

Secession and the Virtues of Clarity

STÉPHANE DION, CP*

Le phénomène de la sécession est considéré avec une méfiance certaine par la communauté internationale, voire avec une véritable aversion lorsqu'elle est faite de façon unilatérale. Cette méfiance transparaît dans le droit interne des États, dans le droit international et dans la pratique des États. Même quand la sécession ressort comme une solution logique et pratique – Kosovo, Sud-Soudan – elle n'est envisagée qu'avec beaucoup de précaution. L'avis rendu en 1998 par la Cour suprême du Canada relatif à la sécession du Québec pourrait aider la communauté internationale à établir dans quelles circonstances et selon quelles modalités la délimitation de nouvelles frontières internationales entre des populations pourrait devenir une solution juste et applicable. En ce sens, cet avis de la Cour suprême du Canada, en plus d'influencer pour le mieux le débat d'aujourd'hui sur l'unité canadienne, a une portée universelle qui pourrait aider à résoudre pacifiquement les situations complexes et délicates de rupture nationale, sur la base de la clarté, de la légalité et de la justice pour tous.

The phenomenon of secession is considered with mistrust, even aversion when effected unilaterally. This mistrust can express itself at three levels: domestic law, international law and state practice. Even in circumstances when secession can be considered as a logical and practical solution – Kosovo, South Sudan – it is envisaged only with the utmost caution. The 1998 opinion rendered by the Supreme Court of Canada concerning the reference on the secession of Québec could have a positive impact in this regard. It may help the international community clarify under what circumstances, and by what means, could the delineation of new international borders between populations be a just and applicable solution. In addition to influencing – for the best – today's debate on Canadian unity, the Court's opinion has a universal scope and significance that may help pacifically solve complex and delicate national breakup situations along the principles of clarity, the rule of law and justice for all.

* Privy Council of Canada and Member of Parliament for Saint-Laurent/Cartierville. Speech delivered at the Rideau Club on February 11, 2011, on the occasion of the 8th Annual Michel Bastarache Conference.

Table of contents

405	I.	INTRODUCTION
405	II.	THE AVERSION OF STATES AND THE INTERNATIONAL COMMUNITY TO SECESSION
406	A.	Domestic Law
406	B.	International Law
407	C.	State Practice
407	D.	The Case of South Sudan
408	E.	The Reasons for Aversion to Secession
410	III.	UNIVERSAL SCOPE AND SIGNIFICANCE OF THE SUPREME COURT OF CANADA'S OPINION ON SECESSION
414	IV.	SCOPE AND SIGNIFICANCE OF THE SUPREME COURT OF CANADA'S OPINION ON SECESSION IN CANADA TODAY
417	V.	CONCLUSION

Secession and the Virtues of Clarity

STÉPHANE DION

I. INTRODUCTION

The phenomenon of secession poses a major challenge for many countries and for the international community. One question to which we need the answer is: under what circumstances, and by what means, could the delineation of new international borders between populations be a just and applicable solution? One document that will greatly assist the international community in answering that question is the opinion rendered by the Supreme Court of Canada on August 20, 1998 concerning the reference on the secession of Québec.¹ This opinion, a turning point in Canadian history, could have a positive impact at the international level. It partakes in the great tradition of our country's contribution to peace and harmony in the world, from the drafting of the *UN Universal Declaration of Human Rights*² to the *Convention on the Prohibition of Anti-Personnel Mines*.³ After describing how the international community views the phenomenon of secession and identifying the principles in play, this article will argue that the opinion of the Supreme Court of Canada does indeed have universal scope and significance. The article will conclude by discussing the current situation concerning Canadian unity and the Québec separatist movement.

II. THE AVERSION OF STATES AND THE INTERNATIONAL COMMUNITY TO SECESSION

Secession is the act of separating from a state to form a new one or to join another existing state. Around the world, secession is not something that is encouraged

1 *Reference re Secession of Québec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference*].

2 *Universal Declaration of Human Rights*, GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71, online: United Nations <<http://www.un.org/en/>>.

3 *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, 3 December 1997, 2056 UNTS 241.

outside of the colonial setting. On the contrary, secession is considered with definite mistrust, even aversion, when it is effected unilaterally; that is, without an agreement negotiated with the predecessor state. This mistrust of secession exists at three levels: domestic state law, international law and state practice.

