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Respecting Democratic Constitutional Change

Craig M. Scott

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Respecting Democratic Constitutional Change

Craig Scott, MP¹

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¹ Member of Parliament, Toronto-Danforth (New Democratic Party); Official Opposition Critic for Democratic and Parliamentary Reform. This text was originally delivered as a lecture at the University of Toronto Faculty of Law in March 2013 and was presented at a seminar at Glendon College, York University, in January 2014.

1. Introduction

On Monday, January 28, 2013, I was privileged to table, on behalf of the NDP and in my capacity as Official Opposition Critic for Democratic and Parliamentary Reform, [Bill C-470, *An Act Respecting Democratic Constitutional Change*](#). On the same day, my colleague Romeo Saganash, NDP Critic for Aboriginal Intergovernmental Affairs, tabled [Bill C-469](#) that would require Canadian law and practice to respect the United Nations Declaration on the Rights of Indigenous Peoples. In this way, on that day, the New Democratic Party was making sure that Canadians know that our party sees the building and nurturing of sustainable and cooperative relationships as the essence of a democratic federalism. We also see the rights of peoples to self-determination as inextricably a relational concept in which unilateralism and absolutism have no place; instead, the concrete consequences of one collectivity's claims to self-determination alongside other collectivities' contrasting and overlapping claims to self-determination can only emerge from good faith dialogue based on mutual respect and recognition.

By reason of my own deep commitment to an inclusive Canada, I hope it will be obvious why I was honoured to introduce Bill C-470 at a time when Tom Mulcair is the federal NDP leader: Tom Mulcair has long been a fierce, dedicated, and tenacious fighter for Canada and against separatism in Quebec, including being in the forward trenches during both the 1980 and 1995 referendums. In this respect, please allow me to personalize my involvement a bit further. The dual goal of Canadian unity and respect for Quebec's distinctiveness has always been close to my heart – as it was for the MP who I succeeded in Toronto-Danforth, Jack Layton. When I was age 19, I was lucky to have had offers of full scholarships to do my BA at both Harvard and McGill. As universities, each had their special attractions but the decisive factor for me was my desire to better understand Quebec and thus Canada – so I decided to turn down Harvard and head to Montreal for three years. It was a decision I will never regret.

I should also acknowledge I worked together with the entire NDP caucus from iteration to iteration of Bill C-470. Our collective effort proposes to replace the problematic federal law entitled [An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference](#) with a framework that draws inspiration from and is more faithful than the Clarity Act to the Supreme Court of Canada's judgment in the [Reference re Secession of Quebec](#) – a framework that is grounded in a vision of democratic constitutional change that is intended to unify and not divide Canada.² I should add, as regards my own role, this is an area with which I have had considerable involvement,

² Note that, although laws can be given a short title and although this law does not have an official short title, it has come to be known as the “Clarity Act.”

from writings on the nature of the contemporary international law on self-determination with respect to Aboriginal peoples to acting, while a professor at the University of Toronto (before I moved to Osgoode Hall Law School), an advisory role to the Government of Saskatchewan during its intervention in *Quebec Secession Reference*.

The essence of the Supreme Court of Canada (SCC) ruling can be summarized with three main points.

- 1) unilateral secession (whether on the basis of a referendum or unilateral declaration of independence) is illegal under both Canadian constitutional and international law;
- 2) it is perfectly legitimate for the government of province like Quebec to use a referendum to determine if the people of the province wish to see the constitution of Canada amended in one way or another, up to and including secession; and
- 3) if a referendum is used for such purpose by a province, the *power or right* of the federal government to negotiate with a province on any constitutional matter at any time actually becomes an *obligation* to negotiate with that province, in good faith and on the basis of foundational unwritten principles of the constitution, *if* that referendum has generated, quote, “a clear majority on a clear question.”

It is within this SCC framework that Bill C-470 seeks to provide clarity and fairness to ground rules where the Clarity Act has, I respectfully submit, fallen quite far short. At the same time, C-470 seeks to open the aperture to create a wider field of vision, by emphasizing that the Court’s framework need not be limited to the ‘nuclear option’ of secession. Rather, C-470’s primary message is that the unity of Canada must accommodate democratic constitutional change that recognizes the right of participants in Confederation to make legitimate efforts to amend the Constitution – including, crucially, amendments that accommodate Quebec’s distinctiveness within a united Canada.

The occasion that triggered Bill C-470 was the move by the Bloc Québécois, through one of its MPs’ own private member’s bill (Bill C-457), [An Act to repeal the Clarity Act](#). The Bloc bill calls for scrapping the Clarity Act entirely and replacing it with nothing; if it had passed, the result would have been a legal void on the question of secession at the federal level. My bill C-470 rejects this approach and, accordingly, no NDP voted in favour of the Bloc bill: whatever the Clarity Act’s problems, fair and clear rules for democratic constitutional change that underpinned the Supreme Court of Canada’s judgment in the *Quebec Secession Reference* deserve to be put in place. A void is unacceptable not least because the Bloc Québécois

peddles a hardline, absolutist – and completely erroneous – view that Quebec can declare its independence after a referendum.³ A void would only feed into this Bloc narrative.

Of course, I did not expect my Bill C-470 proposal to be met with open arms by the two federal parties that exist, more and more, as the alter ego of each other when it comes to making conflict over national unity their bread and butter. We have heard especially loud and understandably passionate protests from people associated with the Liberal Party (apparently I am intent on making it easier for Canada to break up, according to a mass mailing sent into my Toronto-Danforth riding by Bob Rae, using his MP's free postage privileges when he was still MP for Toronto-Centre, with a breathless and ridiculous headline asking why I wanted to make it easier to break up Canada). And, for some time after tabling C-470, Bloc Québécois MPs specialized in sending glares in my direction; just for example, the day after my tabling of Bill C-470, a Bloc Québécois MP rose in the House to deliver a statement attacking me for "trying to shackle Quebec and place it under trusteeship." Those reactions in mind, there is some basis for concluding that I, and the NDP, may well have struck a golden mean between extremes with Bill C-470 in a way similar to what the Supreme Court was so evidently seeking to do in its Solomonic reasoning in the *Quebec Secession Reference*. This sense is reinforced by the following image: the day Bloc MP Bellavance introduced his Bill C-457 to repeal the Clarity Act, some Liberal MPs were seen clapping and smiling broadly – virtually jumping for joy -- in their area of what we call "the lobby." One even went up to Bellavance to shake his hand. It is almost as if each of these two parties – the Bloc Québécois, on the one hand, and the Liberal Party of Canada, on the other hand – exists to give the other a new lease on (political) life.

