

The Reference on Quebec Secession: a Positive Impact for All

The Honourable Stéphane Dion¹

In September 2013, I travelled to Armenia, as a member of a parliamentary mission to investigate the situation of refugees fleeing the Syrian crisis. I was brought to Nagorno-Karabakh where the current government presented me with its statement of claim for international recognition of the territory as an independent State – even though it is also being claimed by Azerbaijan.² On page 30 of the document, I found mention of the *Reference on Quebec Secession*³ where it is pointed out that, according the Supreme Court of Canada, international law provides no legal foundation to unilateral secession in the context of a democracy but such a right might exist in another context. Based on that argument, and alleging that Azerbaijan is not a democracy, Nagorno-Karabakh calls on the international community to recognize it as a sovereign State.

Few people realize how much of an international reference the unanimous August 20, 1998 Supreme Court ruling has become. In a world where almost all countries, including such great democracies as France or the USA, consider themselves as indivisible and where the notion of secession is often abhorred, the Supreme Court opinion seems very daring and liberal. The Court recognized the divisible character of the country. It accepted secession as a possibility but rejected the right to secede on demand. The Court also rejected the use of force or any form of violence. It emphasized clarity, legality, negotiation and justice for all. While the Court's opinion may appear idealistic to many nations, this is precisely because it sought to address, in an ideal manner, situations of breakup which are always complex and sensitive. I am convinced that the ruling will contribute to peace and that it will enlighten State practice. That is what I wrote in an article – soon to be published by the *Ottawa Law Review*⁴ – which has inspired today's presentation.

This time however, I will examine the issue from another angle. My focus will not be on the universal dimension of the Supreme Court opinion but on its significance for us

¹ The Honourable Stéphane Dion, P.C., Member of Parliament for Saint-Laurent – Cartierville: stephane.dion@parl.gc.ca.

² Shahen Avakian, *Nagorno Karabagh Legal Aspects*, Yerevan, 4th Ed., "Tigran Mets" Publishing House, 2013.

³ *Reference re Secession of Quebec*, [1998] 2 R.C.S. 217, 161 D.L.R. (4^e) 385.

⁴ Dion, Stéphane, 2012-2013. "Secession and the Virtues of Clarity", in *Ottawa Law Review*. Online: <<http://stephanedion.liberal.ca/files/2014/07/RDO-OLR-Secession-and-the-virtus-of-clarity-Sent-21072014.pdf>>.

Quebeckers and all Canadians. I will argue that it is in everybody's interest – whether one is for Quebec independence or Canadian unity – to reflect, and act, upon the following six lessons – or findings – learned from the Supreme Court opinion and consequences thereof:

1. Quebec's government and National Assembly have no right to take Canada away from those Quebeckers who want to keep it; this makes unilateral secession unworkable.
2. Secession is possible via a constitutional amendment.
3. The need for clarity, as established by the Supreme Court, is inescapable and in everybody's interest.
4. Believing that a unilateral declaration of independence could garner international recognition is unrealistic.
5. The Bouchard government's refusal to accept the Supreme Court opinion made the *Clarity Act* a necessity.
6. The Supreme Court opinion encourages separatist leaders to show a greater sense of responsibility when considering a third referendum.

Let us examine these lessons one by one.

1. Quebec's government and National Assembly have no right to take Canada away from those Quebeckers who want to keep it; this makes unilateral secession unworkable

Taken at face value, what the Supreme Court said in its 1998 opinion comes as no big surprise.

The Court endorsed a fundamental tenet of international law: the distinction between internal self-determination and external self-determination. Internal self-determination is a people's pursuit of its development "within the framework of an existing state"⁵; external self-determination is a right to unilateral secession which "arises in only the most extreme of cases"⁶ such as colonial contexts or "alien subjugation, domination or exploitation"⁷. Since "such exceptional circumstances are manifestly inapplicable to Quebec"⁸, concludes the Supreme Court, "neither the population of the province of

⁵ *Reference re Secession of Quebec*, par. 126.

⁶ *Ibid.*

⁷ *Ibid.*, par. 133.

⁸ *Ibid.*, par. 138.

Quebec, even if characterized in terms of 'people' or 'peoples', nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada." According to the Court, "[...] there is no such right applicable to the population of Quebec, either under the Constitution of Canada or at international law"⁹. And all this applies even though Quebecers may be considered as a people or nation¹⁰.

Should the government of Quebec attempt unilateral secession, such an attempt would be "contrary to the rule of law"¹¹, would have no "colour of a legal right"¹² and would take place in a context where Quebec's governing institutions "do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally"¹³.