A. Domestic Law

In terms of domestic law, numerous states affirm their indivisibility in their constitution or jurisprudence. Many democratic states consider themselves to be inseparable entities. For example, France, the United States of America (US), Italy, Spain, Australia, Finland, Norway and Sweden.

B. International Law

In international law, any attempt at unilateral secession—secession with no agreement negotiated with the existing state—is without legal foundation. However, international law does not prohibit unilateral secessions; it simply does not authorize them. There are no regulations in this respect, except in cases where there is a right to secession, namely in the case of colonies, subjugation or foreign occupation.

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.⁴ The International Court noted that there is no applicable rule in international law under which such declarations can be disallowed. 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.

International law has no rule prohibiting unilateral secessions, and conversely, no rule allowing a secessionist government to legally impose secession on those who do not want it. The absence of an international rule prohibiting secession does not create a positive right to secession that would oblige citizens or states to recognize or conform to it. Yet, that is exactly what a secessionist government would require if it wanted to proceed unilaterally: a legal means of forcing everyone to accept a change of countries, including those who are against it. International law does not provide for unilateral secession, nor does it contain any peremptory norms that would make it possible to ignore the domestic laws of the state from which the secessionist government is trying to separate.

4 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep 43 at para 121, online: ICJ <<http://www.icj-cij.org>>.

C. State Practice

State practice is extremely reluctant to recognize unilateral secession outside the colonial setting. In fact, no state created by unilateral secession has been admitted to the United Nations (UN) against the declared will of the predecessor state's government.

The case of Kosovo illustrates this reluctance to recognize unilateral secessions. The states that recognize Kosovo against the will of Serbia, notably the US, 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. Their support is founded in 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 their independence. Third, the separation of Kosovo from Serbia was already an established fact in the field. 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.

Despite these four solid arguments supporting the recognition of Kosovo as an independent state, a large number of states continue to support Serbia's point of view; this includes China and Russia, which both have veto power on the UN Security Council. This leaves Kosovo, more than 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 like Canada's, which is used to having its citizenship, passport and government routinely recognized all over the world.

D. The Case of South Sudan

In another recent case, that of South Sudan, there were solid reasons for resorting to secession as a means of pacifying a conflict between warring populations. However, the international community was reluctant to go down that road, and insisted that the secession not be unilateral but negotiated by both sides.

There has been an almost uninterrupted succession of civil wars since the Sudan became independent in 1956, claiming millions of deaths, injuries and refugees. South Sudan, in particular, has been the victim of serious abuses, including the imposition of traditional law (Shari'ah) upon a non-Muslim population. After the last civil war led to a weakening of the Northern authorities' control over the South, a peace agreement was concluded in 2005, under the sponsorship of the US and the UN, between the Sudanese government and the rebels of South Sudan's

People's Liberation Movement.⁵ That agreement provided for a referendum in 2011,⁶ which confirmed the massive support for South Sudan's independence, which was already, in part, a *de facto* reality.

From 1995 to 2011, the UN and the African Union attempted, in vain, to get the two sides to negotiate a compromise, which would have avoided the breakup of Sudan. In light of that fact, the international community set to work with all of the Sudanese authorities to prepare the referendum, so that it might be held under the best possible conditions to limit the risks of violence. Care was taken to ensure that the referendum question clearly stated the choice between Sudanese unity and secession, with no ambiguity. To limit the number of malcontents, plans were made to permit at least one region to hold its own referendum to choose between North and South Sudan. The simple majority chosen as the line of victory was purely rhetorical, since no one doubted the consensus for independence among the population of South Sudan. The secession received 98.83% support, with 97.58% of the population participating in the referendum.⁷ Such a referendum would not have been conceivable had the secession project divided the population into two roughly equal factions. In other words, the focus was on legality, clarity and negotiation.

E. The Reasons for Aversion to Secession

Let us now examine why domestic state law, international law and state practice have such reservations towards unilateral secession. The first reason is the states' concern that their own territorial integrity could be challenged. The golden rule of "do unto others as you would have others do unto you" has a powerful dissuasive effect. It is difficult for a state to demand that its own unity be respected if it does not respect that of others. It will be more difficult for it to prevent separatist movements at home if it encourages them in other states. The second reason is the constant concern for international stability. Separatist movements are potential sources of disorder. If the international community is opposed to recognizing unilateral secession as an automatic right outside of the colonial context, it is because it would be very difficult to determine to whom that right should be granted. An automatic right to secession would have dramatic consequences on the international community—with some three thousand groups each claiming a collective identity for itself in the world—and the creation of each new state would risk mobilizing, within that same state, minorities that would in turn claim their own independence.

