THE DURABILITY OF TIME UNLIMITED LEGAL ARRANGEMENTS

Rt Hon Sir Ivor Richardson*

This paper highlights some instances where certainty and permanence were primary objectives of the parties and the outcomes were later challenged, sometimes successfully. When and why, then, is "forever" not forever? The paper focuses on international law, constitutional law, contract law, controlling provisions in company documents and the impact of perpetuities rules on succession to property. In discussing the subject areas the paper also explores how constitutional law and international law may overlap. The paper concludes by drawing four general conclusions from that survey.

Cet article s'intéresse aux circonstances qui justifient parfois, la remise en cause, d'engagements contractuels où pourtant la sécurité juridique et la perenité formaient les intentions premières des parties. Quand et pourquoi, ce qui était censé être pour toujours ne l'est plus? L'auteur dresse à l'appui d'exemples tirés du droit international, du droit constitutionnel ou encore du droit des contrats, une synthèse des principales situations de nature à justifier ces changements et en tire quatre principaux enseignements.

I INTRODUCTION

Finality and certainty are often primary objectives of those entering into legal arrangements, whether they are states, corporate bodies, natural persons or other legal entities. Particular problems may arise where the legal arrangements are designed to be permanent and are expressed in various shades of everlastingness, such as "lifelong", "forever", "at all times hereafter", "in perpetuity", "indissoluble", "indestructible", "till the end of time" and "in all succeeding generations", sometimes in combination.

This paper highlights various areas of the law where finality problems may arise. It focuses on international law and constitutional law, contract law, controlling provisions in company documents, and on succession to property. It

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does not attempt to review the whole field, let alone analyse all decided cases around the globe and all potential situations in which these questions may arise. It just sketches out some situations in which these questions have arisen in some common law jurisdictions and the principles adopted to resolve them.

The paper starts by noting the Treaty of Union of the two Kingdoms of England and Scotland which, as ratified and approved in the two nations, was ultimately set out in the Act of Union, 5 & 6 Anne, c VIII. It is a striking early example of expressing permanence through the strength of language designed to protect forever the Union and the established religion, education and laws of Scotland.

The paper then considers examples from constitutional law, international law, contract law, company law and succession to property. Constitutional law and international law may overlap where there are questions concerning the application of manner and form provisions and negotiated withdrawals, additions, other amendments and any financial and boundary adjustments.

II THE TREATY AND ACT OF UNION OF 1706

Article I provided:

> That the two Kingdoms of England and Scotland shall upon the first Day of May in the year one thousand seven hundred and seven and *for ever after*, be united into one Kingdom by the name of Great Britain ...

Article II provided for succession of the Monarchy to the "united Kingdom of Great Britain" and Article III continued "That the united Kingdom of Great Britain be represented by one and the same Parliament, to be stiled, The Parliament of Great Britain." Article XXII went on to specify the Scottish membership of the Parliament at Westminster and Article XIX protected the Scottish administration of justice:

> That the Court of Session, or College of Justice, do after the Union and notwithstanding thereof, *remain in all time coming within Scotland*, as it is now constituted by the Laws of that Kingdom, and with the same Authority and Privileges as before the Union, subject nevertheless to such Regulations for the better administration of Justice, as shall be made by the Parliament of Great Britain...

Similar language provided the Court of Justiciary "remain in all time coming in Scotland."

The Treaty and the Act of Union entrenched key national institutions of Scotland – the Kirk, the law (as already noted) and the educational system – in resounding language. In relation to religion, Queen Anne became Head of the

Church of Scotland with the Worship, Discipline, and Government of the Church to continue:

> without any Alteration to the People of this Land *in all succeeding generations*... [and the] Church, and its Presbyterian Church Government and Discipline... shall remain and continue *unalterable* [and] shall be the only Government of the Church within the Kingdom of Scotland.

Article XXV inextricably linked the education system into the Church of Scotland "*forever, and that in all time coming*..." no professors, masters or others bearing office in any university, college or school within Scotland shall be able to be admitted or allowed to continue without subscribing to the Confession of Faith, Worshiping, and submitting themselves to the Government and Discipline of the Church.

The Act of Union went on to statute and ordain that it "be and *continue, in all time coming, the sure and perpetual Foundation of a compleat and entire Union* of the two Kingdoms of Scotland and England."

The background to the Union, the protracted on and off negotiations and the processes involved are helpfully covered, succinctly in two recent histories by Frank Welsh and Norman Davies[1] and extensively in a text by Allan Maciness.[2]

The economic needs of Scotland and the unnerving prospect for England of a Stuart (the "Old Pretender") gaining the throne of Scotland supported by France were powerful influencing factors. But, the Union brought early disappointments to Scotland. Frank Welsh comments:[3]

> In English history the Act is an incident; in that of Scotland it is the central fact of modern times. Union with so much larger and more powerful a country changed the whole character of Scottish national life dramatically and permanently. At the same time the changes did not seem for the better, and the 'singular insensitivity and clumsiness with which the English political establishment treated Scotland after 1707' irritated even co-operative Scots.

In 1713, notwithstanding the assumed permanence of the Treaty and Act of Union, after an attempt was made to extend the expensive malt tax to Scotland, a

1 Frank Welsh *The Four Nations: A History of the United Kingdom* (Harper Collins, London, 2003) at 2003-2008; Norman Davies *The Isles: A History* (Pan Macmillan, London, 2000) at 520-528.

2 Allan I Maciness *Union and Empire: The Making of the United Kingdom in 1707* (Cambridge U P, Cambridge, 2007).

3 Welsh, above n 1, at 204.

proposal to dissolve the Union was put to the House of Lords. It was defeated by only four votes.[4]

Colin Turpin and Adam Tomkins explore various questions concerning the status of the Treaty and the Act raised since 1707 and leading on to devolution in 1998.[5] Turpin and Tomkins also note that the fundamental provision from 1707 obliging professors in Scottish universities to make a formal submission to Presbyterianism was repealed by the Universities (Scotland) Acts 1853 and 1932.[6]

III CONSTITUTIONAL LAW, INTERNATIONAL LAW AND NEGOTIATED AMENDMENTS

The topic is developed under three sub-headings: Negotiated Additions and Withdrawals; Manner and Form Rules; and, because of its wide contemporary significance, the implications of the 1998 judgment of the Supreme Court of Canada on the contemplated secession of Quebec are discussed under the sub-heading "The Contemplated Secession of Quebec from Canada".

A Negotiated Additions and Withdrawals

Secession and border changes may be accomplished by constitutional amendment or successful revolution. The literature on both topics is immense.

In the United States – itself the product of a successful revolution – the unilateral attempt by southern states to secede was rejected by the federal government in order "to preserve the union" and the south failed in the ensuing civil war. And there were breaks in legal continuity in England between the execution of Charles I in 1649 and the assumption of the throne by William and Mary in 1689.

There are many examples over the centuries of secession, absorption of all or part of another country or division into two or more states. As David Hackett Fischer explains:[7]

> In North America, British settlers and soldiers moved quickly to take over foreign posts – peacefully where possible, forcibly when necessary... After independence the

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4 Maciness, above n 2, at 324–325; Welsh, above n 1, at 204.

5 Colin Turpin and Adam Tomkins *British Government and the Constitution* (7th ed, Cambridge University Press, Cambridge, 2012) at 222-244; See also Professor J D B Mitchell "Sovereignty of Parliament – Yet Again" (1963) 179 LQR 196 and Elizabeth Wicks "A New Constitution for a New State? The 1707 Union of England and Scotland" (2001) 117 LQR 109.

6 At 223.

7 David Hackett Fischer *Fairness and Freedom: A History of Two Open Societies, New Zealand and the United States* (Oxford University Press, New York, 2012) at 334.

