. Cartier & P. Patenaude, « La notion de 'loyauté fédérale' en droit constitutionel canadien », in *La Loyauté : Mélanges offerts à E. Cerexhe, op. cit.*, 39, who suggest that the Supreme Court has recognised and applied aspects of Bundestreue (without explicitly or implicitly acknowledging the principle). The cases cited (*PEI Potato Mktg Bd v. Willes*, [1952] 2 *S.C.R.* 392, *AG Ont. v. Scott*, [1956] *S.C.R.* 237 ; *Coughlin v. Ont. HTB*, [1968] *S.C.R.* 569 and *R. v. Smith*, [1972] *S.C.R.* 359) do not deal with procedures for amending the Constitution, and tend to demonstrate, as with other such cases, aspects of Canadian co-operative federalism, specifically, the delegation of administrative powers. Co-operation at this level in a federal state such as Canada is inevitable, and co-operative federalism is a part of Canadian federalism without doubt. But the authors do not suggest or find any aspects of mandatory co-operation and negotiation in Canadian federalism.

conflict where no constitutional participant may act unilaterally in any event, in so far as the (federal) Constitution is concerned. Thus co-operation would extend also to the very frontiers of the federal association, such that having once agreed to federate, such parties are thereafter legally bound to consult and negotiate each time one participant seriously wishes to amend the Constitution.

An explanation of the duty to negotiate relying on Bundestreue is not without its problems. One serious critique of the concept is that Bundestreue is not so much a specific concept with a defined or delineated content, as a generalised category or rubric for subsuming different types of specific ideas, duties, conventions or customs relating to federalism (67). Thus it represents no real justification for a duty to negotiate, but rather tests its coherence with federalism. This is no measure or support for the existence of a duty as opposed to merely legitimate expectation or convention. Secondly, the thrust of the principle is to regulate conflicts of interest and jurisdiction where they overlap or abut. This is hardly the case in constitutional reform, where no one party has jurisdiction to amend the constitution. Negotiation seems appropriate as a tool to keep a constitution functioning, but a duty would arise only where the overriding obligation was to observe the constitutional distribution of powers, and the integrity of the constitution itself. In constitutional reform, or secession crisis, presumably that distribution is not considered desirable or binding. There would appear to be no basis for an overriding obligation to negotiate, apart from political necessity and stability, neither of which are legally enforceable (68).

C. — *More problems for the Court*

Whatever the basis for the duty to negotiate, by making constitutional negotiations obligatory the Court has 'juridified' the whole amending process. The courts are now willingly or not involved in the processes of amending the Canadian Constitution. The Supreme Court has, of course, expressly sought to limit the role of the courts in the process by affixing on political actors the responsibility for determining clear majorities, clear expressions of majority will and constitutional negotiating strategies and

(67) ALEN & PEETERS, *op. cit.*, p. 1147ff.

(68) One possible approach (whether in — or outside a constitutional framework) might consider The Charter of the United Nations which at Arts 1(1), 2(3) 33 imposes duties on nations to resolve their disputes peaceably, thus arguably establishing a duty to negotiate at an international level : see B. SIMMA (ed.), *The Charter of the United Nations : a Commentary*, (Oxford UP, 1994, Oxford), pp. 97-106, 505-512 and J.G. MERRILLS, *International Dispute Settlement*, (3d), (Cambridge UP, 1998, Cambridge). For negotiation in the international law context generally, see R. JENNINGS and A. WATTS (ed.), *Oppenheim's International Law*, (9th) (Longman, 1992, London), pp. 1181-1183. This interesting point merits further consideration, and I am grateful to Nicolas Angelet (of the Université Libre de Bruxelles) for bringing it to my attention.

proposals. But courts may not be able to escape so easily. Leaving the determination of « clear majorities » and « clear expressions of popular will » to politicians does not insulate the courts from disputes. The necessary majority for amending the Constitution seems inherently a point of constitutional law, apt for judicial consideration. In order to speak of clear majorities in the first place, the Court must have considered itself why there was a requirement for « clearness » and therefore what such majorities and what such expression consisted of. Politicians and interest groups with competing versions of what satisfies « clearness » and perhaps even the appropriate procedures for determining same, may no doubt wish to tap the Court's unexpressed opinions thereon. Who constitute the majorities ? Only residents of Québec ? All of Canada ? What is the necessary : 100 %, 75 %, 66 2/3 %, 60 % or even just 50 % + 1 vote (69) ? Of course the applicable legal principles are here no more certain or clear.

Just as unclear is who the participants in the negotiations may be. It is at once a political decision who represents whom, and a point of constitutional law as to the interests recognised thereunder. Given that the negotiations may lead to amendments to the Constitution, perhaps all the provinces should be included. At this level of constitution amending and making, the federal government is hardly the representative of the provinces. But should the First Nations or other special interest groups also be included ?

Inevitably, parties interested in or participating in negotiations will call upon the courts to consider and censure or exonerate particular participants for either failing to negotiate, or negotiating in bad faith or in a manner inconsistent with « fundamental constitutional principles ». The Court has indicated that it expected negotiations to proceed in accordance with those values. Moreover, the set of such values is not closed. Others may apply to negotiation positions and propositions. We should recall that the four « constitutional principles » discussed in the Reference were only the four understood by the Court as relevant to the issues. Although the courts may not wish to pronounce upon negotiating positions, those positions manifestly at odds with the juridified constitutional values would appear in fact amenable to judicial review on that basis. Implicated as the courts now are in the constitutional amendment process, identifying the precise dividing line between judicial and political questions becomes all the more pressing. When we should recall that the Court considered

(69) The Court declined to speculate as to which amending clause under Part V of the Constitution would apply (federal government consent and either provincial unanimity (s. 41), 2/3 of the provinces having at least 50 % of the population (ss. 38 &42), or just the provinces concerned (s. 43). This would have naturally pointed to what majority the Court was in favour of, and thereby circumventing the political question dictum. See also on this point, J. WEBBER, « The Legality of a Unilateral Declaration of Independence under Canadian Law », (1997) 42 *McGill L.J.* 281 and P. MONAHAN, « The Law and Politics of Québec Secession », (1995) 33 *Osgoode Hall L.J.* 1 who examine the use of the Constitution's amending provisions.

legitimacy linked to legality, the task hardly becomes any easier, at least in the Canadian context.