5 *The Comprehensive Peace Agreement Between The Government of The Republic of The Sudan and The Sudan People's Liberation Movement/Sudan People's Liberation Army*, 9 January 2005, online: UNMIS United Nations Mission in Sudan <<http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>>.

6 *Ibid* at 4.

7 European Union Election Observation Mission, *Final Report on the Southern Sudan Referendum*, 2011 at 62, online: European Union External Action <http://eeas.europa.eu/eucom/pdf/missions/final-report-eucom-referendum-south-sudan-2011_en.pdf>.

Take the case of Africa, for example. Nigeria has over two hundred and fifty local languages,⁸ Côte d'Ivoire has over sixty ethnic groups,⁹ the Democratic Republic of Congo has one hundred and five,¹⁰ Cameroon has two hundred.¹¹ Understandably, the breakup of Sudan is being contemplated with a great deal of caution. South Sudan itself is a fragmented region inhabited by some sixty different groups.¹² As the former UN Secretary General Boutros Boutros-Ghali held, "if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve."¹³

In addition to these considerations of state and international stability, there is a third element that argues against recognizing an automatic right to secession; an element fundamental to democracies. The democratic ideal encourages all the citizens of a country to be loyal to each other, regardless of language, race, religion or regional considerations. Secession requires the opposite, asking its citizens to break the solidarity that unites them. Generally, this is based on considerations related to specific affiliations, such as language or ethnic origin. Secession is that rare and unusual exercise in democracy when a country's inhabitants are required to make a choice as to those they wish to keep as fellow citizens and those they wish to turn into foreigners.

A philosophy of democracy based on the logic of secession would be unworkable. It would incite groups to separate from one another rather than trying to unite or reach an agreement. Automatic secession would prevent democracy from absorbing the tensions inherent in differences. Recognition of the right to secession on demand would invite separation on the basis of collective attributes such as religion, language or ethnicity as soon as difficulties develop. This touches upon the fundamental reason why international law and state practice alike only recognize a right to secession in situations of colonization or flagrant human rights violations. In extreme circumstances where a state refuses to treat a group of citizens as citizens—where it rides roughshod over their right to citizenship—those citizens in

8 CIA: The World Factbook, *Nigeria*, online: Central Intelligence Agency <<https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html>>.

9 Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2011 - Côte d'Ivoire* (6 July 2011), online: UNHCR - The UN Refugee Agency <<http://www.unhcr.org/refworld/docid/4e16d378c.html>>.

10 CIA: The World Factbook, *Congo, Democratic Republic of*, online: Central Intelligence Agency <<https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html>>.

11 UK Foreign & Commonwealth Office, *Sub Saharan Africa: Cameroon* (August 17, 2011), online: Travel & living abroad, Country Profiles <<http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/>>.

12 UN Office for the Coordination of Humanitarian Affairs (OCHA), *Distribution of Ethnic Groups in Southern Sudan* (24 December 2009), online: UNHCR - The UN Refugee Agency <<http://www.unhcr.org/refworld/docid/4bea5d622.html>>.

13 Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping - Report Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992*, UNSCOR, 1992, Supp No 24111, UN Doc A/47/277, at para 17.

turn have the right to no longer consider themselves as part of the state. They have that right not by virtue of distinctive traits pertaining to race, language or religion, but because, like all human beings, they have a universal right to citizenship. This does not mean that a democratic state must reject any and all secessionist demands. A state may conclude that in light of a clear desire for secession, allowing it would be the lesser of two evils. However, a democratic government has the obligation to ensure that this desire for secession is truly clear and unambiguous, and that it would not be carried out unilaterally, but within the framework of legality and justice for all. This brings us to the Supreme Court of Canada's opinion on secession dated August 20, 1998.

III. UNIVERSAL SCOPE AND SIGNIFICANCE OF THE SUPREME COURT OF CANADA'S OPINION ON SECESSION

The Supreme Court of Canada's opinion on secession¹⁴ is a legal document that has been quoted, studied and considered in situations as diverse as the relationship between Taiwan and China and the relationship between Montenegro and Serbia. Professor Zoran Oklopčic of Carleton University has highlighted the extent to which this opinion has been considered all over the world.¹⁵ The International Court of Justice's opinion on Kosovo¹⁶ and the briefs submitted by many countries on that occasion¹⁷ refer to the Court's opinion. A delegation of Parliamentarians from North and South Sudan have come to Canada to study the latter's experience and state of law.

