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ABORIGINAL PEOPLES AND THE 1995 QUEBEC REFERENDUM: A SURVEY OF THE ISSUES

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INTRODUCTION

In the debate surrounding the October 1995 Quebec referendum and in subsequent discussions on the future of the province, aboriginal issues have had a significant profile. Most prominent among these has been the conflict over northern Quebec, the traditional territory of the Crees and Inuit. Questions about rights to self-determination, the status of traditional aboriginal territories in the event of Quebec's secession, and the obligations of Canada to aboriginal peoples in Quebec continue to play a role in the ongoing debate.

This paper surveys the issues and reviews the positions of different parties during and following the referendum. Many of the issues involve complex legal and political questions. To provide a better understanding of them, the paper examines concepts in international and domestic law that underlie the debate.

The paper begins with some background on aboriginal peoples in Quebec and the James Bay and Northern Quebec Agreement. It then sketches positions taken during the referendum and in the post-referendum period. The paper goes on to explore aspects of international and domestic law and practice. This study is intended to be descriptive and explanatory. While it presents the views of various commentators, the paper does not attempt to analyze the merits of their arguments or draw conclusions on them.

BACKGROUND

A. Aboriginal Peoples in Quebec

The aboriginal population of Quebec is approximately 62,000.(1) Aboriginal groups include the Inuit, and ten Indian nations: the Crees, Mikm'aq, Malecite, Algonquin, Huron, Montagnais, Abenaki, Atikamekw, Naskapi, and Mohawk. Fifteen Inuit and nine Cree communities are located in northern Quebec.

Lands exclusively dedicated to aboriginal peoples cover 14,770 square kilometres of the province. About 95% of this land has been set aside under the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement, while the remaining 5% is allocated as reserves and settlements.(2)

B. The Province of Quebec's Current Boundaries

Quebec's boundaries have been altered several times since Confederation in 1867.(3) In 1870, Canada purchased Rupert's Land, which was inhabited by Inuit, Cree, Montagnais, Naskapi, Atikamekw and Algonquin, from the Hudson's Bay Company. Over the next few decades, Canada transferred portions of this territory to Quebec. In 1898, Quebec's northern boundary was set along the eastern shore of James Bay to the mouth of the Eastmain River, north along the river, then due east to the Hamilton River and down the river to the western boundary of Labrador. In 1912, the vast territory bounded by the Eastmain River, the Labrador coast, and Hudson and Ungava Bays was transferred to Quebec, extending the northern boundary to its present location. Cree, Montagnais, Naskapi and Inuit inhabited these lands. The *Quebec Boundaries Extension Act* of 1912 included several provisions relating to the aboriginal peoples of the territory: that the province would recognize the rights of Indians to the

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(1) Population figures vary according to sources. In the 1991 census, 137,615 people in Quebec reported having aboriginal origins, whether as their only ancestry or in combination with other origins. Of these, 56,925 reported that they identified with an aboriginal group and/or were registered Indians. However, this group did not include several reserves that did not participate in the census or were incompletely enumerated.

(2) B. Morse, "Comparative Assessment of Indigenous Peoples in Quebec, Canada and Abroad," A Report Prepared for la Commission d`étude sur toute offre d'un nouveau partenariat de nature constitutionelle et la Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, March 1992, p.46.

(3) See T. Morantz, "Aboriginal Land Claims in Quebec," in K. Coates, ed. *Aboriginal Land Claims in Canada*, Copp Clark Pitman, Toronto, 1992, p. 102-104.

same extent as the government of Canada had recognized such rights and that the province should obtain surrenders to the territory in the same matter as the federal government had done elsewhere. The Act also stipulated that the trusteeship of Indians in the territory and management of lands reserved for their use would remain with the Government of Canada.

Indian and Inuit lands in Quebec were not covered by treaty or surrender, although some aboriginal groups were granted title over small allotments of land.

C. James Bay and Northern Quebec Agreement

In the spring of 1971, the Quebec government announced plans to proceed with the construction of the James Bay hydroelectric project. The lands in question were part of the area that had been transferred under the 1912 *Boundaries Extension Act* and had not yet been ceded by aboriginal peoples who lived in the territory. In 1972, the Cree and Inuit instituted legal proceedings against the Quebec government to obtain an injunction against the development. In the fall of 1973, Justice Albert Malouf issued an interim injunction halting the James Bay project. The injunction was later overturned by the Quebec Court of Appeal. Before an appeal to the Supreme Court was heard, the federal and Quebec governments, the Grand Council of the Crees (of Quebec), and the Northern Quebec Inuit Association reached an out-of-court settlement.(4) The James Bay and Northern Quebec Agreement (JBNQA) was signed on 11 November 1975.