This lack of a right to unilateral secession has a concrete, fundamental consequence. It means that the Government of Quebec has no right to take Canada away from those Quebecers who want to keep it. The Government of Quebec has no legal foundation allowing it to force anybody – the Government of Canada, foreign governments, Quebecers themselves – to recognize it as the government of an independent State. International law does not grant it leave to set Canadian law aside and Canadian law does not allow it to take over the mandate granted by the Canadian Constitution to the Federal level of government.

If only for practical reasons, secession would require the Government of Canada's consent and active involvement. Means would have to be found to transfer tens of thousands of public servants from federal departments and Crown corporations to the Quebec public service, as well as tons of laws and regulations and millions of tax returns. The breakup of a modern State such as Canada could turn into an administrative nightmare. The Government of Canada's assent and active participation could not be secured through a unilateral declaration of independence. Not only would unilateral secession be without legal foundation, it would also be a practical impossibility.

It should be noted that the Supreme Court opinion did not create a new legal rule: it only outlined the state of the law. It did not take away an existing right of the Government of Quebec to secede unilaterally: there never was such right. During the 1980 referendum, Prime Minister Trudeau was legally correct to warn that a Yes would

⁹ *Ibid.*, par. 139.

¹⁰ *Ibid.*, par. 138 and 154.

¹¹ *Ibid.*, par. 108.

¹² *Ibid.*, par. 144.

¹³ *Ibid.*, par. 154.

lead to a standoff, not to sovereignty-association.¹⁴ After the 1995 referendum, Lucien Bouchard, then Leader of the Official Opposition, roundly criticized Jean Chrétien for his refusal to commit to accepting secession in case of a narrow majority for the Yes.¹⁵ But the Prime Minister was legally correct not to divide Canada based on an unclear support for secession.

In 1997, Jacques Parizeau labeled as illegal the three referendums held in 1995 by Aboriginal Peoples of Northern Quebec, which confirmed, almost unanimously, that these populations wanted to continue living and keep their territories in Canada.¹⁶ But the legality of the Parizeau government's attempt at secession would also have been questioned. That questioning had already started when Superior Court of Quebec Judge Lesage ruled that such an attempt would be "manifestly illegal" and would pose "a serious threat to the applicant's rights and freedoms as guaranteed under the Canadian Charter of Rights and Freedoms."¹⁷

Let us not forget that the Parizeau government's *Bill 1 – An Act respecting the Future of Quebec*, tabled in 1995 just before the referendum, stated, in Article 2, that Quebec would become a sovereign State at a date to be set by the National Assembly of Quebec and that it would "acquire the exclusive power to pass all its laws, levy all its taxes and conclude all its treaties."¹⁸ The Parizeau government would have had no legal standing to grab such powers and exercise such authority over Quebeckers.

Clearly, a secessionist government acting outside the rule of law would not be able to impose its will; it would subject the whole society to such risks as are unacceptable in a democracy. Whether one is for or against Quebec's secession, it is clear that a unilateral attempt at secession would be doomed to fail. It would adversely affect all parties concerned. It would not lead to independence and would be needlessly disruptive for all. The reason for this is simple: a unilateral attempt at secession would have no legal foundation. It would contravene Canadian law and would have no legal standing in international law. By clarifying this point of law, the Supreme Court did one and all a great service.

¹⁴ "If you knock on the sovereignty-association door, there is no negotiation possible", Pierre Elliott Trudeau, speech at the Paul-Sauvé arena, Montreal, May 14, 1980, in Brian Busby (ed.), *Great Canadian Speeches*, Capella, 2008, p. 163.

¹⁵ "We will recall that [the Prime Minister of Canada] said in this House he reserved the right not to honour a narrow yes majority in favour of sovereignty." Hansard, November 1, 1995, p. 16063.

¹⁶ *La Presse*, Montréal, p. B1 (May 22, 1997).

¹⁷ *Bertrand v. Quebec (Attorney General)*, [1995] R.J.Q. 2500, J.E. 95-1737.

¹⁸ Quebec, National Assembly, Prime Minister, "*Bill N° 1 – An Act Respecting the Sovereignty of Québec*", 35th lég., 1st session, 1995, s. 2.

The Supreme Court did us another great service: it confirmed that secession is possible within the rule of law. This means that in order to make Quebec an independent State, a separation agreement would have to be duly negotiated within the Canadian constitutional framework and based on the clear will of Quebeckers to leave Canada.