Before recalling the content of this opinion, let us recall the reasons why the Government of Canada, under the leadership of Prime Minister Jean Chrétien, applied to the Supreme Court of Canada after the 1995 referendum in Québec. There were basically two reasons. First, the separatist Government of Québec claimed it had a right to secede unilaterally. Second, in both the 1980 and the 1995 referendums, the Government of Québec's questions were confusing, designed to artificially swell support for the "yes" vote.

The Government of Canada felt that it had a moral obligation to refuse giving consent to the loss of Canada for Quebecers unless Quebecers clearly supported secession and unless secession was duly negotiated within the constitutional framework in a manner respectful of everyone's rights. The Government of Québec claimed that international law would prevail over Canadian law in the event of a unilateral proclamation of independence. In the terms used by then Attorney General of Québec, Paul Bégin, before the Superior Court of Québec on April 12, 1996:

14 *Secession Reference*, *supra* note 1.

15 See generally Zoran Oklopčic, "The Migrating Spirit of the Secession Reference in Southeastern Europe" (2011) 24:2 *Can JL & Jur* 347.

16 *Supra* note 4 at paras 55-56.

17 *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo (Request for Advisory Opinion)*, ICJ Pleadings, online: International Court of Justice Written Statements <<http://www.icj-cij.org/docket/index.php?p1=3&p2=2&case=141&code=kos&p3=1>>.

[Translation]

Sovereignty is essentially to be decided through a fundamental democratic process which finds its sanction in international public law, and the Superior Court has no jurisdiction in that regard.¹⁸

The Government of Canada argued that Canada was divisible, but only in legality and clarity. In the words of the Honourable Allan Rock, Attorney General of Canada at the time, “[t]he leading political figures of all the provinces and indeed the Canadian public have long agreed that this country will not be held together against the will of Québécois”¹⁹ Similarly, on December 8, 1997, then Prime Minister Jean Chrétien said:

[Translation]

In such a situation, there will undoubtedly be negotiations with the federal government.²⁰

This is what the federal government argued before the Supreme Court of Canada. For example, the written response from the Attorney General of Canada of the time, the Honourable Anne McLellan, to the questions asked on February 19, 1998 by the Supreme Court of Canada mentions that the Government of Canada has stated on many occasions that “Quebeckers would not be held in this country against their will should they clearly express an unambiguous desire to leave Canada.”²¹ I have stressed this principle many times in my speeches and public letters, starting with my first statement as a minister, where I indicated:

[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.²²

18 *Bertrand c Bégin*, [1996] RJQ 2393 at para 12, 138 DLR (4th) 481 (CS Qc). The original quote is as follows: “la souveraineté relève essentiellement d’une démarche démocratique fondamentale qui trouve sa sanction dans le droit international public et la Cour supérieure n’a pas juridiction à cet égard.”

19 *House of Commons Debates*, 35th Parl, 2nd Sess, No 75 (26 September 1996) at 4707 (Hon Allan Rock).
 20 “OUI : pas question d’accepter une déclaration unilatérale,” *Le Soleil [de Québec]* (8 December 1997) A2. The original quote reads, “[d]ans une telle situation, il y aura des négociations avec le gouvernement fédéral, cela ne fait aucun doute.”

21 *Secession Reference*, *supra* note 1 (Factum of the Appellant at para 33).

22 Huguette Young, “Référendum au Québec - Dion prêt à reconnaître un OUI majoritaire,” *Le Soleil [de Québec]* (27 January 1996) A10. Original quote: “Si le Québec malheureusement votait avec une majorité ferme sur une question claire pour la sécession, j’estime que le reste du Canada a l’obligation morale de négocier le partage du territoire.”

The Court's opinion in the *Secession Reference* of August 20, 1998 confirmed that this obligation to negotiate could be precipitated only by "a decision of a clear majority of the population of Quebec on a clear question to pursue secession . . ."²³ 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."²⁴ The Court does not encourage us to try setting the threshold of this clear majority in advance: "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."²⁵ In other words, there is a qualitative dimension to the examination of "a clear majority" that requires a political evaluation with full and concrete knowledge of the circumstances.