The agreement and a series of federal and provincial implementing statutes are detailed and complex. Under the JBNQA the Crees and Inuit were granted a number of rights and benefits, including financial compensation of $232.5 million over 21 years, in exchange for surrendering their rights to land. The agreement also provided for the establishment of administrative structures and special programs for the Crees and Inuit, granting them a degree of self-government. In 1976, parties to the JBNQA and the Naskapi Indians of Quebec signed the Northeastern Quebec Agreement, which extended the benefits of the JBNQA to the Naskapi.

THE REFERENDUM AND POST-REFERENDUM DEBATES

(4) Three corporations, Hydro-Québec, the James Bay Development Corporation, and the James Bay Energy Corporation, were also parties to the agreement.

Following the election of the Parti Québécois in the fall of 1994, the Quebec government initiated steps toward secession. A draft bill calling for a unilateral declaration of independence was made public in December 1994, followed by the introduction of an *Act respecting the future of Quebec* (Bill 1) in the National Assembly on 7 September 1995.(5) The bill affirmed that a new Quebec constitution would recognize the existing constitutional rights of aboriginal nations, in a manner "consistent with the territorial integrity of Quebec." The bill clearly stated that Quebec would retain its boundaries as they currently exist within Canada. It also provided that under the new constitution, the right of aboriginal nations to self-government on the lands over which they have full ownership and their right to participate in the development of Quebec would be recognized.

In the lead-up to the referendum, aboriginal groups reacted in opposition to this position. In particular, the Crees argued that they had a right to maintain their territory in Canada. The Crees and the Quebec government dominated the debate on this issue, along with academic commentators. Since the referendum, the Crees and the Quebec government have continued to conflict on this matter, and the status of aboriginal territory has also become a prominent part of federal-provincial rhetoric on the terms of a possible secession.

A. Aboriginal Perspectives

1. The Crees of Quebec

The Grand Council of the Crees (of Quebec), under leadership of Grand Chief Matthew Coon Come, have been the most outspoken aboriginal group. The Crees have asserted for many years that they are a people, with a right to self-determination recognized under international law. They argue that no annexation of them or their territory to an independent Quebec should take place without their consent, and that if Quebec has the right to leave Canada then the Cree people have the right to choose to keep their territory in Canada. Cree arguments generally do not claim the right to secede from Canada; rather, the Crees see themselves as a people bound to Canada by treaty (the JBNQA), and as citizens of Canada.(6)

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(5) *An Act Respecting the Future of Québec* (Bill 1), Quebec National Assembly, First Session, 35th Legislature, tabled by Premier Jacques Parizeau on 7 September 1995.

(6) Grand Council of the Crees (of Quebec), "A Message Regarding the Rights of Crees and Other Aboriginal Peoples in Canada," October 1995.

The Crees have stated that a unilateral declaration of independence by Quebec would be a violation of fundamental principles of human rights, democracy and consent. If secession were to proceed, the Crees argue they would seek protection through the Canadian courts as well as asserting Cree jurisdiction over its people and lands.

In the period leading up to the referendum, the Crees were active at both the domestic and international levels. A Cree Commission held 14 hearings in 10 different communities during August and September 1995. Its report, "The Voice of a Nation on Self-Determination," affirmed Cree opposition to secession without their consent, and restated their commitment to maintain a relationship with the federal government.

In October 1995, the Crees released a study, *Sovereign Injustice*, which cited a variety of Canadian and international sources to support their case.(7) The book updates a study completed in 1991 and submitted to the United Nations Commission on Human Rights at its forty-eighth session in February 1992. *Sovereign Injustice* emphasizes that aboriginal peoples have a right to self-determination, including a right to stay in Canada. It argues that the forcible inclusion of the Crees in any future Quebec state would lack validity and legitimacy from the viewpoint of international, Canadian, and aboriginal law and practice. Such an action, the Crees assert, would also seriously detract from Quebec's claims that it is resorting to fair or democratic process to achieve its goals.

The study also argues that there is no rule under Canadian or international law that would ensure the present boundaries of Quebec would become those of a sovereign Quebec state.

The paper notes that portions of Quebec annexed to the province in 1898 and 1912 constitute in large part the traditional territories of the James Bay Cree and other aboriginal peoples, which were added to the province without their consent. It concludes that the James Bay and Northern Quebec Agreement provides for permanent federal obligations that could not be unilaterally undertaken by Quebec.

To highlight their opposition to Quebec secession, the Crees held a separate referendum on 24 October 1995. Cree voters were asked: "Do you consent, as a people, that the Government of Quebec separate the James Bay Crees and Cree traditional territory from Canada

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(7) Grand Council of the Crees (of Quebec), *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec*, Grand Council of the Crees, Nemaska, 1995.

in the event of a Yes vote in the Quebec referendum?" The Crees voted 96.3% to stay with Canada. Of 6,380 eligible voters, 77% participated in the Cree referendum.

