

## Secession and Democracy: a Canadian perspective

Notes for an Address by the Honourable Stéphane Dion  
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I love and admire Spain, including, of course Catalunya and superb Barcelona. But as a foreign parliamentarian, I have to abstain from taking any position on your domestic political debates. Spanish unity concerns Spaniards just as Canadian unity is the business of Canadians. Suffice it to say, regarding Spanish unity, that Canada is highly appreciative of its friendship with an united Spain and that all else falls under the realm of domestic Spanish politics.

That said, one should not be so deaf as to refuse to listen to certain persistent questions being raised, in the Spanish context, regarding the issue of secession in a democracy.

The organizers of this conference have done me the honour of thinking that I could make a useful contribution to the debate by voicing my own answers to these questions. I will give you these answers by addressing each question in turn. I will steadfastly limit them to the Canadian context but will link them to some principles which I believe to be universal in scope. It will be up to you to decide whether or not my discourse bears any validity within the context of your own country.

Since Canada is a pluralistic democracy, no wonder then that there will be Canadians – particularly within Quebec's separatist movement – to challenge my answers. I firmly believe that not only are the latter legally accurate but that they are in the best interest of all Canadians, particularly Quebecers, including those who favour secession. I will say a few words on this in my conclusion.

### 1. What feeds Quebec's secessionist movement?

First and foremost, it is an identity-driven movement. Although Quebec's separatist parties are trying hard to convince their fellow citizens that independence is economically viable, theirs is a minority point of view. Quebec is less prosperous than the Canadian average and if we look at the whole picture, Canada's economic assets are much more diversified than those of any one of its ten provinces taken separately.

Quebec has a strong francophone majority in a continent that, compared to Europe, is not multilingual. About eight million Quebecers, surrounded by some 325,000,000 anglophones (Mexico is far away), can't help feeling the assimilating force of English. Sure, French and English are both Canada's official languages and francophone minorities exist in other Canadian provinces. But they only form a substantial percentage of the population in a small province bordering Quebec: New Brunswick.

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Significant support for Quebec secessionists comes only from francophones, proof that the quest for this option is identity-driven. In the end, the separatists' main argument is that we, Quebecers, form a nation and therefore should be controlling our own destiny rather than being content to be another nation's province.

However, separatists are a minority in Quebec. They were defeated in both referendums held to date – in 1980 and 1995 – and the polls do not favour their option. Although the party in power in Quebec City supports secession, the majority of Quebecers do not want independence and strongly oppose even thinking of holding a third referendum on the issue. The majority support for Canadian unity is also identity-driven. The material benefits we receive from being part of Canada don't explain everything. Opinion polls repeatedly show that the majority of Quebecers are proud to be Canadian, proud of a country that Quebecers built together with other Canadians – a country that is the envy of the whole world.

Many Quebecers consider that belonging to Quebec and Canada both is not a contradiction: it is a strength. Therefore, the separatist movement's challenge – one that has been thwarting them for decades – is to convince Quebecers that they would be happier if they ceased being Canadians.

## 2. 2. Does Canada consider itself divisible?

Yes.

No political party recognized in Parliament or a provincial legislative assembly has ever said they would want to keep Quebecers in Canada against their will as long as their will to secede had been clearly expressed and a separation agreement duly negotiated within Canada's constitutional framework and in a manner that is fair to all.

Canada doesn't have the equivalent of Article 2 of Spain's Constitution, which, as you know, stipulates that: *“La Constitución se fundamenta en la indisoluble unidad de la Nación española, patria común e indivisible de todos los españoles, y reconoce y garantiza el derecho a la autonomía de las nacionalidades y regiones que la integran y la solidaridad entre todas ellas”*. – *“The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all.”*

Spain is far from being the only democracy that considers itself to be an indissoluble entity. Many others, such as France, the United States, Italy and Australia, declare themselves to be indivisible, either in their constitutions or jurisprudence. These democratic States believe that their country cannot be divided because each part of their national territory belongs to all citizens. They give all citizens the guarantee that their country will never be taken away from them, and that they will be able to pass it on to their children.

Canada came to a different conclusion. But make no mistake: the reason why Canada recognizes itself as divisible is not because we believe that Canada, its unity, its citizenship, are less worthy of the respect granted other countries. Rather, we believe that our Canadian identity is too precious to be based on anything other than the will to live together.

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### 3. Is secession a right in Canada?

No.