The Court confirms that "[t]he secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation."²⁶ This must be done "within the existing constitutional framework."²⁷ All of the participants would be required to negotiate secession in conformity with four constitutional principles identified by the Court: "federalism, democracy, constitutionalism and the rule of law, and the protection of minorities."²⁸ The Government of Québec 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."²⁹ It would have the "right to pursue secession" via these negotiations founded on the above-mentioned principles.³⁰

Such negotiations would inevitably touch upon "many issues of great complexity and difficulty."³¹ In particular, the Court mentions issues related to the economy, minority rights, Aboriginal peoples and territorial boundaries by stating that "[n]obody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Québec."³² The Court further said:

In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to

23 *Secession Reference*, *supra* note 1 at para 93.

24 *Ibid* at para 100.

25 *Ibid* at para 153.

26 *Ibid* at para 84.

27 *Ibid* at para 149.

28 *Ibid* at para 90.

29 *Ibid* at para 91.

30 *Ibid* at para 92.

31 *Ibid* at para 96.

32 *Ibid*.

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.³³

The Court does not dismiss the possibility that the Government of Québec might make an attempt at unilateral secession. But the scenario it describes has little in common with the one contemplated by the Parti Québécois government led by Jacques Parizeau in 1995. Such an attempt would have no “colour of a legal right,”³⁴ and would take place in a context where Québec’s governing institutions “do not enjoy a right at international law to effect the secession of Québec from Canada unilaterally.”³⁵ Thus, no rule of law would be available to this government that would permit it to impose unilateral secession on persons who did not want it.

Could the Government of Québec then try to obtain international recognition? The Court weighed the probabilities in that respect very prudently and realistically. “[A] Québec 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.”³⁶ This prudence of the Court is understandable in light of the issue addressed earlier: the international community’s extreme reluctance to recognize unilateral secession. From the perspective of state practice, it is more than doubtful that Quebec would be recognized as an independent state without the government of Canada’s agreement.

In summary, secession is a perilous and difficult enterprise that ushers in “a period of considerable upheaval and uncertainty.”³⁷ There is every interest in resolving this matter within the general framework of the rule of law, conducting negotiations based on the principles that define a country, which in our case are: federalism, democracy, constitutionalism and the rule of law and the protection of minorities. The trigger for such negotiations would be an expression of clear support for secession. These are the simple principles set forth by our Supreme Court of Canada. Thanks to its 1998 opinion, these principles are being increasingly discussed, and sometimes even taken into account, by other countries and by the international community.

33 *Ibid* at para 97.

34 *Ibid* at para 144.

35 *Ibid* at para 154.

36 *Ibid* at para 103.

37 *Ibid* at para 96.

The Court's opinion is part and parcel of what can be called the Canadian approach. That approach consists of focusing, first of all, on the need to continuously improve a country of which all citizens can be proud—a democratic and prosperous country whose highly diversified populations develop and flourish with their own cultures and their own institutions, while working together toward common objectives.

If, in spite of the basis for understanding that a federation such as Canada affords, a population should clearly express its desire to separate, then a negotiation on secession should be undertaken within the legal framework and with a concern for justice for all, no matter the difficulties inherent in such a negotiation. This approach appears daring and liberal in the face of the internationally abhorred phenomenon of secession. It rejects the use of force or any form of violence. It emphasizes clarity, legality, negotiation and justice for all. While it may appear idealistic to many nations, this is precisely because it seeks to address, in an ideal manner, situations of breakup, which are always complex and delicate—this will contribute to peace and to enlighten state practice.

IV. SCOPE AND SIGNIFICANCE OF THE SUPREME COURT OF CANADA'S OPINION ON SECESSION IN CANADA TODAY

Given that Québec's separatist leaders reject the opinion of the Supreme Court of Canada, and even more so the *Clarity Act*,³⁸ which gives it effect, are we to conclude that little progress has been made since 1995? That is the opinion of observers such as University of Ottawa's Professor Michael Behiels³⁹ and journalist William Johnson.⁴⁰ That impression was reinforced by the fact that The New Democratic Party, now the Official Opposition, does not support the *Clarity Act* anymore although it voted for it originally.