So, it is important to note that my NDP colleagues and I did not decide lightly to take on the Bloc's separatist foray. We know that Quebeckers, no less than other Canadians, want an orientation towards the future and not the past. We know they want a focus on things like a poor economy, precarious work, and deteriorating infrastructure, as well as on opposition and alternatives to the Harper government agenda – and so on. But, we also knew we had to be intellectually and politically honest and forthright about the NDP's position. So, we chose not to shy away from doing what we felt to be the right thing when faced with a time table not of our choosing. CBC and Toronto Star political analyst Chantal Hébert recognized this when she wrote about what she called our "proactive engagement" through Bill C-470. She [commented](#):

³ Which position conveniently forgets that former Bloc Québécois and provincial Parti Québécois Leader Lucien Bouchard welcomed and accepted the 1998 Supreme Court of Canada's *Quebec Secession Reference* conclusion that, while Quebec cannot unilaterally secede, there is a federal obligation to work in good faith towards a negotiated secession in the event of a clear 'Yes' result in a referendum.

[A]s he casts himself as a contender for the job of prime minister, Mulcair has a duty to give voters fair warning of his position on such fundamental issues.

The Clarity Act was not cast in stone and former unity minister Stéphane Dion can hardly claim to have drafted it under divine guidance.

If he had, one presumes that bill would have put a firm number on the notion of a so-called “clear” majority in favour of sovereignty rather than suggest that a future federal government would know one when it saw one.

In essence, the NDP is telling voters how it would deal with that gray zone.

...

The same cannot be said for the other parties in Parliament.

The Liberals – while they wrap themselves in the Clarity Act – are less than forthcoming as to what in their eyes would constitute a “clear” majority.

2. The Clarity Act viewed from Quebec

It is thus important that Canadians understand why the so-called Clarity Act became and remains one of the barriers for many Quebecers feeling respected within the Canadian federation. Despite the best of intentions of its drafters and those voting for it, many, perhaps most, Quebecers (including, to this day, the Liberal Party of Quebec) objected and continue to object to the Clarity Act for one or more of a variety of reasons. These include:

- (a) There is the perception that the Clarity Act had been imposed on Quebec by the federal Parliament, not least by moving the goal-posts after Quebecers on all sides had been assuming that a referendum was being fought on a majority-vote basis, even as there was confusion on what the legal effect of a referendum would be until the SCC ruled that a ‘yes’ triggers an obligation to negotiate.⁴

⁴ [Françoise Boivin, during the debate on Bill C-457](#): “In 1995, the day after the last referendum in Quebec, all of Canada woke up and realized that the results were very tight. Oddly enough, no one was talking about 60% or 65%. Throughout the night, I was providing commentary on the results for a television station in my region. No one was asking me what would happen if the results reached the majority of 51%. Although we sensed that the results would be tight, no one told me that we had to wait for them to reach 60% or 70%.”

- (b) There is also the ironic fact that the Clarity Act is anything but clear on the two core requirements set out in the Supreme Court's *Quebec Secession Reference* opinion, namely, a "clear majority" vote on a "clear question", as the impetus for the federal government and the provinces to sit down at the negotiating table with Quebec (it is not for no reason that we speak so often of the "so-called" Clarity Act).
- (c) Quebeckers react to the perceived (I would say actual) arbitrariness of a system whereby Parliament (made up of 75% MPs from outside Quebec) would determine, on the basis of unclear criteria and only *after* a referendum has occurred, whether there had been a "clear majority" vote on a "clear question."
- (d) The Clarity Act sits uncomfortably with the Supreme Court of Canada *Quebec Secession Reference* judgment on a number of dimensions, including: (i) misrepresenting what the Court said by making it look, in the Clarity Act's preamble, like the Court had said that a simple majority could not satisfy what the Court called the "quantitative" aspect of a "clear majority"; (ii) further muddying the picture by setting out criteria in the Clarity Act for determining whether there is a "clear majority" that create the false impression that the Supreme Court held that a clear majority meant a clear-as-substantial (versus a clear-as-unambiguous) majority; and (iii) prohibiting the federal government (in section 2(4) of the Clarity Act) from doing what the UK and Scotland have been doing when they entered into the Edinburgh Agreement that provides some mutual ground rules and expectations in advance of a referendum.⁵
- (e) Increasingly, Quebeckers are noticing how the Clarity Act approach contrasts with a political consensus in Scotland and the United Kingdom that a referendum on statehood for Scotland will be decided by a majority vote. In a

There was already a sense of normalcy. We waited to see which side would get the majority at the end of the day. The federalists ended up being successful."

⁵ Also, another point could be added: (iv) as a kind of corollary of the previous problem, transforming a referendum on secession from being *one* way by which a province could trigger negotiations over secession – but not a required method – into the *only* way that a province can seek to start talks on secession.

January 15, 2013, letter to the Deputy First Minister of Scotland, the UK's Secretary of State for Scotland makes clear that independence negotiations between Scotland and the UK after a planned Scottish referendum vote will be conducted if a majority of Scots vote in favour of independence: "The UK Government is determined to ensure that when people in Scotland vote in the referendum, they are aware of the benefits that they gain currently from being part of the United Kingdom family, and the choices that would arise from a majority vote to leave it."

- (f) Westminster offers further contrast to the Clarity Act approach. UK Prime Minister Cameron has just announced a referendum on leaving the European Union, with no suggestion that this will not be by majority vote. And a look back into history also reminds us that Westminster has been consistent: Newfoundland negotiated its transition from direct rule by Great Britain to province status in Canada in 1949 after a 52% vote. It is little wonder many Quebecers wonder why it is taboo under the Clarity Act regime for them to be treated the same way.

With respect to the Scotland and Newfoundland comparisons, a couple of interesting editorials may be worth considering. On Scotland, National Post political reporter and columnist [John Ivison had the following to say about Bill C-470](#):

I think the NDP is on more solid ground in arguing that 50% plus one is sufficient to open negotiations on sovereignty (provided of course, there are no irregularities on the balloting, counting or transmission of votes, or on spending limits).

....It's apparent that in all the discussions surrounding the independence referendum pending in Scotland next year, no one is arguing that a bare majority would not be a "decisive expression" of the views of the Scottish people. I have read nothing to suggest 50% plus one would not be respected by either side.

I don't think that people in Quebec or Scotland really want to end their fractious but ultimately beneficial affiliation with their larger nation states. But if they do, they should not be denied their right to self-determination by provisions that will be seen as arbitrary and undemocratic by even moderate nationalists. To do so in the third Quebec referendum would be to guarantee the success of the fourth.