Secession is recognized as a possibility, not a right. A provincial government has no right to appoint itself as the government of an independent State. It cannot, legally, secede unilaterally without first securing a negotiated agreement with the Canadian State. It doesn't have that right, either under international law or domestic law. The Supreme Court of Canada confirmed, in its 1998 opinion, that *"the secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which performance requires negotiation"* (para. 84) *"within the existing constitutional framework"* (para. 149).

A separatist government could not claim a right to unilateral secession for itself by arguing that Quebecers form a people or a nation. In its 1998 opinion, the Supreme Court states that: *"(...) whatever be the correct application of the definition of people(s) in this context, their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession."*

### 4. Does the government of a Canadian province have the right to hold a referendum on secession?

Yes.

The government of any province of Canada is entitled to consult its population by referendum on any issue and is entitled to formulate the wording of its referendum question.

However, referendums are consultative rather than decisional in Canada. As the Supreme Court wrote: *"The democratic vote, by however strong a majority, would have no legal effect on its own"*.

### 5. Would the fact that a referendum is only consultative allow Canada to remain indifferent to the expression, by referendum, of a clear will to secede?

No.

But this will to secede must be clearly established in order to trigger the obligation to enter into negotiations on secession.

Canada's former Prime Minister, Jean Chrétien, declared on December 8, 1997: *"In such a situation, there will undoubtedly be negotiations with the federal government."* I myself have stressed this principle many times in my speeches and public letters, beginning in 1996, with my first statement as a Minister, in which I indicated that *"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"*.

The Supreme Court's opinion of August 20, 1998 confirmed that this obligation to negotiate can be precipitated only by *"a decision of a clear majority of the population of Quebec on a clear question to pursue secession"*. It does not exist if the expression of the democratic will is *"itself fraught with ambiguities"*.

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If there were clear support for secession, there would be negotiation. If there were no clear support, there would be no negotiation, and without negotiation there would be no secession. That was the case the Government of Canada pleaded before the Supreme Court. That was also the Court's 1998 opinion, to which the *Clarity Act*, enacted by the Parliament of Canada in 2000, gave effect.

6. If only a clear support triggers the obligation to negotiate secession, who should evaluate the degree of clarity?

The Supreme Court gave that role to political actors: *"Only the political actors"*, says the Court, *"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 another"*.

The government of the province chooses the question. The *Clarity Act* provides for the House of Commons to rule on the clarity of the question by way of resolution, after deliberation and consultations and before the referendum is held. If the question is deemed to be unclear, the referendum cannot trigger negotiations.

After a referendum has been held on a clear question, if the government of the province believes that it has obtained clear support for secession, the House of Commons will examine the clarity of the majority. It is only if the House deems that there is a clear majority – by way of a resolution and after deliberations and consultations – that the Government of Canada can and must undertake negotiations on secession.

Therefore, a clear question and a clear majority are necessary.

7. What is a clear question?

We all know what a clear question on secession would be. What is difficult is to come up with a confusing question. The Supreme Court talks about the wish not to remain in Canada any longer. The closer to that wording the question is, the clearer. 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 country?*

It is likely that the Supreme Court put so much emphasis on the clarity of the question in its 1998 ruling because that clarity was questioned during the Quebec referenda of 1980 and 1995. The questions had been worded by the Parti Québécois government in a way that artificially inflated support for the Yes side, notably by intertwining their plan for independence and the possibility of remaining associated, in some way, with Canada. In 1995, the question read as follows:

*"Do you agree that Québec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the Bill respecting the future of Québec and of the agreement signed on 12 June 1995?"*

Obviously, no clarity can come from a question that deals with something other than secession or that mixes this up with other considerations. If the secessionist government is confident that it has the support of the public, it would be in its interest, as well as in everybody else's, to formulate a clear question that allows no doubt.

## 8. What is a clear majority?

The Court stated that democracy means more than simple majority rule. It confirmed that this obligation to enter into negotiation can be created only by "*a decision of a clear majority of the population of Quebec on a clear question to pursue secession.*" The Supreme Court mentioned the words "clear majority" no less than 13 times, and also referred to a "strong" majority. And the Court refers to a "*clear majority of the Quebec population*" which goes beyond the number of valid 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 adopted. 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 separation of a modern state will 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 sufficiently clear majority that will last through the inevitable negotiation difficulties.

However, the Supreme Court urged us not to determine what constitutes a 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.*" 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.

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

To limit the chances of disagreement over the clarity of a majority, a secessionist government only has to avoid holding a referendum until it is reasonably assured that it will win a clear majority. This assurance would come from different indicators: polls showing clear and stable majorities in favour of secession; various political forces rallying in favour of the idea, and so on.

## 9. Must the negotiations inevitably lead to secession?

No.