Cree concerns over secession continue in the post-referendum period. In late January 1996, Coon-Come urged the prime minister to make a formal declaration in the House of Commons supporting the Cree decision to remain in Canada if Quebec secedes. The Crees again asserted that the JBNQA is a treaty that binds the federal government to protect Cree interests in the event of a unilateral declaration of independence by Quebec.(8) The Crees also appeared during Senate Committee hearings on Bill C-110 (An Act respecting constitutional amendments). They opposed the bill, arguing that reforms should not be made at the expense of the Crees and other aboriginal peoples.(9) In their view, Bill C-110 could constrain the federal government from tabling constitutional initiatives to protect the rights of aboriginal peoples in the context of Quebec secession. The Crees proposed an amendment in the event that the Senate supported the bill, a non-derogation clause to ensure that the Act would not constrain the powers of Parliament to propose or to authorize an amendment to the constitution in order to: a) recognize, affirm or protect the aboriginal peoples and their aboriginal and treaty rights or other rights and freedoms, or b) preserve and protect the national unity and territorial integrity of Canada. The Crees also called for their inclusion in federal unity initiatives.

(8) "Crees: Don't Abandon Us," *Gazette* (Montreal), 1 February 1995.

(9) Grand Council of the Crees, "Presentation Concerning Bill C-110 (An Act Respecting Constitutional Amendments), Senate of Canada, 24 January 1996.

2. Inuit of Northern Quebec

The Inuit of Northern Quebec also raised significant concerns over the future of their territory. Like the Crees, they assert the right to self-determination, and the choice to remain in the Canadian federation. The Inuit held a separate referendum, on 29 October 1995. Inuit voters were asked the question: "Do you agree that Quebec should become sovereign?" With about 75% of eligible voters casting ballots, 96% voted against Quebec's becoming sovereign. This result was similar to the outcome of the vote carried out by the Inuit parallel to the 1980 Quebec referendum, in which 94% had voted "no."

Inuit continue to argue that they have rights to remain Canadian citizens and keep northern Quebec within Canada, which are supported by section 35 of the *Constitution Act, 1982* and the JBNQA. For reasons similar to the Crees', the Inuit opposed Bill C-110. They recommended that the proposal be reconsidered, and if not, supported the adoption of an amendment identical to that put forward by the Crees.

3. Other Aboriginal Groups

Leaders of other aboriginal peoples in Quebec have also expressed their opposition to taking aboriginal land out of Canada. In early October 1995, First Nations Chiefs, in a statement entitled "Reaffirmation of Aboriginal Peoples of Quebec and Labrador's Right to Co-Exist in Peace and Friendship," articulated their resistance to the forcible inclusion of aboriginal people in a new, independent state, arguing that it would be contrary to international law.(10)

Contrary to usual practice, many aboriginal peoples exercised their right to vote, the exception being Mohawks of Kahnasetake, Kahnawake, and Akwesasne. Elsewhere, Indians registered a strong federalist voice.(11) Published referendum results show that more than 95% of aboriginal peoples who participated in the referendum voted "no."

During the final week of the referendum campaign, Quebec chiefs, along with Assembly of First Nations Grand Chief Ovide Mercredi, made it clear that they expect to participate in any discussions on Canada's future.

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(10) "First Nations Say No to PQ," *Windspeaker*, November 1995.

(11) "Les autochtones sont des adversaires acharnés de la souveraineté," *Le Droit*, 9 November 1995.

B. Quebec Government

The Parti Québécois position, as expressed in its sovereignty bill, is that Quebec would retain its current boundaries in the event of secession. In September 1995, Quebec MNA David Cliche, then spokesperson on native affairs, argued before the Cree Commission on sovereignty that the province's borders could not be altered. He told the Commission that Quebec does not require Cree consent to separate from Canada, and that Cree consent would be necessary only if changes were made to the James Bay Agreement. Otherwise, a separate Quebec would simply assume Canada's responsibilities in the agreement.(12)

During the referendum debate, Lucien Bouchard and Jacques Parizeau rejected claims that aboriginal peoples have the same right to self-determination as Quebeckers. They asserted that under international law Quebec has the right to maintain its current borders after secession. Once Quebec was recognized as an independent state, aboriginal peoples would simply be transferred to its jurisdiction.

Since the referendum, the Quebec government has maintained its position that, in the event of secession, the province's territory could not be partitioned.