2. Secession is possible via a constitutional amendment

The Supreme Court confirms that "the secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation"¹⁹. This must be done "within the existing constitutional framework"²⁰. All participants would be required to negotiate secession in conformity with the four constitutional principles identified by the Court: "federalism, democracy, constitutionalism and the rule of law, and the protection of minorities"²¹. The Government of Quebec could not determine on its own what would and would not be negotiable. It "could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties."²² It would have the "right to pursue secession" via these negotiations founded on the above-mentioned principles "so long as in doing so, Quebec respects the rights of others."²³

Negotiating secession would inevitably touch upon "many issues of great complexity and difficulty"²⁴. In particular, the Court mentions issues related to the economy, minority rights, Aboriginal Peoples and territorial boundaries: "Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Québec"²⁵.

In the course of such negotiations, the Government of Quebec would not have the right to unilaterally give itself the status of a government of an independent State. It would not have that right before, during, or after any negotiations that the Quebec government would deem unsuccessful. Negotiation difficulties would not be granted that right. Negotiations would be carried out within Canada's constitutional framework, not between independent States. At no time in the negotiation process would the Government or National Assembly of Quebec have the right to take away the right of Quebeckers to remain in Canada. For secession to comply with the law, the Constitution would need to be amended:

¹⁹ *Reference re Secession of Quebec*, par. 84.

²⁰ *Ibid.*, par. 149.

²¹ *Ibid.*, par. 90.

²² *Ibid.*, par. 91.

²³ *Ibid.*, par. 92.

²⁴ *Ibid.*, par. 96.

²⁵ *Ibid.*

In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached. It is foreseeable that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse. We need not speculate here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated.²⁶

Some separatists argue that unilateral secession is the only workable option because other Canadians will never agree to negotiate Quebec independence in good faith. This is a very strange line of reasoning: if we accept the notion that other Canadians would show bad faith in the case of an attempt at negotiated secession, wouldn't they show at least as much bad faith when faced with an attempt at unilateral secession? Why would they want to cooperate in a unilateral and illegal attempt at secession, one that would have been rejected by a large number of Quebecers with the law on their side?

The reality is that in Canada, no political party represented in Parliament, or in a provincial or territorial legislative assembly, is calling for Quebecers to be kept within Canada against their clearly expressed will. In Canada, such stonewalling is unseen. We Canadians accept that our country is divisible. But that has nothing to do with international law because international law creates no such obligation. Our stance is based on the fact that in keeping with Canada's political culture, we believe that national unity must be based on a will to live together.

Under the highly unlikely scenario where a single premier would try to block a separation agreement that would have been duly negotiated within the Canadian constitutional framework – a scenario contemplated, for example, by Daniel Turp²⁷ and Brian Lee Crowley²⁸ – the proper procedure would be to ask the Supreme Court to identify an applicable amending formula that would solve the impasse under these concrete circumstances. Accepting the Attorney General of Canada's arguments, the Supreme Court justices unanimously declined to choose an amending formula in abstraction, outside of a specific context: "In accordance with the usual rule of prudence in constitutional cases, we refrain from pronouncing on the applicability of

²⁶ *Ibid.*, par. 97.

²⁷ Daniel Turp, «Can Quebec unilaterally secede from Canada? YES», *The Ottawa Citizen*, Ottawa, 21 juin 2013.

²⁸ Brian Lee Crowley, «Column: Tell the truth, separatism is dead», *The Ottawa Citizen*, Ottawa, 21 juin 2013.

any particular constitutional procedure to effect secession unless and until sufficiently clear facts exist to squarely raise an issue for judicial determination"²⁹.

The reason why effecting secession would be tremendously difficult is not that other Canadians might want to keep Quebecers in Canada against their clearly expressed will; it would not be because our Constitution is a straightjacket, since the Supreme Court confirmed that constitutional arrangements may allow secession "should it be so desired"³⁰ after duly and principled negotiations; it is simply that breaking up a modern State is, in itself, an extremely sensitive, complex and daunting task. One thing is certain: such an undertaking must not be initiated without Quebecers having clearly expressed their support.

3. The need for clarity, as established by the Supreme Court, is inescapable and in everybody's interest

The Supreme Court confirmed that the obligation to enter into negotiation on secession could be precipitated only by "a decision of a clear majority of the population of Quebec on a clear question to pursue secession [...]"³¹. It does not exist "if the expression of the democratic will is itself fraught with ambiguities. Only the political actors would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other."³²

Obviously, clarity cannot come from double-barrelled questions, or from a question that addresses something other than secession, or that mixes in other considerations.³³ We all know what a clear question on secession would look like. What is difficult is to come up with a confusing question such as those we were asked in the 1980 and 1995 referendums. The Supreme Court mentions "the wish not to remain in Canada any longer"³⁴. The closer the question is to that wording, the clearer it is. But there are other possibilities, such as: "Do you want your province to separate from Canada?" or: "Do you want your province to cease being part of Canada and become an independent

²⁹ *Reference re Secession of Quebec*, par. 105.