With respect to the Newfoundland referendum that triggered the negotiations that led to Newfoundland entering Confederation [in 1949, the following editorial from the *Montreal Gazette*](#) the day after the referendum is perhaps of more than historical interest (my emphasis added):

Newfoundland's second referendum to decide its political future has proved, unhappily, almost as indecisive as its first. *It is conceded that Confederation with Canada has achieved a majority. Therefore, it seems probable that, on the balloting, the Commission of Government at St. John's has no alternative but to request Ottawa to accept Newfoundland as a tenth province in consonance with majority opinion and democratic practice.*

But the strength of the minority opinion preferring Responsible Government as shown at the polls is an unfortunate, possibly a limiting factor in the proceedings. *So modest a majority for Confederation scarcely [i.e. BARELY] meets Mr. Mackenzie King's prerequisite of a decision "clear and beyond the possibility of misunderstanding". The majority is clear enough.* But it is evident that nearly half the eligible electorate does not favor tenth provincial status.

However, *Newfoundland has expressed its view democratically.* It is unlikely that the Dominion can now refuse to recognize the validity of the vote for Confederation; or should conceive that the minority will not loyally accept that decision. The next step, obviously, is one for Ottawa. The Federal Government must now accept or reject the application; the other political parties must be consulted; and presumably the people through Parliament.

All such governmental processes are complicated and, evidently, will consume time. When the process is completed - always supposing no insuperable difficulty arises - it must be hoped that the large minority that preferred independence will have been converted to the majority view; and that all Newfoundland will enter Confederation together willingly and gladly.

3. The scheme of Bill C-470, an *Act respecting Democratic Constitutional Change*

So, now, in contrast to the Clarity Act, what does my Bill C-470, an *Act respecting Democratic Constitutional Change*, say and do?

The basic scheme of Bill C-470 is fairly straightforward. I will outline it with six points:

1. The bill lays down clear rules for how *the Government of Canada* should respond to any referendum to be held in Quebec that seeks any form of constitutional change. As noted several times already, is not limited to the question of secession. It is important to be clear that Bill C-470 leaves Quebec free to hold any referendum it wishes, while at the same time making clear to Quebec what it can expect from the federal government as an exercise of federal jurisdiction in its role representing Canada as a whole.
2. The initial inquiry is whether the Government of Quebec's proposed referendum question "clearly sets out the constitutional change being sought." In the event the Government of Canada determines that, from its point of view, the question is not clear, it must refer the matter to the Quebec Court of Appeal (Quebec's highest court, with judges appointed by the Government of Canada) for a neutral, non-politicized assessment of whether the question is indeed unclear.
3. On the specific question of secession, my bill not only differs from the Clarity Act in requiring the Government of Canada to make known in advance whether it views the question as clear but it also differs from the Clarity Act in setting out two questions that are deemed clear, including "Should Quebec separate from Canada and become a sovereign country?" If Quebec uses that question, my bill, if passed, would reflect the advance political judgment of Parliament that the question is clear, and there would be no further need for the Government of Canada or the Quebec Court of Appeal to scrutinize the question.
4. Another crucial difference from the Clarity Act is that my bill also foresees, indeed embraces, the possibility of Canada and Quebec agreeing in advance on a question. This is a mechanism that could be especially useful when it comes to the formulation of referendum questions dealing with constitutional change that are about Quebec's place within a united Canada (a list of examples of such change are found in section 9 of the bill). If they so agree, then the question on which they agree will be deemed clear.
5. If the "clear question" threshold is met, then and only then does the question of a "clear majority" enter into the picture. The bill follows the Supreme Court of Canada in giving the same meaning to the word "clear" in both "clear question" and "clear majority," versus one meaning in "clear question" and a different meaning in "clear majority." In that respect, the key passage, which lines up with all other uses of the word "majority" and specific uses of "clear majority" in the *Quebec Secession Reference*, is in paragraph 87, which reads (emphasis added):

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

So (note I am still in my point 5 here), after the results from a referendum on a clear question are known, the Government of Canada must determine whether there is a clear – as in, unambiguous – majority, on two dimensions. First of all, there is the threshold quantitative dimension: the majority of votes must have been cast in favour of the change – i.e. a simple majority. Secondly, there is Bill C-470's interpretation of the Supreme Court's statement that a "clear majority" means the majority must also be unambiguous in a "qualitative" sense. So, Bill C-470 provides that there must be no "determinative irregularities" such as fraud in balloting, vote counts, respect for campaign spending rules, and so on. Fraudulent voter suppression tactics that cause people not to vote at all would certainly be caught as part of this non-exhaustive list. If there are such irregularities that put in doubt the vote count beyond a simple majority threshold, then it cannot be said that the majority is clear (i.e. unambiguous).

6. Finally, what, then, are the consequences if the question was clear and the two dimensions – quantitative and qualitative – of a clear majority are satisfied? Following the ruling of the Supreme Court of Canada, the consequence is that the Government of Canada then has an obligation to enter into negotiations with the Government of Quebec. Following this, there may or may not be negotiated agreement. And after that, if there is agreement, the rules for amending the constitution must still be followed before lawful secession can occur. The Court commented on some of the dynamics

around whether or not there would be agreement, but decided to withhold virtually all comment on which Canadian constitutional amending formula might apply.

With respect to the nature and import of negotiation and with respect to what comes after negotiations, all the principles and processes envisaged by the Supreme Court would continue to apply. What is crucial to understand – but widely misunderstood because of the way some have been misrepresenting my Bill C-470 just as they have misrepresented the *Quebec Secession Reference* – is that *a clear majority vote on a clear referendum question is not a vote that generates a right to secede*. The Supreme Court’s core holding was that a referendum vote, *no matter how large the majority*, cannot unilaterally change the Constitution – whether on the question of secession or on any other constitutional change. Paragraph 151 of the *Quebec Secession Reference* says in part (emphasis added):

The democratic vote, *by however strong a majority*, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole.

A ‘yes’ vote in a referendum on secession does not generate secession, nor does it generate a right to declare secession through a unilateral declaration of independence. It triggers a negotiation process.

To better understand what is at stake, it is helpful to understand that, where a referendum is involved, constitutional change can only come about after a four-step process, with the referendum outcome being Step 1:

Step 1: The first step is the clear expression of the democratic will of the people of Quebec (or of any province, if another province also wants to use a referendum as a way to kick-start constitutional change) for a constitutional change. A clear majority on a clear referendum question generates what the Supreme Court called “a legitimate attempt to seek” an amendment to the Constitution. But such an amendment can only come about legally through a mutual process, not a unilateral one – and that is where steps 2 to 4 enter into the picture.