C. Federal Government

During the referendum debate, the federal government made few comments on aboriginal issues. In May 1994, however, Minister of Indian Affairs Ron Irwin stated his view that aboriginal peoples have the right to stay in Canada with their territories if the province of Quebec were to secede. In October 1995, Irwin told a meeting of First Nations chiefs in Ottawa that the federal government would protect Quebec aboriginal peoples and their territories if the province voted to separate, and repeated his position that Quebec aboriginal peoples have the right to stay with Canada. (13)

The federal government entered more forcefully into the debate in early 1966. Commenting on a federal strategy in the event of a Quebec vote to separate, both Intergovernmental Affairs Minister Stéphane Dion and the Prime Minister suggested that regions

(12) "Cree Wave 'Red Flag' at Separatists," *Ottawa Citizen*, 22 September 1995.

(13) "Irwin Guarantees Protection for Aboriginals," *Ottawa Citizen*, 28 October 1995.

of Quebec may be entitled to remain with Canada.(14) Minister Irwin has also questioned Quebec's right to the territory covered by the James Bay Agreement.(15)

ISSUES IN INTERNATIONAL LAW

The arguments put forth by the different parties raise questions about rights to self-determination, the conditions for secession, and rights to territory that are based in international law. This section discusses the concepts of self-determination, secession, and territorial integrity; both broadly and as applied to aboriginal peoples. Given the complexity of the issues and the evolving nature of international law, it is evident that different interpretations can be presented.

A. Self-Determination

Quebec supporters of secession and the Cree both present arguments based on a right to self-determination. While the principle of self-determination has evolved at the international level, it lacks a precise definition in international law; governments and legal scholars take many different positions on the issue. The development of the concept shows a continuing conflict between the principle of having peoples freely determine their political status and the principle of territorial integrity of states.

(14) "Quebec Divisible, Chrétien says," *Globe and Mail* (Toronto), 30 January 1996.

(15) "Native Land not Quebec's, Irwin Says," *Globe and Mail* (Toronto), 14 February 1996.

1. History and Evolution of the Concept in International Law

During the latter stages of World War I, the principle of self-determination began to emerge as an element of international law. In the 14 points he put forward as part of United States' approach to peace process in 1918, American President Woodrow Wilson advocated a moderate version of self-determination, intended to apply to the peoples of Europe, particularly those formerly ruled by the Ottoman Empire. A more radical version of self-determination, articulated by Lenin prior to the Bolshevik Revolution, advocated self-determination as a means for the liberation of all peoples subject to a colonial order.(16)

Wilson's more restrictive view of self-determination took prominence at this time. The Covenant of the League of Nations did not clarify the principle of self-determination, but the League made it clear that no positive international right to secession existed.(17) While the international community failed to adopt the right of self-determination to protect "peoples" within existing states it did embrace the principle of "minority rights." A "minority group" within a segment of a state would receive the support of the international community if its rights to self-determination, short of secession, were being infringed.(18)

In the period during and after World War II, an ethos of nationalism and anti-colonialism began to spread. There continued to be a split in the international community, however, between those who challenged the colonial order, and countries that remained committed to retaining their colonies.

2. United Nations Documents and Self-Determination

Following the creation of the United Nations, the process of clarifying and interpreting the concept of self-determination began. At its inception, the U.N. Charter clearly did not include any general right of self-determination; it characterized self-determination as a

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(16) Richard Falk, "The Relevance of the Right of Self-Determination of Peoples under International Law to Canada's Fiduciary Obligations to the Aboriginal Peoples of Quebec in the Context of Quebec's Possible Accession to Sovereignty," in S.J. Anaya, R. Falk and D. Pharand, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec, Volume 1: International Dimensions*, Royal Commission on Aboriginal Peoples, Ottawa, 1995, p.44.

(17) Distinction should be made between legal principles and political practices. While a right to secession was not provided for in international law, secession might occur in practice.

(18) M. M. Kampelman, "Secession and the Right of Self-Determination," *Washington Quarterly*, Vol. 16, 1993, p. 6.

principle, rather than a right. Article 1(2) stated one of the U.N.'s guiding principles: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples..."

The pressures of decolonization movements gradually led to a broader interpretation of a right to self-determination. In 1960, in a significant move, the United Nations adopted the Declaration on the Granting of Independence to Colonial Peoples.(19) The Declaration provided in Article 2 that "(a)ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." While this document is essential political in nature and is of questionable legal authority, it has provided the groundwork for what may be called the new U.N. law of self-determination. As international law scholar Richard Falk has noted:

> The thinking expressed in Resolution 1514 remains important in understanding the most recent post-colonial phases of struggle with respect to the application of the right of self-determination, although it does not attempt to clarify the specific legal content of the right, nor does it identify the circumstances of its application and their limits.(20)

In 1966, the General Assembly of the United Nations adopted the final text of the two International Covenants on Human Rights. The texts of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant on Civil and Political Rights recognize that all peoples have the right to self-determination.