³⁰ *Ibid.*, par. 85.

³¹ *Ibid.*, par. 93.

³² *Ibid.*, par. 100.

³³ [Translation] "A question is ambiguous if it deals with more than one dimension. So it is best to introduce only one idea at a time." André Blais and Claire Durand, *Recherche sociale*, Presses de l'Université du Québec, 1997, p. 385. "Avoid Double-Barrelled Questions." Earl Babbie, *Survey Research Methods*, Wadsworth Publishing Company, 1973, p. 140. Also: Vincent Lemieux, *La formulation de la question*, in Pierre F. Côté et coll., *Démocratie et référendum: la procédure référendaire*, Montréal, Québec-Amérique, 1992, p. 98.

³⁴ *Reference re Secession of Quebec*, par. 151.

country?". If a secessionist government is confident that it has the support of the public, it would be in its interest, as well as everybody else's, to formulate a clear question that allows no doubt.

In its opinion, the Supreme Court mentioned the words "clear majority" no less than thirteen times, and also referred to a "strong" majority. And the Court refers to a "clear majority of the Quebec population"³⁵, a concept that includes much more than the number of votes expressed.

There are two fundamental reasons why negotiations on secession should be done on the basis of a clear majority. The first reason is that the more a decision impacts on citizen rights, becomes irreversible and binds future generations, the more stringent democracy must be regarding the procedures required for such a decision to be implemented. There is no doubt that secession is a serious and probably irreversible action, one that affects future generations and has serious consequences for all the citizens of the country being broken up.

The second reason is that even with all the goodwill in the world, negotiating the breakup of a modern State would inevitably be difficult and fraught with pitfalls. What must not happen is that while negotiators are working on a separation agreement, the majority should change its mind and decide to oppose secession. That would be an untenable situation. This is why the process should only be undertaken if there is a clear enough majority that will last through the inevitable negotiation difficulties. In fact, Quebecers are highly skeptical about the notion of attempting secession on the basis of an uncertain majority and they have said so every time they have been polled on that issue.³⁶

However, the Supreme Court urged us not to determine in advance what constitutes a clear majority: "it will be for the political actors to determine what constitutes 'a clear majority on a clear question' in the circumstances under which a future referendum vote may be taken"^{37,38}. This is very wise advice. There is a qualitative dimension to assessing clarity, which begs for a political assessment to be done in full understanding of the actual circumstances.

³⁵ *Ibid.*, par. 93.

³⁶ "Majority of Quebecers (55%) and Those in Rest of Canada (67%) Say 'Clear Majority' for Winning Referendum Should be No Less than 66%", Ipsos Reid, Wednesday, September 05, 2012; online : <http://www.ipsos-na.com/news-polls/pressrelease.aspx?id=5751>.

³⁷ *Reference re Secession of Quebec*, par. 153.

³⁸ "I just don't think there is a constitutional basis for doing that (setting a threshold) and that's why fidelity to the court's judgment requires us now to wait until after the referendum." Peter Hogg, appearing before the House Standing Committee charged with studying *Bill C-20*, February 2000.

Furthermore, setting any kind of majority threshold in advance would expose us to the risk of leaving such a serious decision as the choice of a country to the result of a judicial recount or the examination of rejected ballots. That would put us all in a very difficult, even senseless position.

When it suggests that a majority threshold should not be set in advance, the Supreme Court abides by Canada's legal tradition regarding referendums³⁹ – including Quebec's. In the white paper that led up to Quebec's *Referendum Act*, it is noted that, because of the consultative – and not decisive – nature of referenda, "it would be pointless to include in the law special provisions requiring a certain majority votes or rate of participation." When the Bill was tabled on April 5, 1978, its sponsor, Robert Burns, spoke of "the moral weight" of a referendum won on the basis of "a clearly and broadly expressed popular will."

To limit the risk of disagreement over the clarity of a majority, a secessionist government needs only to avoid holding a referendum until it is reasonably assured to win a clear majority.

4. Believing that a unilateral declaration of independence could garner international recognition is unrealistic

All of that tells us that while Quebec secession is possible, it can only happen if Quebecers clearly support it and after a separation agreement has been duly negotiated within the Canadian constitutional framework. Now, could the Government of Quebec work around this process by obtaining international recognition of a unilateral declaration of independence?

The Supreme Court weighed the probabilities in that respect very prudently and realistically:

Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Québec which did not itself act according to constitutional principles in the negotiation process.⁴⁰

The Court's prudence is understandable in light of the international community's extreme reluctance to recognize unilateral secession. From the perspective of State

³⁹ "Historically, the federal government has never, never, in any referendum, recognized 50% + 1 as a rule prior to a referendum." Guy Lachapelle, appearing before the House Standing Committee charged with studying *Bill C-20*, February 2000; see also: Wayne Norman's intervention before the same Committee.