In contrast, I believe that in Québec and across Canada, we have taken giant steps toward understanding the irresponsible and unrealistic nature of unilateral secession. However, we must guard against any complacency and continue the debate. I believe there is a growing realization in Québec that an attempt at secession made without clear support and without the safeguard of a legal right would divide the Québec population in a dangerous and unacceptable fashion. It has become clearer that a secessionist government acting outside the law would have no way to compel obedience and would confront the entire society with dangers that are unacceptable in a democracy. An attempt at the unilateral secession of Québec from Canada would be an irresponsible act and would be perceived as such by the international community.

38 SC 2000, c 26.

39 Michael Behiels, « Quebec sovereignty threat remains very real », *The Ottawa Citizen* (August 30, 2010), online: Canada.com <<http://www2.canada.com/ottawacitizen/news/archives/story.html?id=887912a6-037b-42b0-a9dc-c4c32e014f35&p=2>>.

40 William Johnson, "Spinning the fairy tale of secession," *The Globe and Mail* (29 October 2010) A23.

It seems that there is a growing realization in Québec, including in the sovereignty movement, that the Parliament and Government of Canada could not, outside the law and without the clear support of Quebeckers for secession, proceed with the breakup of Canada, thus putting an end to its constitutional obligations toward almost a quarter of the country's population. In fact, such a breakup would require not only the consent but also the active involvement of the Government of Canada, if only for practical reasons. For Québec separation to occur, methods would have to be found to transfer tens of thousands of public servants from federal departments and Crown corporations to the Québec public service, as well as millions of tax returns and tons of laws and regulations. The breakup of a modern state like Canada could turn into an administrative nightmare. Obviously, such a huge operation could not happen without the assent and active participation of the Government of Canada, which would not be secured through a unilateral declaration of independence. On the contrary, not only would unilateral secession be without legal foundation, it would also be a practical impossibility.

Separatist leaders would not admit that their belief in the legality of unilateral secession is wrong, that the questions asked in 1980 and 1995 were confusing or that it would be irresponsible and unrealistic to attempt to secede without the support of a clear majority. It was precisely because the Bouchard Government engaged in a selective reading of the Supreme Court of Canada's opinion and did not consider itself bound by it that the Chrétien Government passed the *Clarity Act*, obliging the Government of Canada to give effect to the Court's opinion. The *Clarity Act* requires the Government of Canada to negotiate secession only when there is clear support for secession. Negotiate if it is clear and do not negotiate if it is not clear. With no negotiation there can be no secession.

This clarification initiative has changed the separatist leaders' outlook on potential future referendums. There is no current discussion on linking a question on secession with a possible political and economic association or partnership with Canada. That is a huge gain from the standpoint of clarity. In 1995, according to surveys, one elector in two mistakenly believed that the conclusion of a partnership was a prerequisite for sovereignty.

The leaders of the Bloc and the Parti Québécois maintain that fifty percent plus one of votes cast in a referendum would be a clear majority, sufficient to give effect to secession. However, their current internal debate on the appropriate time to hold a referendum raises doubt as to whether they truly believe that. There is growing support for the 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 will prevail and that all will agree that a further referendum should be held only when it is certain that a clear majority of Quebeckers wish to secede. It is encouraging that a noted separatist, Joseph Facal, has pronounced that for sovereignty to be possible, 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 to leave Canada is a solemn and serious decision, we cannot take advantage of an inflamed climate to hold a rush referendum.⁴¹

Facal further stated:

[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 tried it will tell you so.⁴²

The immense difficulties that the recognition of unilateral secession would cause are much better understood in Québec today than they were in 1995.⁴³ Naturally, the separatist leaders will not acknowledge that it would be totally unrealistic and contrary to State practice for such recognition to be obtained against the will of the Government of Canada. But even Mr. Jacques Parizeau has agreed that recognition would be far from guaranteed (*La Presse*, November 24, 2009). What a change from the assurance displayed in 1995!

In fact, the best way to measure the progress of the debate is to compare the bill introduced by Parizeau in 1995⁴⁴ with the Facal Bill⁴⁵ that was adopted in 2000, in response to the *Clarity Act*.⁴⁶ The Parizeau Bill clearly announced a unilateral secession. It contained a clause stating that the declaration of sovereignty contained in the Preamble would take effect and that Québec would become independent on a date determined by National Assembly proclamation.⁴⁷ In comparison, the Facal

41 Joseph Facal, Address (delivered at the Ligue d'Action Nationale, 29 October 2010), [unpublished]. Online: <<http://www.action> - Original quote: "une majorité franche, stable et résolue ... qui ne variera pas de plusieurs points d'une semaine à l'autre au gré des humeurs. La décision de quitter ou non le Canada est une décision solennelle et grave. [O]n ne saurait tirer profit d'un climat enfiévré pour tenir un référendum, à la va-vite"