Again, no definition of the right to self-determination was provided in the documents. Comments formulated during the drafting of these documents suggest that the right of secession was not meant to be embraced by this provision, which is the position held by most international legal authors. The few who have attempted to prove otherwise put forward the argument that, in spite of existing ambiguity, both Covenants were adopted unanimously, stating a universal principle of the right to self-determination that could not exclude a right to secede. They further view their position as supported by the language of the Covenant, which grants a right of self-determination to "all peoples" and not just to colonies or other non-self-governing territories.

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(19) G.A. Resolution 1514(XV).

(20) Falk (1995), p. 48.

Efforts to reconcile conflicting opinions over the principle or right of self-determination culminated in a new U.N. resolution in 1970. The influential Declaration Concerning Friendly Relations Among States[21] reasserted the principle of the equality of the rights of peoples and their right to self-determination established in the U.N. Charter:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.
>
> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

The Declaration seems to indicate that respect for the territorial integrity of a state should be given precedence over the exercise of self-determination. Thus, it would preclude secession. It has been suggested, however, that the Declaration reasserts the principle of territorial integrity but in a more conditional form, indicating a "potential receptivity to and loopholes for self-determination claims that are not strictly reconcilable with the primacy previously accorded unconditionally to territorial integrity and political unity."[22]

A broad view of the right encompasses both "external" self-determination, through which a people freely determines its status within the international community and liberates itself from alien rule, and "internal" self-determination, through which a people chooses the desired system of government and the nature of the regime. Thus, external self-determination includes the classic sense of the right -- that of secession and the formation of a new state. It may also include integration into an existing state or association with another state. Internal self-determination involves a people determining their own destiny *within the boundaries* of an existing state.

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(21) G.A. Resolution 2625(XXV).

(22) Falk (1995), p. 51.

As is evident from the preceding discussion, self-determination is an ambiguous concept without a clear definition. As a result, the status of the right in international law is subject to varying interpretations. Richard Falk argues that the right has matured along three paths; morality, politics, and law; with international law lagging behind moral advocacy and political practice.(23) He notes that international law literature supports two opposite tendencies: the first limits self-determination by insisting on the unconditional territorial unity of states; the second, reformulated legal approach "acknowledges the unsettled character and scope of the right but takes note of the degree to which diplomatic recognition and admission to the United Nations have been granted to entities formerly encompassed by the Soviet Union and Yugoslavia."(24) While some legal debate continues over the status of self-determination as a legal right versus a political principle, in Falk's opinion it has become generally accepted as a norm of international law.

The international law documents discussed above refer to the self-determination of "peoples." There is, however, no generally accepted definition of this term in international law; as a result, its meaning varies and remains contentious. Elements that have been identified include a common language, history, culture, race or ethnicity, way of life and territory. The notion of peoples also includes a subjective element -- a present consciousness of group identity and a will to protect that identity.(25)

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(23) *Ibid*., p. 47.

(24) *Ibid*., p. 53.

(25) Y. Dinsten, "Collective Human Rights of Peoples and Minorities," *International and Comparative Law Quarterly*, Vol. 25, 1976, p. 104.

3. Secession

Secession, as understood in international law, refers to the creation of a state without the consent of the former state to which the breakaway entity was joined.(26) As scholars in international law have pointed out, secessionist self-determination is an issue separate from a general right of self-determination.(27)

International law supports secession or independence for "peoples" or "territories" only in exceptional situations.(28) While international law does support the right of self-determination of all peoples, it has generally limited the right to secede to special conditions of decolonization in the third world. Although most international lawyers agree that the U.N. Charter does not encompass the right of secession, various justifications for secession have been offered.(29)

4. Territorial Integrity

Territorial integrity, the principle that supports the inviolability of the territory of state, is recognized in Article (4) of the U.N. Charter.

In the case of secession for colonized or subjugated peoples, international practice has followed the principle of *uti possidetis*, by which a colonized area becomes independent using the state boundaries established for the colony. It was first applied to the Spanish colonies in Latin America, and has since been adopted in other areas. This rule intended to maximize continuity and stability, to limit ethnic claims, and to minimize conflict. However, some authors have noted that *uti possidetis* is not a mandatory principle under international law, and that its application has been variable.(30)

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(26) S. Williams, *International Legal Effects of Secession by Quebec*, York University Centre for Public Law and Public Policy, North York, Ontario, 1992, p. 2.

(27) L. Bucheit, *Secession: The Legitimacy of Self-Determination*, Yale University Press, New Haven, 1978, p. 127.

(28) D. Sanders, "If Quebec Secedes from Canada Can the Cree Secede from Quebec?," *UBC Law Review*, Vol. 29, No. 1, 1995, p. 157.

(29) See, for example, Allen Buchanan, "Self-Determination and the Right to Secede," *Journal of International Affairs*, Vol. 45, 1992, p. 353-357.