⁴⁰ *Reference re Secession of Quebec*, par. 103.

practice, it is more than doubtful that Quebec would be recognized as an independent State without the government of Canada's agreement. In fact, there is no such precedent: "no state which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor state".⁴¹

A unilateral attempt by the Quebec government to secede from Canada would be an irresponsible action and would be perceived as such by the international community.

The case of Kosovo illustrates how difficult it is to secure international recognition via unilateral secession. Should Serbia recognize Kosovo, all other countries would follow suit. But as long as Serbia defers, Kosovo will not be allowed to join the United Nations. On July 22, 2010, the International Court of Justice declared in an advisory opinion that Kosovo's unilateral declaration of independence did not violate international law. The International Court noted that no applicable rule in international law disallows such declarations.⁴² However, it did not say that Kosovo had a right to secede from Serbia. In fact, the International Court did not rule on the legal consequences of this unilateral declaration of independence. It explicitly refused to say whether or not Kosovo has the status of a State, and did not tell other States whether they should recognize it as such.

The States that recognized Kosovo against Serbia's will, notably the USA, European Union countries and Canada, have taken endless precautions. They insist that Kosovo is a unique case that, in their opinion, does not create a precedent. They invoke a combination of four factors. First, the people of Kosovo were victims of serious abuse, particularly during the bloody attempt at ethnic cleansing under the Milosevic regime at the end of the 1990s. Second, there is no doubt that nearly all the peoples of Albanian descent in Kosovo want independence. Third, the separation of Kosovo from Serbia is already an established fact in the territory itself. In the spring of 1999, NATO drove the Serbian forces out of Kosovo to put an end to a humanitarian disaster; Kosovo was placed under UN authority for nearly ten years. Fourth, forcing the people of Kosovo to return under Serbian authority would inevitably cause instability in an already fragile region. We cannot go back in time.

⁴¹ James Crawford, *State Practice and International Law in Relation to Unilateral Secession: Report*, Department of Justice of Canada, p. 16; also : [Translation] "If Canada opposes secession and declares it illegal, no country will recognize it formally". Jean-Pierre Derriennic, « Les déclarations unilatérales d'indépendance en Palestine et au Québec », *Le Devoir*, Montréal, 26 avril 2000, p. A7.

⁴² *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion*, [2010] ICG; online : International Court of Justice website, <<http://www.icj-cij.org/docket/files/141/15987.pdf>>.

Notwithstanding these four solid arguments in support of Kosovo's recognition as an independent State, many States continue to support Serbia's point of view, including China and Russia which both have veto power on the UN Security Council. This leaves Kosovo, twenty years after its first unilateral declaration of independence, with partial, restricted recognition throughout the world – a situation that would be unacceptable to a population such as Quebec's, used to having its Canadian citizenship, passport and government routinely recognized all over the world.

A situation more akin to ours is the Government of Catalonia's unfulfilled desire to have the European Union commit to recognizing an eventual unilateral declaration of independence. On September 16, 2013, European Commission spokesperson Ahrenkilde-Hansen ruled out any chance of this happening, declaring: "It is not the role of the Commission to express a position on the internal organisation relating to constitutional arrangements in the member States"⁴³. On the same day, the Foreign Affairs Minister of Lithuania – the country that held the presidency of the European Union at the time – was just as categorical, declaring, also in reference to Catalonia, that Spain's internal affairs "should be resolved according to democratic and legal measures that exist within the country, respecting the Constitution"⁴⁴, and adding that "The Soviet occupation of the Baltic nations cannot be compared with the situation in Spain. Spain is a democratic country, a member of the European Union, our close partner in the EU and NATO"⁴⁵.

In a controversial book, Frédéric Bastien argues that London and Washington would have recognized Quebec as an independent State following the 1980 and 1995 referendums "without too many problems"⁴⁶. As proof of his theory, he quotes four pronouncements from ministers or diplomats of the day. But those quotes do not validate the author's claims. What those foreign dignitaries said, in essence, is that "it is up to Canadians to deal with this issue". That is what I demonstrated in an article published in the July 17, 2013 edition of the daily *La Presse*.⁴⁷

⁴³ Lucie Abellan and Miquel Noguer. "Bruselas asegura que Cataluña saldría de la UE con la independencia", *El País Cataluña*, Barcelona (September 16, 2013); online : El País website : <http://ccaa.elpais.com/ccaa/2013/09/16/catalunya/1379321524_236717.html>.