> new United States pursued a similar policy by other means. As national wealth increased, purchase became the method of choice. American leaders bought Louisiana from France (1803), East Florida from Spain (1819), the Gadsden Purchase from Mexico (1853), Alaska from Russia (1867) and great tracts of lands from Indians. When offers of purchase failed, Americans did not hesitate to use force. They took West Florida from Spain (1810), annexed Texas by an unconstitutional resolution (1844), and seized the vast lands of California, Utah, New Mexico and Arizona from the Mexican Republic in 1848 as spoils of war.

Then, in 1868 a claim by the reconstructed State Government of Texas in relation to bonds seized by the Texas government in the course of the civil war came before the United States Supreme Court in *Texas v White*.[8] The government had purported to withdraw from the Union with the backing of a three fourths majority of Texas voters. The questions for the Court were whether the purported secession was lawful and whether the reconstructed State Government could bring the proceeding. On the first question Chase CJ delivered the majority opinion (Grier J dissenting) rejecting secession. On the second the majority (Grier, Swayne and Miller JJ dissenting) held that the suit was instituted and presented by competent authority.

On the first question the majority said that by the Articles of Confederation of 1777:[9]

> The Union was declared to 'be perpetual'. And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union'. It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not? ... The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States ... The Union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

Within the British Empire and Commonwealth and other European empires there were many varied examples, well before the post-Second World War massive decolonisation processes which more than doubled the initial 1945 membership of the United Nations. The break-up of Yugoslavia and the Soviet Union posed new

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8 *Texas v White* (1868) 74 US 700.

9 At 725.

problems in developing criteria for recognition of new states. And after major wars the victors freely parcelled out lands of the vanquished.

Australia, South Africa and Canada provide uncomplicated examples of attempted changes. On federation of the self-governing colonies by the Commonwealth of Australia Constitution Act 1900 (GB) the new Commonwealth became a self-governing British colony.

The Preamble to the 1900 Act recorded that "the people of the [named colonies] have agreed to unite in one indissoluble Federal Colony under the Crown of Great Britain and Ireland and under the Constitution hereby established."

Russel Ward discusses Western Australia's attempted secession and movements for constitutional change in other States of the Commonwealth.[10] Many Western Australians believed that they were severely disadvantaged by federal economic policies and in May 1930 the Dominion League of Western Australia began to agitate for secession. Voting in a plebiscite held on 8 April 1933 resulted in an approximately two-thirds majority favouring secession which led to a petition to the British Parliament for secession from the Commonwealth. After a long delay a British Parliamentary Committee concluded in May 1935 that the petition could not properly be received.

The Union of South Africa became a self-governing colony in 1910 pursuant to the Union of South Africa Constitution Act 1909 (GB) and, following the Great War, the adjacent former German Colony of South West Africa was mandated to the Union which, however, after the Second World War refused to surrender the mandate to the United Nations and imposed its apartheid policy on the territory. After a long armed struggle and efforts by the United Nations, Namibia eventually became independent on 21 March 1990.

In Canada, Peter W Hogg discusses how an attempt by Nova Scotia in 1868 to secede backed by a petition in favour signed by nearly two-thirds of voters was blocked by the federal government.[11] Professor Hogg also explains the admission of Newfoundland to Canada.[12] Newfoundland had been a self-governing colony which, buffeted by the 1930s depression, had requested the United Kingdom in 1933 to suspend its constitution until it became self-supporting again and for it to be governed by a Commission appointed by the British Government. Admission as

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10 Russel Ward *A Nation for a Continent: The History of Australia 1901-1975* (Heinemann, Richmond, Victoria, 1988) at 203-208.

11 Peter W Hogg *Constitutional Law of Canada* (4th ed, Thomson Carswell, Toronto, 1997) at [5.7(b)].

12 At [2.5(e)] and [5.7(b)], n 239.

a Province of Canada resulted from agreement between Canada and the Colonial Office, preceded by a referendum in Newfoundland (there being no extant legislature in Newfoundland) and effected by the British North America Act 1949 (UK).

B Manner and Form Rules

Manner and form requirements may impose legitimate procedural restraints on amendment processes in constitutions and other enactments. They may also be misused by the executive and the legislature to stifle any changes by creating process barriers which are insurmountable in practice or attempt to perpetuate policy decisions and matters of substance.

The apartheid structure in South Africa is a classic case of misuse by the executive and legislature. Australia, Canada and New Zealand illustrate the working out of manner and form rules.

The apartheid regime structured in South Africa and reflected in the *Harris v Ministry of the Interior*[13] litigation illustrates how a determined controlling white minority intent on embedding total legislative power was stymied by the Judiciary but then found a circuitous legal way to achieve its objective. That regime endured until progressively ameliorated in the 1990s under President de Klerk and the introduction of a democratic constitution with universal suffrage resulting in Nelson Mandela becoming President of the Republic at the polls in 1994.[14] The Representation of Natives Act 1936 had minimised any electoral influence of the huge black majority of the population. The Separate Representation of Voters Act 1951 of Cape Province was designed to degrade the status and power of "coloured" voters, who had previously been included along with "whites" in a combined list. The 1951 Bill defined "white person" as a person "who in appearance obviously is or who is generally accepted as a white person, but does not include a person who, although in appearance a white person is generally accepted as a non-European" and provided for separate rolls and representation. The Government had decided that it was not subject to the manner and form requirements of the Union of South Africa Act 1909 (GB) and would follow its own Parliamentary rules for passage of the Bill.

In *Harris v Ministry of the Interior* the five Judges of the Supreme Court of South Africa unanimously declared the 1951 Act invalid. The Supreme Court held

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13 *Harris v Ministry of the Interior* [1952] 2 SALR 428.

14 See Martin Meredith, *The State of Africa: A History of Fifty Years of Independence* (Simon and Schuster, London, 2006) at 434-440.

the Act to be invalid because it was not passed in conformity with the provisions of s 35(1) and s 152 of the 1909 legislation, which entrenched s 35 and required a two-thirds majority in a joint session of Parliament. Separate majority votes in the two Houses did not satisfy that requirement. A second case also failed in the Supreme Court.[15] However, the Government passed a separate Act which enlarged the Senate so as to facilitate further appointments to satisfy the two-thirds requirement.[16]

Attorney-General for New South Wales v Trethowan[17] raised a particular question only explored in the judgment of McTiernan J and 20 years later the subject of extended consideration by Professor W Friedmann.[18] Professor Friedmann discussed McTiernan J's proposition that certain kinds of legislation may, under the guise "manner and form" really be legislation as to substance. He concluded that it would be safe to say that a provision affecting the Upper House of parliament and requiring 80% of all votes in a referendum "would make any constitutional alteration of the functions of the Upper House virtually impossible". As such it would be subject to invalidation as exceeding the bounds of a manner and form process provision, and as constituting an abuse of the exercise of legislative power.[19]

Professor Hogg, under the heading "Manner and form of future laws" develops the proposition that: [20]

> While a legislative body is not bound by self-imposed restraints as to the content, substance or policy of its enactments, it is reasonably clear that a legislative body may be bound by self-imposed procedural (or manner and form) restraints on its enactments.

He notes that in the leading Canadian case, *R v Mercure*[21] the Supreme Court held that a Saskatchewan statute enacted in English only in breach of a bilingual

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15 *Ministry of the Interior v Harris* [1952] 4 SALR 769.

16 Dion Basson and Henning Viljoen *South African Constitutional Law* (Juta, Cape Town, 1988) at 180-181; HR Hahlo and Ellison Kahn *The Union of South Africa: The Development of its Laws and Constitution* (Stevens, London, 1960) at 146-163.

17 *Attorney-General for New South Wales v Trethowan* (1931) 44 CLR 394; [1932] AC 526 (PC).