Finally, one further issue of note in the Reference opinion is whether a breach of the duty to negotiate, or even continuing failure to amend the Constitution (whether or not with a view to secession) could satisfy the third ground for secession at international law. That is, does such a breach or continuing failure to agree (even if in good faith) constitute a denial to a definable group of that « meaningful access to government to pursue their political, economic and cultural development » ? The Court states that the continuing failure to reach agreement on constitutional amendments (in particular the Meech Lake and Charlottetown Accords) does not amount to a denial of self-determination. But the Court also states that a breach of the duty or intransigence in negotiation may affect the legitimacy of conduct by the guilty or innocent participant, a legitimacy reflected in what recognition is given to either party's acts at an international level.

Once again, we have a significant tension between the political and the legal. Firstly, the Court gives no reason to exclude necessarily continuing failure to reach agreement on amendments, even in good faith, from the grounds for secession. The Court would seemingly confer legal effect upon the one, but leave the problem of unachieved amendment to the political realm. This would restrict the concept of oppression to one of active, positive acts of harm. But on another view, the inability to amend the Constitution because of an inability to agree suggests a disagreement over the fundamental conception of the constitutional structure of the country, which in turn suggests that at least one concept of self-determination is being rejected or denied. Continuing disagreement, it would follow, may well point to continuing rejection or denial of reasonable paths to self-determination. Is this not a form of failing to negotiate ? For what reasons should the ongoing frustration of the desired forms of self-determination not be considered oppressive ? Is there truly any reason to prefer one form over another, particularly where each nonetheless respects the federal principle ? This is not to say that the Court is mistaken or correct in its view. Rather, it is to highlight the indeterminate and uncertain status of that third ground for secession, and the difficulty, once again, with the duty to negotiate.

Secondly, who is to determine a breach of the duty, intransigence, or even a sufficient and necessary failure to agree ? A Québec government backed by a majority referendum vote for secession would no doubt claim one or all such grounds in order, so it would hope, to trigger its right to secede under self-determination ground #3. Given the Québec government position to date on court hearings concerning sovereignty, it is hardly imaginable that the government would seek a court's opinion. The Court suggests that a breach of the duty may have legal repercussions, clearly

inviting a judicial role. But it is not clear why a court is in any better position than a government, or the electorate, to decide issues at this level, in all or even some circumstances. All three can not decide, and if we accept the Court's reasoning under the democracy principle, the people should decide. And this in turn brings us back to the history, the nature and problems of amending the Canadian Constitution discussed above. Even if the matter did come before a court, the basis for any judicial opinion (unless rejected as a political question) would necessarily have to pull once again seemingly « inherent fundamental principles » from its constitutional hat. Each time the courts do this, the courts adopt a less judicial, but more political role — a risk that requires no further explanation.

V. — Conclusion

It is a matter of concern that unwritten principles can have 'significant legal force', particularly where it is questionable how well-grounded, how widely-known and how widely-accepted these principles just might be. At first glance, converting what appears to be broad, generalised political or ethical convictions or policies into hard and fast law would appear to cross the line from judiciary to unelected legislature. In the common law (and particularly its constitutional law), it is decidedly difficult not to draw upon principles and policies to support judicial reasoning. True, in a common law setting, legal reasoning, the process of expressing and developing a legal rule, and of applying it, does rely on policy and principle as much as logic and simple analogy. But such policies and principles have no greater especial merit when cited by a judge in the course of a judgment. It is the same principle whether cited by politician, professor, or judge. If it be objected that the institution or office of each matters, the issue is the office and its social situation, not the principle. And the office must keep to its place, and not obscure or presumptively legitimate what judges are doing when they dip outside the text of a constitution for legal and binding rules (70). It calls for careful judicial appreciation of just where the dividing line between the legal and the political (or more generally, the non-legal) actually is, more than a perfunctory recital of the rules of

(70) This point has received most attention in the US, under the hands of R. Dworkin, in *Taking Rights Seriously* (Duckworth & Co, 1977, London), and *Law's Empire* (Duckworth & Co, 1990, London), J. Choper, in *Judicial Review in the National Political Process : A Functional Reconsideration of the Role of the Supreme Court* (Princeton UP, 1980, Princeton), J.H. Ely, in *Democracy and Distrust* (Harvard UP, 1980, Cambridge), and C. Wolfe, in *The Rise of Modern Judicial Review* (U. Chicago Press, 1985, Chicago), among others. It is sometimes cast as the debate between « interpretivism » (being closely, if not exclusively bound to the four corners of the constitutional text), « non-interpretivism » (ranging somewhat more freely over policy grounds), and the search for « neutral principles » of constitutional interpretation. And see also, from a Canadian perspective, M. Mandel, *The Charter of Rights and the Legalisation of Politics in Canada* (Wall & Thompson, 1989, Toronto).

justiciability. These concerns, a recurring theme throughout this article, are only moderately tempered by the realisation that the Court is exercising an advisory function — but with significant legal ramifications nonetheless. Where this new duty takes Canada and its political representatives, as well as the courts, remains to be seen.