(30) I. Brownlie notes that the principle is not mandatory and that states are free to adopt other principles, *Principles of Public International Law*, Clarendon Press, Oxford, 1990, p. 135. Sanders (1995) p. 157 argues that *uti possidetis* cannot be accepted as an established norm of international law in the context of the breakup of federal states, and that its application has not been successful in a number of circumstances. Regarding the international community's treatment of the pre-existing boundaries internal

B. Current International Norms and Aboriginal Peoples

International law dealing specifically with indigenous peoples is a fairly recent development. The 1989 ILO Convention 169 Concerning Indigenous and Tribal Peoples is contemporary international law's most concrete statement of indigenous peoples' rights.(31) The Convention recognizes the limits that have been placed on the rights of indigenous peoples, and their aspirations to control their own institutions, way of life and economic development and to maintain their identities, languages and religions. It urges governments to promote indigenous cultural integrity, to safeguard land and resource rights, and to consult the peoples concerned and establish means by which they can participate in representative institutions and develop their own institutions.

The Convention does not specifically address the issue of self-determination. Article 1(3) states: "the use of the term 'peoples' in this Convention shall not be construed as having any application as regards the right which may attach to the term under international law." This provision was included to meet the concerns of countries, in particular Canada, that the Convention not be interpreted as supporting the right of indigenous peoples to complete self-determination in international law.(32)

In 1982, the U.N. Working Group on Indigenous Populations was established.(33) The group has met nearly every year since that time in an effort to develop the Draft Declaration on the Rights of Indigenous Peoples. The central debate has been the formulation of the right of self-determination, with aboriginal peoples advocating the explicit inclusion of the right in an unrestricted form, and state representatives arguing against such a full legal recognition. The

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to Yugoslavia, Falk (1995) p. 69, suggests that the firmness of the boundaries is not fixed by law and that their outcome is shaped by an assessment of the context.

(31) International Labour Organization Convention (No. 169) *Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989 (entered into force 5 September 1990). This was a revision of Convention 107, *Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries*, adopted in 1969 (title). The change from "populations" to "peoples" was a subject of much debate, and signified an evolution not only in the ILO, but more broadly at the international level. R. Dupuis, "L'avenir du Québec et les peuples autochtones," *Choix*, Vol. 1, No. 10, 1995, p. 26.

(32) Canada has not ratified the Convention because of several specific issues, as well as a general concern over the meaning of the term "peoples."

(33) For a discussion of the group's progress, see D. Sanders, "The U.N. Working Group on Indigenous Populations," *Human Rights Quarterly* Vol. 11, 1989, p. 406-433.

1993 Draft Declaration contains the wording: “Indigenous peoples have the right of self-determination. By virtue of that right they freely pursue their economic, social and cultural development.” The draft does not contain a definition of “indigenous peoples.” This text has been supported by the Grand Council of the Crees (of Quebec) and the Inuit Circumpolar Conference. Some indigenous organizations have criticized the draft text for not going far enough, while governments generally argue that it goes too far.(34) Erica-Irene Daes, Chair of the Working Group on Indigenous Populations, has emphasized that indigenous peoples generally do not aspire to separate statehood, and has described self-determination for indigenous peoples as autonomy or internal self-government, within existing states.(35)

Reflected in disputes over indigenous self-determination are different approaches to what constitutes a “people” for the purposes of self-determination. Indigenous peoples have sought a broad application of the term. Some commentators view indigenous peoples as minorities within nations and as such would deny them various rights, including self-determination.(36) Others have argued that indigenous peoples are unquestionably “peoples” in every social, cultural, and ethnological meaning of this term, as evidenced by their distinct languages, laws, traditions and histories.(37)

The question of the rights of indigenous peoples under international law remains controversial. James Anaya has suggested that, while several states have resisted the express use of the term “self-determination” in association with indigenous peoples, there is a widely held international consensus that indigenous peoples are entitled to continue as distinct groups, in control of their own destinies.(38)

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(34) Canada has been engaged in deliberations on the Draft Declaration. It has expressed concern about the use of the term “peoples” at the international level and resisted an unqualified use of the term “self-determination” in association with indigenous peoples.

(35) D. Sanders, “Developments at the United Nations: 1994,” *Canadian Native Law Reporter,* Vol. 4, 1994, p. 13.

(36) P. Thornberry, “Self-Determination, Minorities, Human Rights: A Review of International Instruments,” *International and Comparative Law Quarterly*, Vol. 38, 1980, p. 868-869.

(37) Erica-Irene Daes, “Some Considerations on the Right of Indigenous Peoples to Self-Determination,” Unpublished Paper, 1993, p. 7.

(38) S. J. Anaya, “Canada’s Fiduciary Obligation toward Indigenous Peoples in Quebec under International Law in General,” in S.J. Anaya, R. Falk and D. Pharand, *Canada’s Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec, Volume 1: International Dimensions*, Royal Commission on Aboriginal Peoples, Ottawa, 1995, p. 31.