18 W Friedmann "Trethowan's Case, Parliamentary Sovereignty and the Limits of Legal Change" (1950) 24 Aust LJ 103.

19 At 105.

20 Peter Hogg, above n 11, at [12.3(b)].

21 *R v Mercure* [1988] SCR 234.

requirement was no different from a self-imposed manner and form requirement and was accordingly invalidated.[22]

And he goes on to conclude his survey of the field:[23]

> A statutory provision that is unmistakably addressed to the future action of the enacting legislative body may be a manner and form provision. But it is not necessarily so. A statutory provision that looks like a manner and form provision may be one of four other kinds of laws. First, the statutory provision could be regarded as an attempt to restrict the substance of future legislation, which is of course ineffective. Secondly, the statutory provision could be regarded as a 'directory' procedural requirement; the breach of a directory, as opposed to a mandatory, requirement does not lead to invalidity. Thirdly, the statutory provision could be regarded as a rule of interpretation, which would be displaced by any clear statutory indication to the contrary. Fourthly, the statutory provision could be regarded as an 'internal' rule of parliamentary procedure; the breach of such a procedure does not invalidate the resulting statute.

Needless to say there is ample academic comment on all these questions in the literature.[24] By adopting a moderate stance the New Zealand Parliament has largely steered clear of these difficulties. The Constitution Act 1986 s 15(1) simply states: "The Parliament of New Zealand continues to have full power to make laws." It does not limit the legislative power. But the Electoral Act 1993 restricts the manner by which the reserved provisions may be amended or repealed. The Electoral Referendum Act 2010 governed the 2011 referendum and expired six months after the result of the referendum was declared.[25] It regulated the conduct of the referendum and the counting of the votes cast.

As listed in s 268(1) of the Electoral Act, the reserved provisions relate to (a) the term of Parliament, (b) the Representation Commission, (c) the division of New Zealand into electoral districts, (d) the allowance for the adjustment of the quota for any General electoral district, (e) the provisions prescribing 18 years as the minimum age to vote, and (f) the method of voting. Section 268(2) then states:

> No reserved provision shall be repealed or amended unless the proposal for the amendment or repeal –

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22 Peter Hogg, above n 11, at 317.

23 At 319.

24 See for example Jerome B Elkind "A New Look at Entrenchment" (1987) 50 MLR 158.

25 Section 5(1).

(a) is passed by a majority of 75% of all the members of the House of Representatives; or

(b) has been carried by a majority of the valid votes cast at a poll of the electors of the General and Maori electoral districts...

Section 268(2) is not itself entrenched and could be repealed by a bare majority but that is highly unlikely in the proportional representation environment.

Finally, as to the Electoral Act, s 266 provides an express statutory basis for validating irregularities. It treats certain procedural requirements affecting elections as directory rather than mandatory – as was done by the Court of Appeal in *Simpson v Attorney-General*.[26]

The Electoral Referendum Act provided for voting on two separate matters. Part A was whether to continue with the then current MMP (mixed member proportional) representation system of voting or to change to another voting system. Under Part B, (if the majority expressed by s 74 as "50% or more of the valid votes cast in relation to Part A", favoured retention), electors expressed their preference between four alternative systems (First Past the Post, and three different proportional representative systems). By s 17 the returning officer was required to "ascertain the number of valid votes cast for each of the options for the question" in Part A and Part B respectively and by ss 19 and 20 the Electoral Commission was required to follow the same "total number of votes cast" standard in determining and declaring the result of the referendum.

The yardstick for the count (and also for the count under a referendum under s 268(2)(b)) thus avoids any hypothetical questions which may arise from requiring high percentage majorities or from the influence of the turnout on various categories of voters where the yardstick is percentage of voters on the roll. But, the requirement of a majority of 75 per cent under s 268(2) would effectively require a bipartisan or multi-party accord to avoid the usually unwelcome alternative of a referendum. And in *Shaw v Commissioner of Inland Revenue* the Court of Appeal affirmed that Parliament is subject to laws governing the manner in which its Acts are created:[27]

> The Court's power under s 3 [of the Declaratory Judgments Act 1908] to consider the validity of legislation is limited to ensuring that a statute was properly enacted; in other words the Court may determine whether Parliament itself has followed the laws that govern the manner in which legislation is created. Parliament is subject to

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26 *Simpson v Attorney-General* [1955] NZLR 271 (SC).

27 *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at 157.

law just like every other person or body in New Zealand; it is bound by statutory requirements...

C The Contemplated Secession of Quebec from Canada

The judgment in *Reference Re Secession of Quebec*[28] must rank as one of the most important cases ever decided by the Supreme Court. It was heard over four days in February 1998 and the judgment was delivered on 20 August 1998.

After years of political discord and unsuccessful attempts by the federal Government and the provinces to negotiate accords the Canadian Government asked the Court to consider whether or not the province of Quebec had the right to secede unilaterally from Canada. The Reference posed three questions:

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

I suggest that the Court's judgment is particularly important outside as well as within Canada for four reasons. First, it brings home the value of the pattern of regional representation on the Court which, as Professor Hogg explains, ensures that:[29]

> … there are judges on the Court who are personally familiar with each major region of the country, and who can bring to the decision of a case from that region an understanding of the region's distinctive legal, social and economic character.

Second, a single judgment of the Court, signed by all nine judges, was delivered providing clarity and enhancing the authority of the decision.

28 *Reference Re Secession of Quebec* [1998] 2 SCR 117.

29 Peter Hogg, above n 11, at 232].

Third, the clear rejection of the right to secede unilaterally was supported by the careful canvassing and weighing of all the constitutional and international law arguments advanced.

Fourth, the crucial emphasis the Court gave to good faith negotiations on any specific proposal to pursue negotiations backed by a clear majority of the population of Quebec in a referendum and the Court's indication of various matters to be considered in any negotiations, presented a balanced compromise which was well-received in both the English and French press.

It is sufficient for present purposes to cite from the "Summary of Conclusions" and also at [96] relating to the content of any negotiations:

> [148] ... We have emphasised that the Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles that animate the whole of our Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event a clear majority votes on a clear question in favour of secession.
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> [149] ... 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.
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> [150] ... Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order.
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> [151] Quebec could not, however, 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 clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada ... No one suggests that it would be an easy set of negotiations.

[153] The task of the Court has been to clarify the legal framework within which political decisions are to be taken 'under the Constitution', not to usurp the prerogatives of the political forces that operate within that framework. The obligations we have identified are binding obligations under the Constitution of Canada...To the extent issues addressed in the course of negotiations are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.

[154] We have also considered whether a positive legal entitlement to secession exists under international law in the factual circumstances contemplated by Question 1, i.e. a clear democratic expression of support on a clear question for Quebec secession. Some of those who supported an affirmative answer to this question did so on the basis of the recognised right to self-determination that belongs to all 'peoples'. Although much of the Quebec population certainly share many of the characteristics of a people, it is not necessary to decide the 'people' issue because, whatever maybe the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of peoples at international law where a 'people' is governed as part of a colonial empire; where a 'people' is subject to alien subjugation, dominance or exploitation; and possibly where a 'people' is denied any meaningful exercise of its right to self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be said that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to the secession of Quebec from Canada unilaterally.

Paragraph 96 states:

> No one can predict the course that such negotiations might take. The possibility that they might not lead to an agreement amongst the parties must be recognised. Negotiations following a referendum vote in favour of seeking secession would inevitably address a wide range of issues, many of wide import, After 131 years of Confederation, there exists, inevitably, a high level of integration in economic, political and social institutions across Canada. The vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces. Accordingly, while there are regional economic interests, which sometimes coincide with provincial boundaries, there are also national interests and enterprises (both public and private) that would face potential dismemberment. There is a national economy and a national debt. Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many respects, could be effortlessly separated along what are now the provincial boundaries of Quebec...

The Quebec secession case led to the consequential Clarity Act 2000 providing briefly for the Supreme Court's requirements of a clear question (s 1) and a clear majority (s 2) and for certain aspects of secession negotiations (s 3). These requirements have been discussed in Canadian academic law reviews and texts but with little focus on the necessarily detailed content of negotiations for the pathway to secession in Canada and elsewhere.[30]

In her wide-ranging discussion Professor Mancini remarks:[31]

> Between 1869, when the US Supreme Court ruled out categorically the very possibility of secession, and 1998, when the Canadian Court legitimized a

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30 See for example Susanna Mancini "Secession and Self-Determination" in Michel Rosenfeld and András Sojó (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012) 481; Patrick J Menahan *Constitutional Law* (3rd ed, Irwin Law, Toronto, 2006) at 214–228 and 479–485 and "Forum: The Canadian Unity Debate and its Impacts in Atlantic Canada" (2002) 51 University of New Brunswick Law Journal 259.