Step 2: As a consequence of the clear expression of democratic will (Step 1), an obligation to negotiate is triggered such that the next stage is good faith negotiations amongst all relevant participants in Confederation. Within this process, four foundational principles articulated by the Supreme Court of Canada must be respected

for the outcome – whether that outcome be agreement or non-agreement – to be a constitutionally reasonable one: the principles of federalism, of democracy, of constitutionalism and the rule of law combined, and of the protection of minorities, including Aboriginal peoples with their special constitutional status. The Court emphasized this is a political process, with no judicial arbiter, and also suggested that the external judgment of the international community will be highly relevant in creating incentives for the parties to act in a principled and good faith fashion – led on one side by the Government of Canada with, on the other side, the province seeking to secede, here Quebec.

Step 3: The third step is quite simply agreement or non-agreement flowing from negotiations. The Supreme Court emphasized that the Government of Canada and Government of Quebec must both negotiate in good faith and on a principled basis *and* that there was no guarantee either of good faith or of agreement. The key passages are perhaps paragraphs 151 and 152 (emphasis added):

Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted. The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. *There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of*

minorities. No one suggests that it would be an easy set of negotiations.

The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles we have mentioned puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

Step 4: Assuming there is agreement in negotiations between Quebec and other participants in Confederation with the Government of Canada as the lead, there is then a further major hurdle: the rules for amending the Constitution must then be followed. Neither the Supreme Court of Canada nor my bill takes a position on which amending formula would apply if Step 4 were ever reached.

Let me now comment on Step 4. What amendment rules would apply? There is, shall we say, uncertainty about this.

Would the general amending formula in section 38 of the Constitution Act apply? If so, two-thirds of the provinces (i.e. seven) making up at least 50% of the Canadian population must endorse the constitutional change by simple majority votes in their legislatures; Canada's leading constitutional law scholar, Peter Hogg, leans toward this view in his leading text *Constitutional Law in Canada*.

Or would unanimity apply? If so, the legislatures of all provinces as well as the federal Parliament must approve the secession arrangements. Probably a majority of constitutional scholars outside Quebec take this view.

Or, could it be that we are to take our cue from the way in which the Supreme Court of Canada recognized unwritten constitutional principles and created a previously unknown obligation to negotiate in the *Quebec Secession Reference*? If so, would special amending principles apply to secession by virtue of secession not being expressly mentioned – or in any way dealt with – in the Constitution? If so, something more fluid might end up melding the political and the juridical such that the Government and Parliament of Canada would have a special role to play in tandem with the Government and National Assembly of Quebec – on the assumption that the Government of Canada would not be able to get Parliamentary approval unless the interests of all other

participants in Confederation had been satisfactorily coordinated by the Government of Canada. Something like this view may be more likely to gain adherents amongst constitutional scholars in Quebec than in the rest of Canada.

At the present time, I would not want to speculate on which formula applies, other than to say that the Supreme Court of Canada may well be called upon again to exercise judicial acumen and wisdom in order to help answer that question – although I sincerely and fervently hope we are never faced with the need.

4. Misconceptions about Bill C-470 and the *Quebec Secession Reference*

Having set out the four steps for constitutionally lawful secession, allow me now to address some misconceptions making the rounds about my bill and indeed about the Supreme Court's *Quebec Secession Reference*.

(A) Comparison with the NDP Constitution's amendment rules

Let me first deal with perhaps the most pernicious argument that was handed out as a talking point to Liberal MPs and commentators after Bill C-470 was tabled. This is the false comparison that contrasts a simple-majority vote of the population of a province triggering negotiations for a constitutional change (including secession) with the NDP party constitution's requirement of two-thirds support in order to amend the NDP constitution. Frankly, while this may be a simple error on the part of those who have regurgitated talking points without understanding them (as is perhaps the case with Justin Trudeau who delights in using this comparison), it is more than a simple error when propagated by those who should know better by virtue of having either legal training or having the capacity to understand the difference between Step 1 and Step 4 of the above-described process. In this respect, I very much regret that Bob Rae, in the take-down letter he has flooded my riding with (mentioned earlier), descended into this manifestly false comparison. He told my constituents, in his attack on me: "And, even more ludicrously, according to its constitution, the NDP itself requires a 66% vote just to change its name."

Either mistakenly or deliberately, those insisting on this false comparison are comparing apples (what referendum vote is needed to trigger negotiations, step 1) and oranges (what is needed to amend the constitution to permit secession, step 4). If one insisted on finding some comparison, the correct comparison is between the NDP constitution's amending formula and the Canadian constitution's amending formula applicable to secession. For secession to occur lawfully under our constitution once negotiations have ended, as I have already said, the dominant view of constitutional scholars appears to be that, at the very least, a formula known

as the 7/50 formula applies; more precisely, under the 7/50 formula, secession would need to be approved by the legislatures of *two-thirds of the provinces* with over 50% of Canada's population. If Liberals were to compare apples (two-thirds) to apples (two-thirds), their disingenuous talking point might just disappear in a puff of smoke.

Allow me to quote the understandably exasperated words of my colleague, Françoise Boivin who is the NDP Justice Critic, in the face of this disinformation that the Liberal Party insists on spreading because that party's strategists know that this manipulative and even dishonest line of argument resonates with people who are not close enough to this issue to detect the distortion. In the debate on the Bloc Bill C-457, [she said](#):

I am asking those who are telling me that the NDP's constitution requires two-thirds of the votes to leave me alone. If my Gatineau riding association wants to change the NDP's constitution, then a majority has to pass a resolution. Then, it can go to the next level. It is the same thing for Canada.

(B) The gradual taking hold in Canadian political consciousness of a false assumption about “clear majority” versus the meaning accorded by the Supreme Court of Canada

There is a second misconception that has taken hold in the minds of the public. This is the gradual taking hold in Canadian political consciousness of the false assumption that the Supreme Court in the Quebec Secession Reference intended a “clear majority” to have a quantitative dimension beyond a “simple majority.” This misconception is partly the result of understandings that have built up by osmosis over time since the Clarity Act entered into force in 2000 and partly the result of deliberate messaging, especially of late, from defenders of the Clarity Act. Let me give you a taste of this messaging strategy in the take-down letter Bob Rae has sent into my riding of Toronto-Danforth. He tells my constituents the following:

The Court [the SCC] stated that the government needed “a decision of a clear majority of the population of Quebec on a clear question to pursue secession.” They used the term “clear majority” not less than 13 times.

And this opinion formed the basis of the Clarity Act.