Mrs Ahrenkilde-Hansen's comments can be heard in the videoclip incorporated in the article, at 1:06.

⁴⁴ Anna Perez, "Almunia Says Catalonia Would Need to Leave EU if it Secedes From Spain; Comments Disappoint Catalan Secessionists", *The Wall Street Journal*, New York (September 16, 2013).

⁴⁵ *Ibid.*

⁴⁶ Frédéric Bastien, *La bataille de Londres*, Boréal, Montréal, 2013, p. 81.

⁴⁷ Stéphane Dion, « Une autre thèse réfutée », *La Presse*, Montréal, 17 juin 2013.

Quebec separatists cannot count on the international community recognizing a unilateral declaration of independence. The world has no reason to treat Canadian unity with less consideration than the unity of other countries

5. The Bouchard government's refusal to accept the Supreme Court opinion made the *Clarity Act* a necessity.

The Supreme Court opinion described the conditions under which secession could take place: in a clear context, according to the rule of law, and with concern for fairness for all. So if that opinion was so clear and flawless, why did the Government of Canada feel the need in 2000 – two years later – to enact a law that would give it effect: the *Clarity Act*?

The Government of Canada was fully satisfied with the Court opinion, which provided the clarification the government sought. On December 8, 1997, Prime Minister Jean Chrétien had declared: [Translation] "In such a situation [clear support for secession], there will undoubtedly be negotiations with the federal government"⁴⁸.

I myself had often highlighted this principle in my speeches and public letters, beginning with my first ministerial statement in which I had said: [Translation] "In the unfortunate eventuality that a firm majority in Quebec were to vote on a clear question in favour of secession, I believe that the rest of Canada would have a moral obligation to negotiate the division of the territory."⁴⁹

On March 23, 1998 in Montreal, in an address delivered before the Canadian Bar Association, I had spoken some words that would be echoed in the Court opinion five months later:

If it were to be determined that Quebeckers no longer wanted to be Canadians, negotiations would be undertaken within the legal framework. In that eventuality, the secessionist government would be in no position to decide alone what would be negotiable and what wouldn't. Secession would be very difficult to achieve, there would be numerous pitfalls and risks of derailment, the economic situation would be deeply disturbed, but at least one could hope to avoid chaos. A mutually agreed-on secession could be based only on very clear support by Quebeckers, recognized by all, and would have to be negotiated with concern for fairness for all. The different interests

⁴⁸ Joël Denis Bellavance, « OUI : Pas question d'accepter une déclaration unilatérale », *Le Soleil*, Québec, 8 décembre 1997, p. A2.

⁴⁹ Huguette Young, « Référendum au Québec : Dion prêt à reconnaître un OUI majoritaire », *Le Soleil*, Québec, 27 janvier 1996, p. A10.

that would be expressed within Quebec would also have to be taken into account, as well as the concerns of all Canadians.⁵⁰

The substance of the *Clarity Act* derives from the Court opinion. Closely following that opinion, the Act deals with the clarity of the question, the clarity of the majority and those issues to be discussed during negotiations. The *Clarity Act* forbids the Government of Canada from entering into negotiations on secession until the House of Commons has concluded that there is clear support for secession, and from proceeding with secession until it has been duly negotiated. Such prescriptions clearly follow the Court ruling. Appearing before the House Standing Committee charged with studying Bill C-20, dean Peter Hogg said: "Bill C-20 is completely consistent with the Supreme Court's judgment and I think it would be difficult to both support the decision of the Court and reject the Bill."⁵¹

The reason why it became necessary to proceed with the *Clarity Act* is that the Quebec government of the day, the Bouchard government, refused to accept the Supreme Court opinion in its entirety. That government only recognized what best suited it – the obligation to negotiate – and rejected everything else, notably the need for clear support and the absence of a legal foundation for unilateral secession.

Personally, I would have preferred an agreement to a law. I didn't see why responsible governments could not agree on a process to resolve their differences, why we couldn't agree on how secession may be effected thus allowing us to shift the discussion to the reasons why secession should or should not be pursued. If the British were able to do it in 2012, why couldn't we do it in 1996?

I never stopped trying to reach such an agreement since my first speech in the House of Commons, on May 16, 1996, in which I declared: "Now is the time to calmly set, under the law, mutually acceptable secession rules. Not two weeks before a referendum. [...] What is not known is whether the secessionist leaders are capable of entering into a calm, level-headed and reasoned discussion process."⁵²

⁵⁰ Canada, Minister of Intergovernmental Affairs, Archived Speeches, "The Practical Difficulties of a Unilateral Secession, Notes for an Address to the Canadian Bar Association", Montréal (March 23, 1998), Online: Privy Council Office and Intergovernmental Affairs website, <<http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&page=archive&sub=speeches-discours&doc=19980323-eng.htm>>.