31 At 498. See also the discussion of *Texas v White* and other constitutional and international studies in Hogg, above n 11 at [5.7(a)] and [5.7(c)]; and, historically, for the British Empire and Commonwealth, see Sir Kenneth Roberts–Wray *Commonwealth and Colonial Law* (Stevens, London, 1966) at 364-368 and 410–419 and the detailed material on individual states and territories in the appendices at 655–994.

> democratic secession process, the conceptualization of federalism and the actual implementation of federal models had changed dramatically... most federal constitutions today are not ordained to form 'a more perfect Union', but, rather, to loosen ties to a union that has become unbearable to many. Thus, the idea that constitutions do not necessarily look to 'indestructible unions' and that they may contain international (or confederal) elements seems to re-emerge in contemporary constitutionalism. In fact, comparative analysis shows that there is an increasing number of 'borderline constitutions' that combine federal and confederal features.

IV PRIVATE LAW

Turning from international law and constitutional law situations to essentially private law subjects, the second half of the paper discusses in turn: contract; entrenching powers of control of companies; and the impact of rules against perpetuities on succession to property.

The Power Co Ltd v Gore District Council[32] is a striking illustration of the application of contract and administrative law principles to a challenged contract by deed of 30 March 1927 between the Southland Electric Power Board and the Gore Borough Council (the statutory predecessors of the Power Co and the District Council). Clause 19 provided that "The provisions of this Deed shall be binding upon the Board and the Council for all time hereafter."

The Council had supplied electricity to residences and businesses within the borough, as well as for its own use. From early in the 20th century it had obtained its electricity supply initially from a nearby freezing works and then from the Board, which constructed a power station at Lake Monowai that began to generate electricity in May 1925. All steps were taken under statutory authority.

An initial agreement for a term of years was replaced by the agreement in question under which the Board purchased the Council's electricity reticulation system and associated works except for the assets used for its street lighting and its own municipal purposes. The Board covenanted to provide a continuous supply of electricity to the Council for its own purposes and to all present and future consumers within the borough. The agreement included a scale of charges to consumers not to be "higher at any time or under any circumstances" than as set out subject to adjustments and with other protective provisions, but the charge to the Council for its energy requirements was fixed by clause 15 "at the price of one penny per unit ..."

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32 *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA).

The Court of Appeal summarised the arguments for the appellant Power Co and the reasons for rejecting them in this way:[33]

> The appellant advances three arguments. The first is that the commitment which the board purported to make to the council was ultra vires the board and that the agreement was therefore void from its inception notwithstanding that it has been acted upon for nearly 70 years and that assets were transferred pursuant to it from the council to the board in 1927. The second is that the appellant is entitled to bring the agreement to an end on reasonable notice, which it purported to do as from 1 July 1996 by notice given on 28 February 1995. If that course was not open to the appellant it says, as its third argument, that the agreement has been frustrated by events occurring over the last 20 years, especially the decrease in the value of the New Zealand currency (inflation) and the reorganisation of the electricity industry.
>
> ... As to the first, the fettering of the discretion argument, we conclude that the challenged clauses of the agreement fall squarely within the powers expressly conferred by the relevant statute, the Electric-power Boards Act 1925, which should not be read down by reference to the Public Works Regulations 1922 which concern charges for electricity. The potential for executive and legislative supervision of such undertakings and the pattern of legislation altering the relationship between the various public authorities involved reinforce that conclusion.
>
> As to the second, the contention for the appellant is that the right to terminate on notice arose after a reasonable time had elapsed, not that it was exercisable from the date of execution of the agreement. We conclude that the proposed implied term contradicts cl 19 of the agreement, is uncertain to the point of vagueness, and there is nothing in the agreement or the surrounding circumstances from which the terms of any inferred provisions could be spelt out.
>
> The third argument is that the high level of inflation which had occurred in the 1970s and 1980s was a supervening event of such a character that the obligation on the appellant, as successor to the board, had become radically different from that undertaken or contemplated in the 1927 contract. We conclude that the board gained continuing and long-term advantages in exchange for agreeing to supply at the prices fixed for all time both for the supply to the council and for supplies to the council's consumers. One cannot look merely at the effect of inflation on the prices in the contract without considering also the benefits gained by the board. Looked at as a whole, the effects of the contract have changed in various ways, but not to such a fundamental extent as to have brought it to an end by frustration.

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33 At 540.

> Finally, while we have dealt with the frustration argument applying conventional frustration principles applicable to private contracts, we record that such principles may be of limited relevance in cases such as the present involving long-term relationships between public agencies where adjustment can be sought and effected through legislative review and administrative action (including the possibility of renegotiation).

Elaborating on the frustration question and after discussing general principles of frustration and the detailed evidence the Court concluded:[34]

> It is impossible in the light of these figures to argue that the fixed cost to the successor of the council has caused so dramatic an imbalance as to make the contract fundamentally different. The obligations on the power board, now on The Power Co, under cl 15 of the deed are more onerous. The gain from the accession of the Gore consumers has become more advantageous. The Gore consumers are no longer supplied pursuant to the deed, but their custom was originally obtained through the deed, and the long-term benefit of that gain has been enhanced. Looked at as a whole, the effects of the contract have changed in various ways but not to such a fundamental extent as to have brought it to an end by frustration.

The judgment then returned briefly to the earlier comment on the frustration of contracts between public agencies.[35]

In *Auckland Electric Power Board v Electricity Corporation of New Zealand*[36] the Court of Appeal had concluded on its analysis of the State-Owned Enterprises Act 1986 that the requirements of s 4 on the Corporation "to operate as a successful business" and to "be as profitable and efficient as comparable businesses not owned by the Crown", while having generalised responsibilities "to be a good employer" and "to exhibit a sense of social responsibility", along with the shareholder and accountability provisions under the Act left no room in the statutory scheme for a civil action for breach of statutory duty or judicial review at the suit of a customer of the SOE. That left the Corporation subject to the ordinary rules of contract law.

In *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*[37] the Privy Council upheld the argument for Mercury (the renamed Auckland Electric

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34 At 555.

35 At 555–556, without citing any authorities.

36 *Auckland Electric Power Board v Electricity Corporation of New Zealand* [1994] 1 NZLR 551 (CA).

37 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC).

Power Board), that, in principle, the decisions of the Corporation were amenable to judicial review both under the Judicature Amendment Act 1972 and under the common law. This was on the grounds that it was a public body whose decisions in the public interest might adversely affect the rights and liabilities of private individuals without affording them any redress. However, it concluded that there was nothing in the statement of claim or the particulars which supported a claim to judicial review.[38]

Significantly for present purposes, the Judicial Committee then set out to narrow the possibility of judicial review against state-owned enterprises and emphasised other accountabilities against excessive prices and related industrial disputes:[39]

> It does not seem likely that a decision by a state-owned enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith. Increases in prices whether by state-owned or private monopolies or by powerful traders may be subjected to voluntary or common law or legislative control or may be uncontrolled. Where a state-owned enterprise is concerned, the shareholding ministers may exercise powers to ensure directly or indirectly that there are no price increases which the ministers regard as excessive. Retribution for excessive prices is likely to be exacted on the directors of the state-owned enterprises at the hands of the ministers. Retribution is likely to be exacted on the ministers at the hands of the House of Representatives and on the elected members of the House of Representatives at the hands of the electorate. Industrial disputes over prices and related matters can only be solved by industry or by government interference and not by judicial interference in the absence of a breach of the law.