“They used the term ‘clear majority’ not less than 13 times,” says Mr. Rae: this sentence wields “clear majority” as a shibboleth. It acts as if “clear majority” is self-defining and all the more self-defining by virtue of being repeated – and it wants people to believe that “clear majority”

must mean something like substantial or significant majority, since this is a common enough usage of the expression. In the process, the association of “clear majority” with “clear question” gets lost in the fog, and people don’t think to ask, ‘Hold on, there. Don’t courts usually use the same word to mean the same thing, unless they explicitly give that word a different meaning – especially when the same word appears in the same sentence? And, if so, since “clear” in “clear question” can only mean “unambiguous”, then surely “clear” in “clear majority” must also mean unambiguous.’ But, no, people are encouraged to suspend reflection. Instead, we have a cumulative discursive effect – produced by repetition over time (in this case, over a decade) and as false logic (per Bob Rae’s mass letter, saying the words 13 times somehow makes it clearer what “clear majority” means). Political argument by repetition and inundation takes over from persuasive juridical argument through sound interpretive analysis.

Since the Clarity Act entered into force, “clear majority” keeps getting repeated in ways that result in people thinking it was, or must have been, the Supreme Court of Canada that defined “clear majority” as meaning something like “substantial” or “significant” majority. It is this ‘common’ popularized understanding of “clear majority” as being some sort of special or enhanced majority that has taken root in the general societal imagination and that allows a Justin Trudeau to move around Canada floating 67% as what a clear majority means. And this ‘common’ or lay understanding gets reinforced when commentators – such as an assistant professor of political science who, writing on Maclean’s website, clearly has challenges when it comes to reading a court judgment – go so far as to say that the SCC explicitly said that a simple majority could not qualify as a “clear majority”. The SCC said *no such thing*.

Beyond repetition of “clear majority” as if it has some autonomous meaning outside the Court’s own reasoning and beyond drawing attention away from how the Court expressly defined “clear” as “free of ambiguity” in paragraph 87, such commentators achieve their ends by misquoting passages in the judgment – doing so, one must assume, either due to incompetence or for instrumental reasons.

So, where the Court used the term “enhanced majority” in one paragraph, we are urged to believe by commentators that the Court was using “enhanced majority” to define “clear majority” when in fact the Court was discussing the use of special majorities to amend a constitution (including ours) – step 4 in the above-described process – and not as a synonym for “clear majority” as the test for when a referendum majority is sufficient at step 1 to trigger step 2 negotiations. Here is paragraph 77 (emphasis added):

In this way, our belief in democracy may be harmonized with our belief in constitutionalism. *Constitutional amendment often requires some form of*

substantial consensus precisely because the content of the underlying principles of our Constitution demand it. By requiring broad support in the form of an *"enhanced majority" to achieve constitutional change*, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted.

Sometimes, it will be paragraph 76 that is the source of a quotation taken out of context of what the Court is discussing. So, the first sentence of para 76 says: "Canadians have never accepted that ours is a system of simple majority rule." But, one only has to read the rest of the paragraph to see that the Court is not saying that a "simple majority" is not enough to trigger negotiations, but rather is saying that constitutionalism layers itself on top of majoritarian democracy to create hedges against majoritarianism at stages beyond a referendum, notably through negotiations, then agreement, and then post-negotiations constitutional amendments (emphasis added):

Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are "binding" not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.

Occasionally, although more rarely, one sees the short paragraph 73 quoted as supposed proof that the Court said a "clear majority" is incompatible with a simple majority. Here is the paragraph (emphasis added):

An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly *why a constitution is entrenched beyond the reach of simple majority rule*. There are three overlapping reasons.

The reason this passage is rarely quoted as proof that a simple majority is not enough at the referendum step is that it is manifestly clear, even to the untrained eye and ear, that the Court is discussing – when it goes on to elaborate in paragraph 74 the "three overlapping reasons" – the rules and mechanisms within the constitution that counterbalance simple majority rule

such that the Court is rebutting the hard-line claim that a simple-majority referendum vote is sufficient to secede. That this is the context is expressly stated in paragraph 75 (emphasis):

The argument that the Constitution may be legitimately circumvented by resort to a majority vote in a province-wide referendum is superficially persuasive, in large measure because it seems to appeal to some of the same principles that underlie the legitimacy of the Constitution itself, namely, democracy and self-government. In short, it is suggested that as the notion of popular sovereignty underlies the legitimacy of our existing constitutional arrangements, so the same popular sovereignty that originally led to the present Constitution must (it is argued) also permit "the people" in their exercise of popular sovereignty to secede by majority vote alone. However, closer analysis reveals that this argument is unsound, because it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy.

Importantly, every time that the Court is clearly saying a majority or a simple majority is insufficient for *unilateral* amendment of a constitution – in this case, unilateral secession – it is actually reinforcing the fact that the majority necessary to trigger a non-unilateral process (negotiations, agreement, and then amendment) is “majority vote alone” – in other words, *simple majority*. The entire Court judgment is resplendent with clear evidence that an unqualified majority vote is sufficient to trigger negotiations at the same time as there is no majority of any size that is large enough to justify unilateralism.

There is, finally, one paragraph that more often than not is the one most frequently quoted. One phrase that appears in para 149, and is also directly reproduced in the preamble to the Clarity Act, is quite often invoked completely out of context. That is the phrase that says: “democracy means more than simple majority rule.” This frequently gets quoted as a free-floating validation of the erroneous view that the Court was saying a “clear majority” could not be a “simple majority”, when it was not even discussing that question. Rather, what the Court was doing – very clearly, for anyone who can read a court judgment – was, yet again, providing reasons for why democracy is not a reason for *unilateral* constitutional change on the part of one partner in the constitution – specifically, not a reason for *unilateral* secession – and why a simple majority vote cannot prevail over other foundational principles to be the sole basis for a province to secede. Here is the para. 149 sentence read in context, starting with the two sentences that precede it and then the remainder of the paragraph (emphasis by italics is added but emphasis by underlining is the Court’s own emphasis):

The Reference requires us to consider whether Quebec has a right to unilateral secession. Those who support the existence of such a right

found their case primarily on *the principle of democracy*. *Democracy, however, means more than simple majority rule*. As reflected in our constitutional jurisprudence, democracy exists in the larger context of other constitutional values such as those already mentioned. In the 131 years since Confederation, the people of the provinces and territories have created close ties of interdependence (economically, socially, politically and culturally) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. *A democratic decision of Quebecers in favour of secession would put those relationships at risk*. The Constitution vouchsafes order and stability, and accordingly *secession of a province "under the Constitution" could not be achieved unilaterally*, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

Here, I have to say that the Court is partly to blame because this is one time in the judgment where it could have taken a bit more care, notably in the sentence “Democracy, however, means more than simple majority rule,” to say either “constitutional democracy” or “democratic constitutionalism”, instead of “democracy” simpliciter. But it is plain as day what the Court means, and that, just as it is saying at the end of paragraph 75 that constitutional democracy means more than popular sovereignty, it is saying in para 149 that “*constitutional democracy means more than simple majority rule.*”