C. Discussion

The preceding sections discussed concepts of self-determination, secession and territorial integrity. Both supporters of Quebec secession and aboriginal peoples have asserted rights to self-determination. The claims of Quebec and aboriginal peoples in the province are sometimes described as competing, or comparable; it is argued that if Quebec has a right to self-determination, aboriginal peoples have an equal or similar claim.(39) Cree claims to self-determination also conflict with Quebec's claim to territorial integrity in the event of secession.

With respect to Quebec, a right to self-determination has been supported by a number of commentators. For example, Daniel Turp has made a case for the existence of a Quebec people, with, as a corollary, the right to self-determination.(40) The draft report of the Quebec National Assembly's Committee on Sovereignty defined a Quebec people based on residency, noting the awareness of a distinct national collectivity composed of anyone domiciled in Quebec.(41) Others have argued that Quebec's right is not certain, and question whether a single Quebec people can be defined for the purposes of self-determination.(42)

With regard to indigenous peoples in northern Quebec, Cree and Inuit have asserted to provincial and federal governments, in international forums, and at the U.N. that they are "peoples" entitled to self-determination. A number of authors have supported their claims to status as peoples, pointing to the unique cultures, histories, political organization and senses of identity of the indigenous groups.(43)

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(39) Daniel Turp makes the argument that Quebecois and native nations have a similar claim under international law to self-determination and democratic secession, D. Turp, "Quebec's Democratic Right to Self-Determination," in S. Hartt, A. deMestral, J. McCallum, V. Loungnarath, D. Morton and D. Turp, *Tangled Web: Legal Aspects of Deconfederation*, C.D. Howe Institute, 1992. Reg Whitaker outlines the different nature of the claims, contrasting moral and political aspects, "Quebec Versus Aboriginal Rights to Self-Determination" *Canada Watch*, No. 3, March/April 1995, p. 87-89. He argues that the aboriginal people have much stronger moral claims than the Québécois, but the latter have greater economic and political power and capacity to assume sovereign status.

(40) D. Turp (1992), p. 11.

(41) Committee to Examine Matters Relating to the Accession of Quebec to Sovereignty, *Draft Report*, Quebec, Bibliotheque nationale du Quebec, 1992, p. 10.

(42) *Sovereign Injustice*, p. 17-32, discusses the issue of whether "Quebec peoples" are a distinct peoples for the purposes of self-determination.

(43) Sanders (1995) argues that the Cree and Inuit have a strong case for separate political rights, p. 144-145. See also B. Miller, "Quebec's Accession to Sovereignty and its Impact on First Nations," *University of New Brunswick Law Journal*, Vol 43, 1994, p. 261-166; and G. Alfred, "L'avenir des relations entre les Autochtones and le Québec," *Choix/IRPP*, Vol. 1, No. 10, June 1995, p. 4-19. Michael Bryant, "Aboriginal Self-Determination: The Status of Canadian Aboriginal Peoples at International Law,"

A variety of opinions also exist on whether any right to self-determination would entail a right to secession. In 1992, a report by a Committee of five international law experts commissioned by the Quebec National Assembly stated that the indigenous peoples of Quebec did not have a right to secession, but neither did Quebec.(44) A recent article by N. Finklestein, G. Vegh and C. Joly concludes that Quebec does not have a right to secede at international law.(45) As for the Crees' claim to self-determination, this is not framed as an argument for secession, but rather for a choice of political status.(46)

The five-expert report recognized that, whatever the legal right may be, Quebec secession might occur as a matter of fact. In such a case, the authors applied the principle of *uti possidetis* to conclude that the proper boundaries would be the existing boundaries of the province. Others have argued that *uti possidetis* cannot be accepted as an established norm of international law in the context of the breakup of federal states,(47) and that the five experts erred in applying the principle to the Quebec situation.(48) It has also been asserted that international law does not clarify the legitimacy of Quebec sovereignty or the territorial integrity of an independent Quebec. Rather, these are dependent on the recognition of the international community.(49)

These differing views contribute to the conflicting claims we see today. The Quebec government asserts that it does have a right to secede, and to keep the province's territory intact. The Cree and other aboriginal groups assert their right to self-determination, which involves the claim to maintain their territory as part of Canada. Recent debates have

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University of Saskatchewan Law Review, Vol. 56, No. 2, 1992, p. 285-296, discusses whether aboriginal peoples in Canada meet criteria for self-determination.

(44) R. Higgins, A. Pellet, M. Shaw, C. Tomuschat and T. Franck, "L'intégrité territoriale du Québec dans l'hypothèse de l'accession du Québec à la souveraineté" in Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté: Projet de Rapport (Annexe), Québec, The Commission, 1992.