Mercury Energy remains the leading authority on the limited scope of judicial review of government contracting decisions. The decision has prompted much comment. Professor David Mullan's recent article "The State of Judicial Scrutiny of Public Contracting in New Zealand and Canada" helpfully, and sufficiently for present purposes, reviews the cases and academic commentary.[40]

In *Gore District Council v The Power Co Ltd*[41] the Power Company argued again that the contract had been brought to an end by frustration. William Young J

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38 At 391.

39 At 391.

40 David Mullan "The State of Judicial Scrutiny of Public Contracting in New Zealand and Canada" (2012) 43 VUWLR 173

41 *Gore District Council v The Power Co Ltd* [2003] 1 NZLR 697 (HC).

upheld the continuing validity of the 1927 agreement. He rejected argument that the Electricity Industry Reform Act 1998, which prohibited involvement in both an electricity lines business and an electric supply business, had frustrated the contract. The Power Company did not advance an argument that conventional frustration principles did not apply to this time unlimited contract between government agencies.

Maggbury Pty Ltd v Hafele Australia Pty Ltd[42] and *Harbinger UK Ltd v GE Information Services Ltd*[43] are also in point.

In *Maggbury* covenants not to disclose certain confidential information imparted in the course of negotiations with a prospective commercial partner relating to Australian patent applications for a foldaway ironing board were subsequently disclosed, as required in a published application by Maggbury under the Patent Cooperation Treaty, and by Maggbury at trade fairs. The covenants specified that Hafele (cl 5.6) would not "at any time hereafter" use the information "for any purpose whatsoever" except with Maggbury's consent; and would (cl 11) "forever" observe the obligations of confidence, unless released by Maggbury. Negotiations failed and Hafele began distributing a foldaway ironing board. No patents had been granted. Maggbury contended that "the injunctions enforce negative stipulations ... which, on their proper construction, continue 'forever' and do not depend upon the continuation of secrecy or lack of public disclosure."[44]

By a majority the High Court of Australia (Gleeson CJ, Gummow and Hayne JJ, Kirby and Callinan JJ dissenting) dismissed the appeal. The majority judgment concluded that the covenants operated as a restraint of trade and that the rights attaching to the confidential quality of the information in question did not involve the ability to enforce restraints where the information had become available from public sources as a result of disclosures by the party asserting the quality of confidence.[45] The majority judgment noted that Maggbury had not sought at trial to justify the restraints as reasonable in the interests of the public and the parties.[46]

Both Kirby J[47] and Callinan J[48] accepted the time unlimited quality of the restraint but considered that the doctrine of restraint did not render those

42 *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 (HCA).

43 *Harbinger UK Ltd v GE Information Services Ltd* [2000] 1 All ER (Comm) 166 (CA).

44 At [38].

45 At [54].

46 At [57].

47 At [62].

constraints unenforceable and concluded that an injunction to prevent further use of the information was an appropriate remedy.

I pause to mention that, in his critique of *Maggbury,* Dr David J Brennan contended that the High Court majority arguably unduly favoured the facilitation of trade in the market for ironing boards, rather than maximising the benefits which flow from providing greater security for those who develop intellectual property.[49] However, he concluded:[50]

> It may be that it is possible to exaggerate the extent to which in *Maggbury* the desirable outcomes of providing incentives for intellectual property and facilitating trade are in conflict. For once the restraint of trade doctrine and springboarding principles are understood, rational solutions which navigate a middle course between the two extremes readily appear. It seems that Hafele should not be restrained 'forever', but nor should it be able to opportunistically expropriate the value of Allen [of *Maggbury*]'s information without regard to the contractual relationship of confidence. Once courts begin to better express the recognisable interests that support as reasonable the contractual restraints, and once the restraint doctrine is expressly applied at the time of break, it may well be that injunctions limited to reasonable periods, or restitutionary monetary sums for springboarding uses over such periods will provide more compelling remedial alternatives to the 'all or nothing' response of which *Maggbury* is an example.

Harbinger reflects a similar reluctance to accept the time unlimited force of "forever". In *Harbinger* the appellant GE Information Services had exercised their contractual right to terminate a software supply contract for their customers as end users, leaving the separate contractual obligation of Harbinger to provide after sales service support "in perpetuity" in return for an annual payment. Evans LJ, Potter LJ and Alliot J concurring, construed the obligation as continuing "without limit of time ... [but] not literally 'forever' or 'until the crack of doom'".[51] The after sales support was important for customers, but:

> The time will come when the technology is superseded and the software is outdated. As a result, customers will require a change in the software (and no doubt in the hardware which they use) and they will no longer make the annual payments in return for which the services are provided. No-one can predict definitely when this

48 At [97].

49 David Brennan "Springboards and Ironing Boards: Confidential Information as a Restraint of Trade" (2005) 21 Journal of Contract Law 71.

50 At 95.

51 At 170.

> will occur. But until it does, the contract and the obligation both survive. ... The respondent's obligation continues until the appellants and their customers no longer require and are willing to pay for the support and maintenance services.

That nuanced interpretation was the Court's response to the commercial unreality of the time unlimited contractual language. I suggest that in adopting that construction the Court was substituting a unilateral right to terminate the contract for the right the parties always had to end it by mutual agreement and doubtless would have exercised when the nuanced time was reached or earlier under a negotiated settlement.

Corbin on Contracts, "Promises of Performance without a Time Limit", explores such promises which seem to be clear and definite in meaning yet are capable of several interpretations having very different legal effects.[52] His analysis is an interesting parallel to Professor Hogg's illustration of statutory provisions that look like a manner and form provision yet may be one of four other kinds of laws.

Corbin's first example is where the promoter of a real estate development sells a lot to X for $1,000, and promises X that "no other lot in the tract shall ever be sold for less than $1,000."[53] The quoted words seem to be clear and definite in meaning. But they may be interpreted (and *Corbin* cites numerous decided cases) as meaning that: (1) neither the promoter nor any successor in title will ever, in perpetuity, sell any lot for less than $1,000; (2) only the promoter will never, during his or her life, sell any lot for less than $1,000; (3) neither the promoter nor any successor will sell any lot for less than $1,000 within a reasonable time.

Corbin notes that neither (2) nor (3) can be clearly expressed without using different words but that no one ever expresses all his or her intentions clearly to others and people often use words, even in express contracts, without having any clear notion of what they want to say. It may be equally impossible to tell either what the promisor meant by the words used or what the promisee understood by them. That being so, the court may be content to determine; (4) what meaning a reasonable person would have given to the promissory words under the circumstances then existing. This, too, may be exceedingly difficult.

But, *Corbin* adds, rules of interpretation are commonly laid down to the effect that words should be interpreted so as to achieve a reasonable result rather than an

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52 Arthur Linton Corbin *Corbin on Contracts* (West Publishing, St Paul, Minnesota, 1960) at [553].

53 At 212–214.

unreasonable one, and so that the agreement may be valid rather than invalid.[54] Then, *Corbin* emphasises that:[55]

> In cases so numerous as to be impossible of full citation here, the [American] courts have held that evidence of practical interpretation and construction by the parties is admissible to aid in choosing the meaning to which legal effect will be given.

Finally, J D Heydon, concludes his discussion of injunctions against future breaches in this way: [56]

> One final problem about injunctions to which a final answer has not been returned is how long an injunction should last after public disclosure of the information. Some authorities hold that the injunction should be perpetual, despite the public disclosure, to prevent the defendant profiting from the wrong. Others hold that the public disclosure ends the obligation of the defendant to respect the confidence. It may be that the answer will depend on whether it was the plaintiff or a third person who disclosed the secret to the public. An interesting compromise solution has been adopted in America [FN *Winston Research Corp v Minnesota Mining & Manufacturing Co* 350 F 2d 134 at 142 (CCA 9th Circ, 1965) that '[The correct period is] the approximate period it would require a legitimate ... competitor to develop a successful machine after the public disclosure of the secret information'.]

V ENTRENCHING POWERS OF CONTROL OF COMPANIES

The topic is considered under four sub-headings: New Zealand Steel Limited – an early New Zealand example; Entrenching Powers of Control under the New Zealand Companies Act 1993; The United Kingdom – the Thatcher and Post-Thatcher Years; and Australia.