⁵¹ Peter Hogg, appearing before the House Standing Committee charged with studying Bill C-20, February 2000; see also: see also: legal experts Yves-Marie Morissette et Gil Rémillard's interventions before the same Committee.

⁵² Stéphane Dion, "Speech on a Motion by the Opposition", House of Commons, Ottawa, May 16, 1996, in Stéphane Dion, *Straight Talk; Speeches and Writings on Canadian Unity*, McGill-Queen's University Press, Montréal, 1999, p. 187.

I often repeated that call for dialogue, as I did in my August 11, 1997 open letter to Premier Lucien Bouchard: "Our fellow citizens expect their elected officials to be calm and level-headed when debating this issue." On the day the Supreme Court released its opinion, I declared that it would be better for the parties to reach an agreement on fundamental principles – such as the need for a clear question – and that the PQ government needed time to "adjust their projects according to the rule of law".⁵³ It is only after all these calls for dialogue had been radically rejected by the Bouchard government that Prime Minister Chrétien entrusted me with the mandate to give effect to the Court opinion via an Act of Parliament.

The Parti Québécois position – that the Government of Canada has no authority over the secession process – is not only contrary to the Supreme Court opinion and the *Clarity Act*, it is inherently untenable. The Government of Canada has the moral duty to oppose the loss of Canada by us Quebecers unless we have clearly expressed support for secession and until secession has been duly negotiated within the Canadian constitutional framework and with a concern for the rights of all. In a democratic State, the government cannot proceed to dismantle the country and put an end to its constitutional obligations toward a quarter of its population if it does not have the assurance that this is what these people really want.

6. The Supreme Court opinion encourages separatist leaders to show a greater sense of responsibility when considering a third referendum

The Supreme Court opinion has changed the perspective under which separatist leaders envisage another referendum – even though they refuse to acknowledge that change. Nowadays, nobody is talking about linking a question on secession with a possible political and economic association or partnership with Canada. From the standpoint of clarity, that is a huge gain. In 1995, surveys found that one voter in two mistakenly believed that the conclusion of a partnership was a prerequisite for sovereignty.⁵⁴

Separatist leaders maintain that fifty percent plus one of the votes cast in a referendum would be a clear majority, sufficient to give effect to secession. This is an untenable position: if "fifty percent plus one" is a clear majority, then what constitutes an unclear majority? Interestingly, there is growing support in the separatist movement for another point of view: that another referendum should only be held when there is a reasonable assurance of a clear majority in favour of secession. It is hoped that responsible voices

⁵³ Manon Cornellier, « La balle se retrouve dans le camp de Québec, croit Stéphane Dion », *Le Devoir*, Montréal, 21 août 1998.

⁵⁴ Maurice Pinard, *Confusion et incompréhension entourant l'option souverainiste*, a brief presented to the House Standing Committee charged with studying *Bill C-20*, February 2000.

will prevail and that all will agree that a further referendum should be held only when it is certain that a clear majority of Quebecers wish to secede.

It is encouraging to see a noted secessionist, Joseph Facal, write that it would be necessary to have [Translation] "a clear, stable and solid majority [...] which will not vary quantitatively from week to week, as the mood dictates. The decision of whether or not to leave Canada is a solemn and serious decision. We should not take advantage of an inflamed climate to rush into a referendum."⁵⁵ All the more that [Translation] "The referendum timetable paralyzes the machinery of government on virtually all other issues. You cannot really govern and prepare a referendum at the same time. Anyone who has lived through it will tell you so".⁵⁶

In fact, the best way to understand how the debate has evolved is to compare *Bill 1 – an Act Respecting the Future of Quebec*, which the Parizeau government tabled in the National Assembly before the 1995 referendum, with *Bill 99 – an Act Respecting the Exercise of Fundamental Rights and Prerogatives of the Quebec People and the Quebec State*,⁵⁷ adopted in 2000 in response to the *Clarity Act*.

The Parizeau Bill clearly announced unilateral secession. Article 2 of the Bill stated: "On the date fixed in the proclamation of the National Assembly, the Declaration of sovereignty appearing in the preamble shall take effect and Québec will become a sovereign country".⁵⁸ In comparison, *Bill 99* lists a series of principles that do not explicitly include external self-determination or the right to secede. The lawyers in the Office of the Attorney General of Quebec are refraining from claiming this right in Quebec Superior Court, which is examining the constitutionality of that Bill.