I would add that this one small phrase that is the source of so much misunderstanding and misquotation seems to have a hex on it, because there is still another formulation problem – which Anglophone readers of the judgment would never know exist. However, the English expression “simple majority rule” can be used, and is used in the judgment, in two ways that are translated differently in French.⁶

It can mean “*simple-majority rule/règle de la simple majorité*” (sense 1) or it can mean “*simple majority-rule/ simple règle de la majorité*” (sense 2). In the above-quoted paragraph 149’s third sentence, if one looks at the French translation, “simple majority rule” is used in the sense 2 meaning as “simple majority-rule:” it is translated as “*simple règle de la majorité*” – which literally means “simple rule by/of the majority” (i.e. “simple majority-rule”). That is, at least in the French version, the Court may not even be talking about the “simple majority” issue in the same way as it was in paragraphs 73 and 76, discussed earlier; rather, it seems to be talking about “majority rule” more generally. More precisely, it is talking again about how a majority vote of any size (50% plus 1, 67%, 90%) is not enough to oust other counterbalancing

⁶ I thank Professor Hugo Cyr of the Université du Québec à Montréal for drawing this translation dimension of the judgment to my attention. Responsibility for any errors in explaining the issues are mine alone.

constitutional principles, such as minority rights and the principles of federalism, that are locked into a constitutionally-mandated negotiations and a constitutional amending formula.

If you doubt what I am saying, you only need read the French version of the judgment to see that, elsewhere, “simple majority rule” is translated as « la règle de la simple majorité » in paragraph 73 and « la seule règle de la simple majorité » in paragraph 76. In these instances, it is possible – but not required – to treat the French translation as connoting the “simple-majority rule” meaning rather than the “simple majority-rule” meaning. I say “possible” but not “required” for two reasons. One, in French “la règle de la simple majorité » can still mean “simple majority-rule”. Two, and more significantly, in French there is an alternative formulation that means “simple majority” in the sense of 50%+1, namely, “*majorité simple*.” *In none of the translations does the Court use the available expression for “simple-majority rule” of “la règle de la majorité simple.”*

In the result, the English “simple majority rule” appears three times and receives three different translations into French! But, to repeat, never once does the translation use the only available expression in French that indisputably means simple-majority rule, rule by 50% + 1: “la règle de la majorité simple.” The failure to use this expression in French provides strong textual evidence that the Court may never once have been speaking of “simple majority” in the sense of 50% plus 1. Readers should keep in mind that the English and French versions of a Supreme Court of Canada judgment are each official and thus equally authoritative.⁷

Be that as it may, it probably does not matter much. Whereas the French translation of “simple majority rule” in paragraph 149 could well mean as a textual matter that the Court was not speaking of “simple majority” in any way that could be contrasted to “clear majority” or any other kind of majority, *even if* the translation had been “la règle de la simple majorité” and even if we charitably say the Court meant this as “la règle de la majorité simple”, it would still be the case that the Court is *not* talking about ruling out a “simple majority” as the threshold for a referendum vote. In that respect, we could take the Court as saying in all three contexts, “*simple rule of a simple majority*” (which is virtually the same thing as one of the three translations, “la seule règle de la simple majorité”) and it would make no difference given what

⁷ Now, I have absolutely no idea whether the translators caught a distinction that the Court intended, whether the Court actually meant all three usages to be “simple-majority rule”, whether the Court instead meant all three usages to be “simple majority-rule”, but I would say that normally, especially in a case like this, care would be taken to be accurate and normally translators would have checked with the authoring judge. That said, in a judgment of the Court, it could well be that authorship of “simple majority rule” in one paragraph may not be the same authorship as “simple majority rule” in another paragraph.

the Court was discussing each of the three times the phrase “simple majority” came up. Each time, the Court was manifestly not talking about “simple majority” in any way that was juxtaposed to or contrasted with “clear majority.”

But could the translation issue be more significant than we realize? Consider that the Clarity Act preamble integrates the paragraph 149 expression “democracy means more than simple majority rule” as follows (emphasis added):

WHEREAS the Supreme Court of Canada has stated *that democracy means more than simple majority rule, that a clear majority in favour of secession would be required to create an obligation to negotiate secession, and that a qualitative evaluation is required to determine whether a clear majority in favour of secession exists in the circumstances;*

It is possible that the intention of the primary drafters of the Clarity Act was to create the subliminal impression that the Supreme Court actually stated that a “clear majority” in a referendum could not be a “simple majority.” Apart from this being an erroneous impression to convey, as we have seen, it is of some interest that the House of Commons legal draftspersons in charge of translation of the Clarity Act made sure to use the same translation of “simple majority” rule as appears in paragraph 149 of the Supreme Court judgment, namely “la simple règle de la majorité”. That is, they used the meaning in French that indisputably does *not* mean “rule by simple majority”, instead using the expression that means “simple rule of the majority”. Nonetheless, it is the English-language preamble text that has helped shape minds in English-speaking Canada, and that has left the indelible impression that the Supreme Court said a “clear majority” could not, at the quantitative level, be a “simple majority” – when they said nothing of the sort.

There are a number of other observations to be made that point decisively against the Court having intended “clear” in “clear majority” to somehow mean something different from what “clear” means in “clear question” – observations that confirm paragraph 87’s already-express statement that “*clear*” means *unambiguous*:

- 1) It is not just the just-mentioned paragraph 87 that makes clear that the Court gave the same meaning – namely, “free of ambiguity” – to the word “clear” in both “clear majority” and “clear question”. It is also the case that, at several other points in the judgment, the definition of “clear” as “unambiguous” is manifest because the Court on occasion refers to a clear majority on a clear question in a compendious way – as when

it says at paragraph 86 “clear expression of democratic will” and at paragraph 88 “clear expression of the desire to pursue secession”. In compendious phrases like this, “clear” is used once but is doing double time by referring simultaneously to a clear question and a clear majority. It is thus virtually a linguistic impossibility for “clear” to mean two different things, and thus we see confirmed that “clear” means “unambiguous” in the expression “clear majority” no less than in the expression “clear question.”