A New Zealand Steel Limited – an Early New Zealand Example

Section 12(1) of the Iron and Steel Industry Act 1959 provided for Crown participation in the formation of an investigating company: "for the purpose of prospecting for or testing ironsands or generally ascertaining the advisability of establishing an iron and steel industry in New Zealand."

By 1965 the technical problems of separating out titanium from the ironsands had been sufficiently resolved and the development of a smelting plant for the new industry was proceeding. Section 7(1) of the Iron and Steel Industry Amendment

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54 At [558].

55 At 249.

56 J D Heydon *The Restraint of Trade Doctrine* (3rd ed, LexisNexis Butterworths Australia, Chatswood, NSW, 2008) at 110.

Act 1965 was then enacted adding a new s 13(1) to the 1959 Act titled "Shares in operating company":

> The Minister of Industries and Commerce may from time to time, on behalf of Her Majesty the Queen, subscribe for or otherwise acquire shares in any company ... formed for the purpose of establishing and carrying on an iron and steel industry in New Zealand, and may from time to time exercise on behalf of Her Majesty all Her Majesty's rights and powers as the holder of any such shares.

The establishment of the industry had bipartisan Parliamentary support but there was considerable debate over the extent of private participation. The Labour Opposition favoured majority Crown ownership. The National Government emphasised private shareholding. The Deputy Prime Minister and Minister of Industries and Commerce, the Hon J R Marshall, said "The Government is prepared to take 25% of the equity capital, but we would like to get more than the 75%"[57] and "We want to see the widest shareholding ... It is not correct to say the taxpayer is subsidising this company ... everything the company is getting will provide a return for the taxpayer."[58] The Hon T P Shand, Minister of Mines, added "I should like to see a limitation on overseas shareholding, as we intend to have, with as wide a local shareholding as possible."[59]

The legal arrangements (in which, as happens, the writer was involved) were complex. Clause 3 of the Memorandum of Association in conjunction with reg 25 of the Articles of Association relating to ownership and transfer of shares entrenched and limited the Crown's controlling powers.[60]

Clause 3 of the Memorandum of Association provided:

> Subject to the provisions of the Companies Act 1955 the Company may from time to time alter or add to its Articles of Association Provided However that when and so long as either:
>
> (1) Her Majesty the Queen or any agency of the Crown holds any security from the Company; or
>
> (2) Her Majesty or any agency of the Crown is guarantor under any guarantee with respect to the Company or in relation to the obligations of the Company; or

57 (26 October 1965) 345 NZPD 3859.

58 (26 October 1965) 345 NZPD 3860.

59 (26 October 1965) 345 NZPD 3864.

60 The relevant company documents are on record at the Turnbull Library, National Library of New Zealand, Wellington under "BHP New Zealand Steel" reference numbers 1548530 and 1548531.

(3) The Company has the sole right to process any New Zealand ironsands for steel production;

(4) Any share in the capital of the Company is held by Her Majesty the Queen or any agency of the Crown or by any nominee for the time being duly authorised in writing by the Minister of Finance -

then no alteration of or addition to the Company's Articles of Association which would: -

A. deprive or have the effect of depriving Her Majesty the Queen of her rights to nominate and appoint Directors of the Company as set out in the original Articles of Association; or

B. Alter or have the effect of altering the provisions for or restrictions on ownership transfer or allotment of shares as set out in Regulation 25 of the Company's original Articles of Association -

shall have any validity unless in either case Her Majesty the Queen consents to the alteration or addition in writing given under the hand of the Minister of Industries and Commerce for the time being or of such other person as may from time to time be designated by Her Majesty the Queen in that regard.

Regulation 25 (a), (b), (c) and (d) of the Articles of Association respectively provided:

(a) Shares representing not less than eighty per centum of the voting power exercisable by members entitled to be present and vote at any general meeting of the company shall be held by persons each of whom is domiciled in New Zealand.

(b) Shares representing more than fifteen per centum of the voting power exercisable by members entitled to be present and vote at any general meeting of the company shall not be held by a person who is not domiciled in New Zealand.

(c) It shall be the responsibility of the directors of the company to ensure so far as is reasonably possible that the preceding paragraphs of this Regulation are complied with at all times.

(d) Every application for shares in the company and every transfer of shares in the company shall be in the form prescribed and shall include a statement as to the domicile of the applicant or transferee as the case may be.

Paragraphs (e) to (q) provided supplementary and ancillary support and forms were prescribed.

Dr D A Bold was a metallurgist and senior manager at New Zealand Steel. Following his retirement from the industry he went on to complete degrees in history at the University of Auckland. His doctoral thesis is a fascinating account of the history of the industry, the establishment of the Company and the technical and marketing problems it faced at the outset and over the years.[61] As well, it records the power plays involved within the bureaucracy, the political establishment and the industry.

To complete the roller-coaster saga of New Zealand Steel, in October 1987 the Government sold its then 80 per cent shareholding to Equiticorp Holdings. Following the almost immediate collapse of Equiticorp in the sharemarket crash the same month, the statutory manager of Equiticorp sold New Zealand Steel in 1989 to a consortium of BHP, Fisher and Paykel, Steel and Tube and the ANZ Bank. In 1992 BHP bought out Fisher and Paykel and Steel and Tube and adopted the new name of BHP New Zealand Steel Limited. In 2002 BHP renamed it New Zealand Steel Limited and it is now a subsidiary of Bluescope Steel Limited.

Whether or not the establishment and functioning of New Zealand Steel under the entrenchment provisions of the Memorandum and Articles of Association and the eventual outcome would have satisfied the ambitions of those involved in the 1960s remains an open question.

B Entrenching Powers of Control under the New Zealand Companies Act 1993

The long title describes the statute as:

An Act to reform the law relating to companies, and, in particular,–

(a) to reaffirm the value of the company as a means of achieving economic and social benefits through the aggregation of capital for productive purposes, the spread of economic risk, and the taking of business risks; and

(b) to provide basic and adaptable requirements for the incorporation, organisation, and operation of companies; and

(c) to define the relationships between companies and their directors, shareholders, and creditors;…

Paragraphs (d) and (e) relate to management and insolvency matters respectively.

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61 D A Bold "A Vision Unfulfilled: the Iron and Steel Industry in New Zealand, 1842 to 1975" (PhD Thesis, University of Auckland, 2001). A copy is held at the Turnbull Library, Call number P q338.4766 BOL 2001.

By s 31(2) "Subject to this Act, the constitution of a company is binding as between - (a) the company and each shareholder and (b) each shareholder – in accordance with its terms"; by s 32(2) "... the shareholders may, by special resolution, alter or revoke the constitution of the company"; and by s 2(1) "'special resolution' means a resolution approved by a majority of 75% or, if a higher majority is required by the constitution, that higher majority of votes of those entitled to vote and voting on the question."

As Watts, Campbell and Hare[62] under the sub-heading "Fettering the shareholders' power to alter or revoke a constitution", conclude, "... The constitution could therefore provide that a special resolution (which, of course, is needed to alter or revoke a constitution) requires 100 per cent shareholder support."

C The United Kingdom – The Thatcher and Post-Thatcher Years

Professor Farrar's major text succinctly explains the role of "Golden Shares".[63] In the third edition, under the sub-heading "Privatisation and the 'golden share'", Professor Farrar states:[64]

> Under the Thatcher Government a number of firms were 'privatised' in the sense that the business was placed in the private sector or, if already in the private sector, the public were invited to invest in the business through private ownership. In most sales the Government sold all its holding in the firm, but important ownership restrictions were put in the articles. In a number of cases the maximum individual shareholding could not exceed 15% and foreign ownership was not permitted. To back-up these restrictions the Government retained what has become known as a 'golden share'. This is held by the relevant Minister and permits him or her to prevent a takeover or the amendment of the articles without the Government's prior consent.