What a paradox! The Marois government has been claiming in all venues that the right of peoples to self-determination, as invoked in *Bill 99*, includes the right, for the government of Quebec, to declare Quebec's independence – to secede unilaterally. In every venue... except the Superior Court of Quebec. Before that Court, the Marois government's arguments are entirely different. The provincial government lawyers are

⁵⁵ Joseph Facal, « Discours à l'Action nationale, Le souper-conférence du carrefour souverainiste, présenté au Lion d'Or », *Le blogue de Joseph Facal, Le Journal de Montréal*, Montréal, 29 octobre 2010, online : *Journal de Montréal* website, <<http://blogues.journaldemontreal.com/facal/2010/10/>>.

⁵⁶ Joseph Facal, « Le respect du peuple », *Le blogue de Joseph Facal, Le Journal de Montréal*, Montréal, 27 septembre 2010, online : *Journal de Montréal* website, <<http://blogues.journaldemontreal.com/facal/articles/journal-de-montreal-et-journal-de-quebec/le-respect-du-peuple-2/>>.

⁵⁷ *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, L.R.Q. c. E-20.2.

⁵⁸ *Supra* note 18.

asking the Court to "read down" the Act, arguing that it only codifies "a series of principles" or "standards that the National Assembly and the Government of Quebec must comply with while exercising their existing powers". They describe an eventual unilateral declaration of independence as a simple "scenario", much too hypothetical to be examined by the Court.⁵⁹

The Marois government's double-speak must be denounced, and its objective understood: getting the Superior Court to validate *Bill 99* on the grounds that the Bill does not stipulate a right to secede unilaterally, and then triumphantly trumpeting everywhere that the Court's validation of *Bill 99* confirms such a right. In other words, the Marois government's strategy is to convince the Superior Court that *Bill 99* can be interpreted as stipulating only Quebec's right to internal self-determination and, right after that ruling is made, to claim that what it really means is the right to external self-determination.

But in no way does double-speak give politicians the rights they don't have over citizens. The Government of Quebec has no right to take Canada away from those Quebeckers who want to keep their country. What the Government of Quebec is entitled to do is ask Quebeckers, by referendum, if they clearly want to secede. If it is proven that Quebeckers clearly agree to secession, then such clear support would trigger an obligation to enter into negotiations on secession; these negotiations could then lead to a fair-for-all separation agreement and to a constitutional amendment removing all references to Quebec from the Canadian Constitution.

Whether we support Quebec's independence or Canadian unity, we, Quebeckers, want political parties to argue for their positions frankly and honestly, with no double-speak and no double standard. We don't want the parties to sing to a different tune depending on whether they speak English or French – as the Harper government and the NDP are prone to do – or whether they speak to the people or a judge – as does the Marois government.

We'll see what the Superior Court of Quebec decides. Until then, Mrs Marois and Mr Cloutier, her Minister of Sovereignist Governance, must answer the following question – right now: does *Bill 99* include the right to external self-determination, yes or no? All Quebeckers, whatever their political stripe, are entitled to a clear and unequivocal answer.

⁵⁹ *Henderson v. Quebec* (Attorney General), Petition for declaratory relief at S.C., Montreal, 500-05-065031-013, factum of Quebec (Attorney General).

Conclusion

I am proud of my participation, under Jean Chrétien's leadership, in the indispensable clarification exercise that led to the 1998 Supreme Court opinion and the 2000 Clarity Act that gave it effect. I am proud of my involvement in that debate, as a Canadian, democrat and citizen of the world, but above all as a Quebecker. An attempt at Quebec's secession, if made without clear support and legal foundation, would have negative impacts in Toronto, Vancouver and Halifax but would seriously undermine the city of Montreal. I love Quebec; that is why I cannot picture my province in the absurd position of having to make a decision on secession on the basis of a judicial recount, or having to settle such an existential debate without the fundamental protections afforded to all citizens by the rule of law in a democracy.

That was a tough but necessary debate, one that was found to be in everybody's interest –including Québec's secessionist movement. That movement has given itself a huge task: convincing Quebeckers they should make Québec an independent country and give Canada up – a country built by Quebeckers and other Canadians alike, a country which is well-respected internationally. Far from making secession less onerous, attempting to achieve that objective unilaterally would put it out of reach.

The difficulty separatist leaders are having in convincing Quebeckers to clearly give up on Canada does not authorize them to resort to confusion in order to achieve that end. Clarity and the rule of law have virtues for everybody.

The breakup of a modern state such as Canada would be a very difficult thing to do – and an unreachable goal if pursued without clarity and outside the rule of law. This lesson applies not only to Canada but to countries worldwide. And it highlights the universal scope and significance of the 1998 opinion of the Supreme Court of Canada.