- 2) Think about the matter a bit more. In a case of this sort, we are asked to believe the Supreme Court of Canada was playing cute. We are essentially asked to believe that the Court was having a go at irony, by using “clear” in a way that was unclear. Or that the Court was having some sort of perverse fun by taking literary licence in writing its judgment, namely, by using “clear” with two different meanings even in the same sentence. ...while never bothering to tell the reader, never bothering to tell the Canadian population, that “clear majority” means “substantial majority” while “clear question” means “unambiguous question.” How many think the Supreme Court would act in such a cavalier fashion in writing this historic judgment?
- 3) Consider also the fact that there is proof throughout the judgment that the Court knows, not surprisingly, that there are other words available in both the English and French languages to express the idea of “substantial majority.” They could, for example, have used the expression...“substantial majority.” After all, “substantial” is an adjective with some pedigree when it comes to constitutional change in Canada. In the first [Patriation Reference](#), when the Court was discussing the degree of provincial consent necessary, it opted for two expressions, used interchangeably: “a *substantial* degree of provincial consent” and “a *substantial* measure of provincial consent” (and in French, the same phrase « un degré appréciable de consentement provincial »). Indeed it is not without interest that, way back in 1981 in this *Patriation Reference*, the Court said the following (at pp 904-905: emphasis added): “But the discussion of this very issue for more than fifty years postulates a *clear* recognition by all the governments concerned of the principle that a *substantial* degree of provincial consent is required.” Or, perhaps in this era of Clarity Act clarity, the Liberal Party of Canada thinks it would have been clearer had the Court in 1981 instead said: “But the discussion of this very issue for more than fifty years postulates a *clear* recognition by all the governments concerned of the principle that a *clear* degree of provincial consent is required.”?
- 4) Finally, perhaps, just perhaps, we do not need to go so far back as 1981. If it had been struggling to find a way to distinguish “clear” in “clear majority” from “clear” in “clear question”, the Court in the *Quebec Secession Reference* might well have found a few

ideas in its own judgment. Recall that, when the Court was looking for ways to speak of a majority beyond a simple majority, it spoke elsewhere in its judgment of “enhanced majority” and “substantial consensus.” But, no, somehow we are meant to believe that not only has “clear majority” taken on its own meaning in popular discourse around the secession issue to mean something like “substantial majority” but also that this is what the Court intended.

5. Providing clarity where it was missing in the Clarity Act as part of respecting Quebec

Let me return to the problem of the lack of clarity in the Clarity Act.

Reaction to comments by Justin Trudeau, when he was a Liberal Party leadership candidate, by other Liberal leadership candidates reveal a lot about the Clarity Act in terms of what seems to be a deliberate strategy of never revealing what a “clear majority” really means in any concrete way.

Mr. Trudeau [advanced the opinion at McGill University](#), and not for the first time, that two-thirds (67%) of Quebecers would need to vote yes in a referendum before the federal government would be permitted to enter any negotiations with Quebec. Other Liberal leadership candidates jumped on him *not* for how high this number was *but* for the fact that Trudeau had put any number at all on what a clear majority is. Marc Garneau called it a rookie mistake, *not* because Trudeau fixed such a high super-majority number, *but* rather because Trudeau had not remained coy about the magic number. Apparently, from what I can understand of the Liberal Party strategy, this magic number is never to be known to Quebecers or Canadians until the federal Parliament makes a determination both on whether a referendum question was clear and on whether a referendum majority was clear – *after* the fact, *after* the referendum has been fought and is over. In the face of criticism from his Liberal Party colleagues, [Trudeau later duly corrected his position](#) to say that, when he had said two-thirds (66.7%), he really meant to say “le niveau d'acceptation est une décision politique qui doit être prise en temps et lieu» (The level of acceptance is a political decision that must be taken at the time and place.)

It is important that listeners know a bit more about why many Quebecers, not to mention no small number of other Canadians like myself, see this coy Clarity Act strategy not just as arbitrary but also as dangerous for Canada’s unity because of how it feeds into the Bloc Québécois and Parti Québécois agenda. Allow me to piggyback on part of the reasoning of

Charles Taylor, probably the greatest political and moral philosopher of the last half-century in Canada and, yes, a committed social democrat, [in a comment in the Globe and Mail](#):

When the so-called Clarity Act was adopted by Parliament in 2000, some federalists breathed a sigh of relief. We were told this was the solution to repeated attempts by Quebec sovereigntists to break up the country we cherish.

....

But the new law failed to provide clarity and became yet another flash point in the ongoing constitutional debate.

...

The current act is a recipe for endless wrangling. This is why it was seen as insulting and paternalist by the vast majority of Quebecers – and why all parties in the National Assembly opposed the current Clarity Act.

But with a clear question, 50 per cent plus one becomes the unambiguous and democratic expression of the electorate. As the Supreme Court made clear, if we agree that Canada must be held together by motivating its people to stay together, and not by force, then there is no other path.

So how do we so motivate them? For one thing, we pass clear laws that avoid the kind of arbitrary after-the-fact shifting of the goalposts that has been met with such anger by Quebecers. Independentists in Quebec have few effective battle horses left, which is why they're trying to exploit this issue, as we see with the Bloc Québécois motion in the House of Commons.

As a federalist, my message to all Canadians who want this country to stay together is simple: Let's not help the Bloc by perpetuating the confusions of the Clarity Act.

This is why I believe that rewriting this act to add clarity is helpful to the cause of unity.

Allow me to abuse the privilege of quotation just a bit further by adopting two further comments from Taylor as my own. They are unfortunately needed in the face of so much questioning of my own commitment to Canada by the likes of Mr. Rae in his take-down mailing with the blaring headline "Why does Craig Scott want to make it easier to break up our country?" [Taylor goes on to write](#):

Let me be clear: I am a federalist and a Quebecker. I campaigned on the No side in 1980 and 1995. And Thomas Mulcair was there with us in the trenches, fighting for Canadian unity and passionately making the case then – as he does now – for Canada, in Quebec.

But Mr. Scott and the NDP go further with their bill: In an innovation that has been mostly overlooked by the media so far, the bill also draws a road map for Quebecers to seek constitutional change within Confederation. This addition is important and puts into law the commitment Mr. Layton made during the last election: creating the winning conditions for Canada in Quebec.

Indeed, the orientation of my Bill C-470, *An Act Respecting Democratic Constitutional Change*, is first and foremost the recognition of Quebec's aspiration to have its distinctiveness not simply recognized but much better integrated into Canadian federal arrangements. It is important to reiterate that Bill C-470 applies to democratic constitutional change of all sorts; it could just as well outline the process for a referendum on whether Quebec should be included in the Constitution Act of 1982, therefore triggering a process leading to a stronger Canada. A less and less well known fact amongst Canadians outside Quebec is that not only did the Lévesque government of Quebec in 1982 refuse to sign on to the 1982 Constitution Act, but also successive governments of Quebec, including governments formed by the Liberal Party of Quebec, have all continued to refuse to sign on. The context in which the 1982 Constitution was generated and the continued refusal of Quebec governments to sign it have, unfortunately, fed into a narrative that is constantly hammered away at by the Bloc Québécois – namely, a refrain that the Canadian constitution was both imposed on Quebec and is illegitimate. This continues to allow separatists to stir up support – by fuelling a grievance culture and a feeling of exclusion – for its single-minded pursuit of separation.