42 Joseph Facal, "Le respect du peuple," *Le journal de Montréal* (27 September 2010) online: Le Blogue de Joseph Facal <<http://blogues.journaldemontreal.com/facal/articles/journal-de-montreal-et-journal-de-quebec/le-respect-du-peuple-2/>>. The original quote is as follows: "l'échéance référendaire paralyse la machine gouvernementale sur presque toutes les autres questions. On ne peut pas vraiment gouverner et préparer un référendum en même temps. Tous ceux qui ont vécu cette expérience de l'intérieur vous le confirmeront."

43 The separatist leaders will not acknowledge that it would be totally unrealistic and contrary to state practice for such recognition to be obtained against the will of the Government of Canada. But even Mr. Parizeau has agreed that recognition would be far from guaranteed (*La Presse*, November 24, 2009). What a change from the assertiveness displayed in 1995!

44 Bill 1, *An Act respecting the future of Québec*, 1st Sess, 35th Leg, Québec, 1995 [Parizeau Bill]

45 Bill 99, *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, 1st Sess, 36th Leg, Québec, 2000 [Facal Bill].

46 *Clarity Act*, supra note 38.

47 Parizeau Bill, supra note 44, cl 2.

Bill lists a series of principles that do not include external self-determination or the right to secede. In the National Assembly, Facal, as the sponsoring minister of the bill, declared:

[*Translation*]

There is no question of clause 1 conferring a right to secession upon the Québec people.⁴⁸

Counsel for the Attorney General of Québec repeated the same argument in its attempt to convince the Québec Superior Court of the constitutionality of the bill, stating:

[*Translation*]

There is nothing that would allow one to claim that this bill takes on any semblance of a unilateral declaration of sovereignty.⁴⁹

They prudently argued that the motion was based on a factual vacuum, and for that reason did not require substantive examination.⁵⁰ Such prudence contrasts with the above-cited pontification by the Attorney General of Québec before the Québec Superior Court in April 1996,⁵¹ where it was argued that Canadian law has no jurisdiction in matters of secession.

V. CONCLUSION

Québec's sovereignty movement has given itself a huge task: to convince Quebecers to make Québec an independent country. In order to do that they must give up Canada, a country built by Quebecers and other Canadians alike; a country that is well-respected internationally. Instead of making this task less onerous, attempting to achieve secession unilaterally would put this objective out of reach.

Whether one is for or against Québec's secession, it is clear that unilateral secession is doomed to fail. It would result in adverse effects on all parties concerned—it would not lead to independence and would be very disruptive for all

48 Québec, National Assembly, *Hansard* 36th Leg, 1st Sess, No 80 (30 May 2000) at 22 (Joseph Facal). Original quote: "il n'est aucunement question par l'article 1 de lui conférer un quelconque droit à la sécession."

49 *Henderson c Québec (Procureur général)*, [2002] RJQ 2435, 220 DLR (4th) 691. See the original quote: "Encore là, rien qui ne permette de prétendre que cette loi prend la couleur d'une déclaration unilatérale de souveraineté." <http://www.macdonaldlaurier.ca/files/pdf/Secession_and_the_Virtues_of_Clarity.pdf>.

50 On August 30, 2007, the Court of Appeal ruled that most of the applicant's application for a declaratory judgment was admissible: *Québec (Procureur général) c Henderson*, 2007 QCCA 1138, [2007] RJQ 2174.

51 Bertrand, *supra* note 18.

Canadians. 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. But by providing thorough clarification on these legal issues and confirming that secession is possible within the proper legal framework, the Supreme Court of Canada has also done all Canadians a great service. A separation agreement would have to be duly negotiated within the Canadian constitutional context and based on the clear will of Quebecers to leave Canada in order to make Québec an independent state. The difficulties that separatist leaders are having in convincing Quebecers to clearly give up on Canada does not authorize them to resort to confusion in order to achieve that end. Clarity has virtues for everybody. The breakup of a modern state such as Canada would be a very difficult goal to attain—and an unreachable one if pursued without clarity and outside the rule of law. This is a lesson of value not only for Canada but for countries worldwide. This approach highlights the universal scope and significance of the opinion of the Supreme Court of Canada.