The obligation to negotiate is not an obligation to achieve a result; however, all the participants would be required to negotiate secession in conformity with four constitutional principles identified by the Supreme Court: "*federalism, democracy, constitutionalism and the rule of law, and the protection of minorities*". The government of Quebec could not

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determine on its own what would or 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”*. It would have *“the right (...) to pursue secession”* via negotiations founded on the above-mentioned principles.

These negotiations, *“a period of considerable upheaval and uncertainty”*, would inevitably *“give rise to many issues of great complexity and difficulty”* – to quote the Court's own words. In particular, the Court mentions economic issues, debt, minority rights, Aboriginal peoples and territorial boundaries. Achieving secession would be an inherently difficult task; this is why it should only be considered within the rule of law and on the basis of a clear support for secession.

#### 10. Could a separatist government ignore the law and implement secession unilaterally?

No.

Such an attempt would have no *“colour of a legal right”*, 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”*, said the Supreme Court.

Thus no rule of law would be available to such a government that would permit it to impose unilateral secession on persons who did not want it. It would have no way to compel obedience and would confront the entire society with dangers that are unacceptable in a democracy.

The Nation's break-up would require not only the consent but also the active involvement of the Government of Canada, if only for practical reasons.

Ways would have to be found to transfer tens of thousands of public servants from federal departments and corporations to the Quebec public service, millions of tax returns, tons of laws and regulations... The break-up 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.

But this level of participation by the Government of Canada 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.

#### 11. Could a unilateral secession attempt achieve international recognition?

No.

The Supreme Court looked at this possibility with much prudence and realism; it said that any form of intransigence from Canada would *“likely”* increase the chances of such unilateral secession being recognized internationally. But in fact, there is no such precedent: no State created through unilateral secession has been admitted to the United Nations against the declared will of the government of the predecessor State. State practice is extremely reluctant to recognize unilateral secession outside the colonial setting. 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.

And so we Quebeckers should not opt for secession by counting on an international support being exercised against the will of the Canadian State, because this would go against State practice. Instead, we should count on the honesty of other Canadians. We should rely on the values of tolerance that we all share in Canada, and which would be essential to the conduct of those painful and difficult negotiations.

### Conclusion

In summary, I will say that secession is a perilous and difficult enterprise. 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.

Those are simple principles, outlined by the Supreme Court and given effect by the *Clarity Act* in order to protect the rights and interests of all Canadians, particularly Quebeckers.

We, Quebeckers, are just as Canadian as those living in other provinces and in the territories. We have a right to the full benefits provided by Canadian citizenship, the Canadian Constitution and the Canadian Charter of Rights and Freedoms. We have a right to the full protection provided by Canadian legislation and by the duty to assist that the Canadian federation governments have toward us wherever we might be located, in Canada or abroad. Like all Canadians, we have the right to participate to the fullest in the building of the nation. Nobody can take these full Canadian citizenship rights away from us. No premier, no government, no politician. Nobody! Not unless we, Quebeckers, clearly give those rights up.

If we, Quebeckers, clearly gave up on Canada with a clear majority in response to a clear question on secession, governments would have the obligation to enter into negotiations on secession. These negotiations would have to be held within Canada's constitutional framework in order to conclude a separation agreement that is fair for all.

Whether we are for Canadian unity or Quebec independence, we all have to agree on a fundamental principle: clearly expressed consent. No attempt at Quebec's secession should be made until Quebeckers have clearly expressed their support for it.

In my introduction, I said I would limit my comments to the Canadian context while basing my responses on some principles I believe to be universal and defining of the relation between secession and democracy.

Allow me, in concluding, to summarize these principles.

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 asks the opposite of citizens, asking them to break the solidarity that unites them, and to do so, almost always, based on considerations related to specific affiliations, such as language or ethnic origin. Secession is that rare and unusual exercise, in a democracy, whereby a choice is made as to which ones of our fellow citizens we want to keep and which ones we wish to transform into foreigners.

A philosophy of democracy that would be 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 agreement. Automatic secession would prevent democracy from absorbing the tensions inherent in any differences. Recognition of the right to secession on demand would invite separation as soon as difficulties were experienced along fault lines which are very likely to develop around collective attributes such as religion, language or ethnicity.

It does not mean that a democratic State must reject any and all secessionist demands. The State may conclude that in light of a clear desire for secession, allowing the secession is the lesser of two evils. But a democratic government has the obligation to ensure that such desire for secession is truly clear and unambiguous, and that it will not be carried out unilaterally, but within the framework of legality and justice for all.