Let me be even clearer. Quebec political parties of *all* persuasions (including the Liberal Party of Quebec) have long objected to how the 1982 amendments to our Constitution came about – that is, without Quebec's signature – and this remains a source of grievance. This is the case notwithstanding Mr. Trudeau's understanding of Canadian constitutional history as demonstrated by his response to a student at the Université de Montréal who commented it was difficult to feel fully Canadian given that Quebec had not given its consent to the constitutional amendments of 1982. [Mr. Trudeau told the assembled students](#), «C'est un beau mythe, ça, que le Québec ne soit pas signataire de l'Acte constitutionnel de 1982». (It's a tall tale [literally a beautiful or fine myth] that Quebec is not a signatory to the 1982 Constitution Act.) The student audience at the Université de Montréal literally burst out in laughter (at the ignorance displayed by the answer). Trudeau may be confused about the difference between Quebec's non-adherence to the accord amongst the provinces and federal government that resulted in the 1982 Constitution Act and the fact that, as a matter of law, the 1982 Constitution Act applies to Quebec despite its lack of agreement in 1982.

6. Bill C-470's antecedents

Setting aside the Bloc's manoeuvre as a proximate cause for Bill C-470 being brought forward at this precise time, it may nonetheless seem to some that Bill C-470 comes out of nowhere. It is important to understand why this is, most decidedly, not the case.

Ever since the NDP adopted a document known as the Sherbrooke Declaration (Appendix 1 of the NDP Policy Book, [*Québec's Voice and a Choice for a Different Canada*](#)), under Jack Layton's leadership in 2006, the NDP has clearly signalled that it wishes to turn the page on sterile debates based on an 'us / them' dynamic, and instead play a leadership role in building a constructive relationship between Quebec and the rest of Canada. It was the inclusive social-democratic vision in the Sherbrooke Declaration – so persuasively messaged by Jack – that Quebeckers came to understand and embrace in the May 2011 federal election, resulting in Quebeckers sending almost 60 New Democratic MPs to Ottawa while ousting all but four MPs of a separatist party (the Bloc Québécois). The NDP is now the first progressive federalist party to represent Quebec in the House of Commons in a full generation.

Within the Sherbrooke Declaration, there are seven sections on six two-columned pages. One of those sections and one of those pages is on self-determination (much of the rest deals with a vision of social democracy). Bill C-470 keeps faith with the following passage in that section (emphasis added):

[T]he NDP would recognize a majority decision (50%+1) of the Québec people in the event of a referendum on the political status of Québec. The NDP recognizes as well that the right to self-determination implies that the Assemblée nationale is able to write a referendum question and that the citizens of Québec are able to answer it freely. It would be to the Federal government to determine its own process in the spirit of the Supreme Court ruling and under international law, in response to the results of the popular consultation in Québec.

According to its values, the NDP rejects also any of – or threat of – force against Québec at any stage. Our vision is one of trust toward democracy, good faith and values of peace.

For the NDP, it is necessary to propose a positive vision of the future rather than contribute to polarize the debate. We want to develop a new attitude towards the whole debate, as our work must contribute to

the reinforcement and the renewal of federalism, not to maintain entrenched positions.

In this latter respect, the NDP also sought to give substance to a November 2006 House of Commons' motion, that was championed by Prime Minister Harper and then Liberal Leader Ignatieff, that recognized that "the Québécois form a nation within a united Canada." Although that motion was not an NDP initiative, the NDP appears to be the only party in the House of Commons that currently believes that the will of Parliament as expressed in that motion cannot be treated as empty words – as the Liberals and Conservatives now seem to want to treat it – and that we have a responsibility to give positive content to the motion in a way that embraces the reality and aspirations of Quebec.

7. Conclusion: further reasons why Canadian unity is more likely under Bill C-470 than under the Clarity Act regime

Allow me to end by being even clearer about one thing: my belief that secession is made *less* likely by this bill, in comparison to the approach taken in the Clarity Act.

First of all, [allow me to quote the Globe and Mail \(quoting me\)](#) on January 29:

Mr. Scott said the NDP proposal actually favours Canadian unity, by ensuring that Quebeckers feel respected inside the federation.

"By showing respect and a spirit of engagement, this bill actually makes it far less likely that we will ever see a separation scenario," said Mr. Scott...

As already mentioned, Bill C-470 constitutes a positive offer to Quebec society to pursue its aspirations within Canada. It expressly states in section 9 that a referendum on constitutional changes designed to accommodate Quebec as "a nation within a united Canada" (which status was recognized by all parties in the House of Commons motion several years ago) would be an "expression of democratic will" (to use the Supreme Court's language) of the people of Quebec that the federal government and other provinces would need to respect by agreeing to come to the negotiating table – to work out whether, and if so how, such changes could be agreed to and then subjected to the approval of the requisite number of legislatures as required by our Constitution's amending principles.

Secondly, the bill emphasizes the importance of any referendum question being both clear and fairly determined. Unlike the Clarity Act, *An Act respecting Democratic Constitutional Change*

places emphasis on clear questions that will prevent misleading statements or confusion on the meaning of the question so that Quebecers know exactly what they are voting for – in contrast to the deliberate lack of clarity in the Clarity Act about what a clear question would look like.

Thirdly, voters will know the stakes not only because of the clarity of a question like “Should Quebec separate and become a sovereign country?” but also because a simple majority is the threshold, such that they will vote for separation only if they are hard-core separatists. On this last point, astute political strategists have long argued persuasively that a higher threshold than a normal majority can produce a dynamic that makes a vote for secession more likely, not less likely. As [Mark Kennedy summarized the matter in the National Post](#) after an interview with me:

Uncertainty over the acceptable threshold for victory could even backfire on federalists, [Scott] said, because some Quebecers might vote for sovereignty to send a “signal” — only then to unhappily realize it helped secure a referendum victory for hard-core separatists.

As I concluded in my introductory remarks when tabling Bill C-470:

This bill shows that the NDP is focused on the future. We are working to build a stronger Canada that recognizes and includes Quebec as an essential part of our federation. We believe that a stronger Canada cannot be imposed, nor can it be achieved by divisive policies. This is our vision of democratic federalism.

And that’s why, adhering to Jack Layton’s unifying vision (a vision of a Canada that respects Quebec), the people of Quebec trusted the NDP and elected a progressive federalist majority in 2011 . This is why we see Bill C-470 as a continuation of our efforts to build sustainable and cooperative relationships as the essence of our democratic federalism.