The fourth edition updates and shortens the explanation. Under the subheading "Golden Shares" it states:[65]

> ... in a number of cases the Government wished to retain some control over the company, for example, to prevent a foreign takeover or to prevent individual shareholders building up too large a stake ... the method used instead to entrench those provisions was to create a class of special preference share, usually made up of a single £ share held by the relevant Secretary of State. Whatever restriction the

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62 Watts, Campbell and Hare *Company Law in New Zealand* (LexisNexis, Wellington, 2011) at [5.3.6(c)]

63 JH Farrar *Farrar's Company Law* (Butterworths, London 3rd ed 1991 and 4th ed 1998).

64 At 228.

65 At 231.

> Government wished to impose was then specified in articles and it was stated that any attempt to vary those provisions required the consent of the special preference class.

Finally, Gower and Davies discuss the use of entrenchment powers contained in s 22 of the Companies Act 2006 and other practical steps to prevent change:[66]

> Under this section [s 22] a provision in the articles can be declared to be alterable only through a more restricted procedure than that required by a special resolution under section 21. The entrenchment provision may go so far as to require unanimity for a particular change, although it cannot render the power unalterable if all the members agree to the change (section 22(3))...However, the entrenchment provision may have a powerful and adverse effect on those it does not benefit and so section 22(2) provides that an entrenchment provision may be included only in the company's articles on formation or, subsequently, with the consent of all the members of the company. Entrenchment is, thus, essentially a small company facility.
>
> Consequently, it may be more attractive to provide the required protection in a company already in existence by creating a new class of shares carrying the relevant protection, issuing those shares to the shareholder to be protected, and then including a broad variation of rights clause in the articles, so that, for example, the consent of the particular shareholder becomes necessary for the alteration of the protection. Alternatively, the shareholder may be given in effect control over the taking of any resolution through provisions which in principle are alterable but in practice cannot be. An example would be a rule that the quorum for a meeting of the company cannot be constituted unless the minority shareholder is present, either in person or by proxy. Thus, the shareholder would be given a veto over the decisions of the shareholders, exercisable by refusing to participate in the meeting ... [and] it might be possible to provide a solution [where shareholders decide by written resolution] by requiring the particular shareholder's consent for a written resolution or through weighted voting rights.

Gower and Davies cites *Bushell v Faith*:[67]

> There is no fetter which compels the company to make voting rights or restrictions of general application and these such rights or restrictions can be attached to special circumstances and to particular types of resolution.

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66 Paul L Davies and Sarah Worthington (eds) *Gower and Davies' Principles of Modern Company Law* (9th ed, Thomson Reuters, London, 2012) at [19]–[47].

67 *Bushell v Faith* [1970] AC 1099 at 1109 n 119.

D Australia

Bruce Arnold of Caslon Analytics records that in Australia:[68]

> ... estimates of privatisation proceeds are put at US$70 billion by the end of 2001. Privatisation was not confined to telecommunications but extended across financial services (retail banks, home loans, funds management and insurance), infrastructure (eg pipelines and airports), transport (rail, shipping, airlines), energy (gas, electricity generation and distribution), manufacturing) and other sectors…

Privatisation typically involved a trade sale by way of tender and public float, including offering shares on the stock exchange to institutional and retail investors. The article listed 74 such privatisations between 1988 and 2007.

But, unlike New Zealand and the United Kingdom, governments in Australia have not entrenched and limited their powers to control the privatised entities through companies legislation (for example under the Corporations Act 2001) and there is a dearth of academic and professional discussion in legal periodicals and texts.

The ubiquitous Professor Farrar explains and comments on the Australian experience:[69]

> ... governments in Australia have hesitated to embrace privatisation in a wholehearted fashion. In most cases, they have settled for corporatisation or limited outsourcing as substitutes. At first glance this is puzzling: why stop there if the object is to reform the economy? One explanation is that politicians and bureaucrats remain firmly wedded to the notion of a strong public sector. While they are prepared to countenance reforms that will make public sector entities operate more efficiently, they are not prepared to accept a diminished role for government and political accountability.

He had earlier noted:[70]

> Issues of corporatisation and privatisation raise in an acute form the public/private distinction and the question whether it is sustainable in modern conditions... Going to the substance of the distinction, there are innate differences between the public and private sectors... [and he goes on to list and discuss seven differences, concluding] Corporatisation is part of a policy of commercialism which in its turn is

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68 <www.caslon.com.au/privatisation>.

69 John Farrar *Corporate Governance: Theories, Principles and Practice* (3rd ed, Oxford University Press, Melbourne, 2008) at 478.

70 At 476.

part of a policy of liberalism or deregulation of the economy. It uses the private sector as the model of efficiency and aims to replicate as far as possible the corporate firms in the private sector. Yet the replication can go only so far. The absence of low-cost monitors and political interference mean that corporatised entities are almost inevitably less efficient in agency-cost terms than their counterparts in the private sector.

VI THE IMPACT OF RULES AGAINST PERPETUITIES ON SUCCESSION TO PROPERTY

Rules against perpetuities have perplexed testators, settlors and their legal advisers in common law jurisdictions for centuries. Many practitioners and scholars spent their working lives in the byways and intricacies of the subject. It has spawned many thousands of cases and discussions in hundreds of texts and law review articles. The rules evolved over several hundred years in England. They became part of the basic fabric of the common law of property throughout the British Empire and have since been subjected to a range of statutory modifications in the various jurisdictions.

Perpetuities rules have always been based on public policy. In the still regularly cited the *Duke of Norfolk's Case* Lord Nottingham LC explained the rationale of the rule in this way:[71]

> The law hath so long laboured to defeat perpetuities, that now it is become a sufficient reason of itself against any settlement to say it tends to a perpetuity ... such perpetuities fight against God, by affecting a stability which human providence can never attain to, and are utterly against the reason and the policy of the common law.

At a subsequent stage in the *Duke of Norfolk's Case*, Sir Francis North, the Lord Keeper added:[72]

> A perpetuity is a thing odious in law, and destructive of the Commonwealth: it would put a stop to commerce and prevent the circulation of the riches of the Kingdom, and therefore is not to be countenanced in equity.

The first edition of *Halsbury's Laws of England*, citing commentary back as far as the 13th century, puts it more prosaically:[73]

> ... although private ownership of property involves a power of disposition of the whole interest of the owner ... power should not be abused. Accordingly, the law has

71 *The Duke of Norfolk's Case* (1681) 2 Swans 452 at 460; 36 ER 690 at 692.

72 *The Duke of Norfolk's Case* (1683) 1 Vern 163 at 164; 23 ER 388 at 389.

73 *Halsbury's Laws of England* (1st ed, 1912) vol 22 at [36].

> from early times discouraged dispositions of property which either (1) impose restrictions on future alienation of that property, or (2) fetter the future devolution or enjoyment of the property to an unreasonable extent.

Dr Julie Maxton in *The Laws of New Zealand* shortly states the rule against perpetuities as follows: "... to be valid an executory devise or future limitation must vest, if at all, within a life or lives in being and 21 years and a possible period of gestation."[74]

The Perpetuities Act 1964, the first statutory intrusion in New Zealand, supports and modifies the common law. The statute was based on the report of the expert sub-committee of the Law Revision Committee comprising J G Hamilton, First Assistant Law Draftsman, convener, Professor D E Allan, Victoria University of Wellington, who had been involved in the drafting of the Law Reform (Property, Perpetuities and Succession) Act 1962 of Western Australia, F R Macken, Secretary of the New Zealand Law Society and formerly Commissioner of Inland Revenue, and K U McKay, a very experienced trusts and tax practitioner. Their report drew on the Fourth Report of the English Law Reform Committee 1956[75] which was followed in the Western Australian statute and in England in the Perpetuities and Accumulations Act 1964.

By s 8 the "wait and see" rule protects the validity of the vesting of interests occurring before the end of the perpetuity period and by s 6, where the instrument making a disposition so provides, the perpetuity period is the number of years not exceeding 80 specified in the instrument. Section 7 discarded the doctrine of timeless human fertility for procreating and bearing children which had led to depictions of "the precocious toddler" and "the fertile octogenarian". It did so by providing rebuttable presumptions of parenthood, that a boy or girl under 12 was incapable of begetting a child and a woman over 55 was incapable of bearing a child.

In the course of his speech in the House discussing the report of the Statutes Revision Committee, the Hon H G R Mason explained that New Zealand statistics showed that births fell off rapidly after age 45 and after 51 on average about 3 children were born every 10 years, so 55 gave a "pretty safe margin."[76] Whether age 80 was based on life expectancy tables plus 21 years or some other assumption was not stated.

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74 *The Laws of New Zealand* Perpetuities and Accumulations at [7].

75 English Law Reform Committee 1956 (1956, Cmd 18),

76 (13 November 1964), 341 NZPD 3076.

I pause to mention more recent overseas developments. Megarry and Wade[77] note that the Perpetuities and Accumulations Act 2009, implementing the recommendations of the Law Commission, created a single mandatory period of 125 years. It also restricted the application of the rule against perpetuities to interests arising under wills and trusts, observing that the trend of modern legislation is to prolong the period in which a gift may vest, thereby achieving more exactly the settlor's objective. In the Cayman Islands a 150 year perpetuity period has been adopted; the rule had been abolished altogether in 21 states in the USA by the end of 2005 bringing in its wake so-called perpetual "dynasty trusts"; and within the Commonwealth both Manitoba and Bermuda have abolished the rule.

In Australia, too, the rule against perpetuities has received legislative consideration. South Australia has abolished the rule and in the other Australian jurisdictions it has been significantly and variously modified.[78]

The New Zealand legislature has not yet turned its attention to the major changes in other jurisdictions but the subject is under consideration by the Law Commission as part of its current review of the law of trusts. Issues Paper 31 proposes replacing current common law and statutory rules with a maximum duration rule for trusts of 150 years.[79]

The 1964 Perpetuities Act also provided for three different kinds of cy-près modifications of dispositions infringing the perpetuities rules: the reduction of invalid age conditions [to age 21] and the closing of age classes [to age 21] by s 9 and the general cy-près reformation modification by s 10 if the general intentions originally governing the disposition can be ascertained from the instrument or the scheme of the disposition and the reformed disposition can give effect to those intentions within the limits of the perpetuities rules.

The 1964 legislation was discussed in two contemporary articles by K U McKay and R E C Beatson.[80]Mr Beatson noted the sub-committee's comment in its para 6 that:[81]

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77 Megarry and Wade *The Law of Real Property* (8th ed, Thomson Reuters, London,2012) at [9-017].

78 *Laws of Australia* Real Property at [6.400]–[6.710].

79 Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31) Chapter 14: Remoteness of vesting and the duration of trusts, at 251-260.

80 K U McKay "Perpetuities Act 1964" (1965) 1 NZULR 484 and R E C Beatson, (Office Solicitor of the Public Trust), "The Perpetuities Act 1964: Some Long Needed Reforms" [1965] NZLJ 152 and 181.

> there was a special problem in New Zealand which stems from the tremendous growth in the formation of trusts and settlements since the last war and the fact that a number of them have been drafted by some practitioners on the basis of certain precedents prepared many years ago ... in recent years some doubts have been raised ... and although the matter has not been litigated before the Courts, it is generally considered today that they would be held void.

No wonder that the Hon HG R Mason's closing comment was: "I do not know of any Bill that deals with so complex a problem as this, or with a part of the law with so many pitfalls."[82]

Mr McKay cited Professor Barton Leach's characterisation of the common law rule as "a technicality-ridden legal nightmare"[83] and in the classic American text, *Gray on Perpetuities* Professor Gray muses in the Preface to the first edition:[84]

> There is something in the subject which seems to facilitate error. Perhaps it is because the mode of reasoning is unlike that with which lawyers are most familiar. ... there are few lawyers of any practice in drawing wills and settlements who have not at some time either fallen into the net which the Rule spreads for the unwary, or at least shuddered to think how narrowly they have escaped it.

VII SOME CONCLUDING COMMENTS

The paper highlights some examples in various subject areas where finality questions may arise. It poses the question, when and why is "forever" not forever?

I suggest we can draw four general conclusions from this survey:

(1) The parties to the legal arrangements, whether States, corporate bodies, natural persons or other legal entities may agree to vary or rescind the arrangements. If one party has the power of controlling the durability of the arrangement, that party may relinquish its powers and so end it unilaterally.

Nothing seems to have been omitted in foreclosing any future questioning of the finality of the Treaty and Act of Union of 1706 yet in 1713 a proposal to dissolve the Union failed by only four votes in the House of Lords. And the permanently entrenched fundamental provision obliging professors to make a formal submission to Presbyterianism was repealed by the Universities (Scotland) Acts 1853 and 1932.

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81 Beatson at 152. See also McKay at 487.

82 NZPD, Above n 76, at 3077.

83 McKay, above n 80, at 487.

84 Roland Gray (ed) *Gray on Perpetuities* (4th ed, Little Brown & Co, Boston, 1886).

Further, constitutional law and international law may recognise negotiated secessions, absorption of all or part of another country or division into two or more states or successful revolutions or successful annexing of lands by other states.

Finally, the relinquishing of entrenched and limited powers of control of companies discussed in Part V of the paper and exemplified ultimately in New Zealand Steel Limited and many other mixed public/private developments is another illustration of the unilateral ending of those powers.

(2) Requirements set for an unlimited time may seem to be clear and definite yet on analysis may be considered capable of several interpretations or qualifications having different legal effects.

Corbin's examples and conclusions bring out the subtleties of the English language, the understandable lack of thought and expression in many contractual documents, interpretations designed to achieve a reasonable result and the admissibility of evidence of practical construction by the parties. While cases such as *Harbinger* reflect a reluctance to accept the time unlimited force of "forever", *The Power Co Ltd v Gore District Council*[85] and the later equally unsuccessful challenge to the same 1927 contract are striking examples of the upholding of the contractual term binding the parties "for all time hereafter" and the careful analysis and assessment of the relevant material by the Courts. In such cases there is always the option of renegotiation.

However, the history of perpetuities brings home how the immersion of common law property lawyers for centuries in the unwelcoming waters of Rules against Perpetuities may have engendered particular reluctance to find that "forever" does mean forever.

(3) The application of rigorous frustration principles applicable to private contracts may bring the contract to an end in rare cases but where the contracts are between public agencies it is arguable that the more appropriate course may be to seek adjustments through governmental processes.

The key points emphasised by the Court of Appeal in the *Gore* judgment rejecting the frustration argument[86] largely match much of the language of art 62 of the Vienna Convention on the Law of Treaties 1969.

Paralleling private law frustration principles Article 62 provides that a fundamental change of circumstances not foreseen by the parties may not be

85 *The Power Co Ltd v Gore District Council,* above n 32.

86 *The Power Co Ltd v Gore District Council,* above n 32, at 15.

invoked as a ground for terminating or withdrawing from the treaty unless the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty and the effect of the change is radically to transform the extent of the obligations still to be performed under the treaty. Professor Fitzmaurice[87] concludes from the cases that the International Court of Justice has taken a very cautious approach to art 62.

(4) Democratic constitutions accommodate a continuing process of discussion and evaluation and the underlying principles may require good faith negotiations for secession or lesser changes sought with a clear expression of a clear majority.

That was the outcome of the Quebec secession case.[88] The Supreme Court of Canada emphasised what they described as:[89]

> a more profound investigation of the principles that animate the whole of our Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities.

What good faith obligations may apply in other states must turn on the nature and history of the particular constitutional arrangements and on the underlying economic, social and cultural influences.

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87 Malgosia Fitzmaurice "The Practical Working of the Law of Treaties" in Malcolm Evans *International Law* (2nd ed, Oxford University Press, Oxford, 2006) 187 at 211.

88 *Reference Re Secession of Quebec,* above n 28.

89 At [148].