(45) N. Finkelstein, G. Vegh and C. Joly, "Does Quebec Have a Right to Secede at International Law?", *The Canadian Bar Review*, Vol. 74, No. 2 (1995), p. 223-260.

(46) As Allen Buchanan notes, exercising the right of self-determination need not always involve secession if other degrees and forms of self-determination are available. "Self-Determination and the Right to Secede," *Journal of International Affairs*, Vol. 45, Winter 1992, p. 351.

(47) Sanders (1995), p. 157.

(48) Finklestein *et al*. (1995) p. 260; Falk (1995), p. 68.

(49) See, for example, J-P. Venne, "Le Québec et le Droit International," *Policy Options*, April 1995, p. 32-34.

centred on this issue, asking: if Canada is divisible, is not Quebec divisible also?(50) As evident from the preceding review, arguments in support of each position can be made.

CONSTITUTIONAL AND TREATY RESPONSIBILITIES

In addition to issues of international law, the referendum also prompted discussions on Canada's constitutional and treaty responsibilities in the context of Quebec sovereignty. Debate often focuses on the James Bay and Northern Quebec Agreement.

Section 91(24) of the *Constitution Act, 1867* gives the federal government jurisdiction over Indians and lands reserved for Indians. Under section 35 of the *Constitution Act, 1982*, the existing aboriginal and treaty rights of the aboriginal peoples of Canada are recognized and affirmed. Section 35.1 commits the government of Canada and the provinces to the principle that, before any amendments are made to section 35, section 25 (which protects aboriginal rights from abrogation or derogation by the Charter), or section 91(24) of the *Constitution Act, 1867*, a constitutional conference related to the proposed amendment would be convened, with the participation of aboriginal representatives.

Canadian courts have established that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada.(51) As a result of the special fiduciary responsibility created by history, treaties and legislation, the government has a responsibility to protect the interests of aboriginal peoples.(52)

In the context of negotiations on sovereignty, Reneé Dupuis and Kent McNeil argue that obligations created by federal jurisdiction would require the federal government to defend the interests of aboriginal peoples with respect to lands reserved for them. The federal government would also be responsible for ensuring respect for aboriginal and treaty rights, including the rights created by the James Bay and Northern Quebec Agreement. These authors suggest that in a preliminary, non-constitutional process, neither Quebec nor the federal government would have a legal obligation to ensure that aboriginal peoples played a direct role in negotiations. Any constitutional amendments resulting from such negotiations would,

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(50) See, for example, P. Monahan, "If Canada Is Divisible, So Is Quebec," *Globe and Mail* (Toronto), 1 February 1996.

(51) *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1108.

(52) A variety of sources for these obligations are identified in R. Dupuis and K. McNeil, *Canada's Fiduciary Obligations to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, Volume 2, *Domestic Dimensions*, Royal Commission on Aboriginal Peoples, Ottawa, 1995, p. 6.

however, likely require the federal and provincial governments to convene a constitutional conference with aboriginal representation, because of the guarantee of participation in section 35.1 of the constitution.(53) The impact of amendments on aboriginal and treaty rights may also give rise to federal fiduciary obligations to ensure aboriginal participation in any constitutional discussions.(54)

Allen Buchanan also argues that the James Bay Agreement was made within the Canadian federal order, which includes a mandate for the federal government to protect the basic interests of aboriginal peoples. He suggests that the validity of the agreement is conditional on the existence of the federal obligations and the constitutional framework for fulfilling them, and concludes that the federal government could make renegotiation of the status of aboriginal peoples in Quebec a condition of completion of secession.(55)

> Among the most important conditions is the clarification of the status of native peoples and the protection of their interests, including their interests in self-determination. Since it cannot be prejudged that the adequate protection of these interests will *not* require significant jurisdictional powers over territory or even adjustments in the border between Canada and Quebec if the native peoples choose to remain under Canadian jurisdiction, the native question and the territoriality issue are inextricably linked.(56)

In the context of a unilateral declaration of independence, Dupuis and McNeil assert that fiduciary obligations would require Canada to maintain its relationship with aboriginal peoples in Quebec for as long as necessary to protect their interests.(57) They conclude that Canada's obligations would require the federal government to consult with aboriginal peoples both inside and outside Quebec in the event of a unilateral declaration of independence.

José Woehrling has written that, in the case of a unilateral declaration, a peaceful secession, without loss of territory, would require an accord between aboriginal peoples in Quebec and the Quebec government. He suggests that in such circumstances Quebec ought to

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(53) On this issue, see also N. Finklestein and G. Vegh, *The Separation of Quebec and the Constitution of Canada*, York University Centre for Public Law and Public Policy, North York, Ontario, 1992.

(54) Dupuis and McNeil (1995), p. 63.

(55) Allen Buchanan, "Quebec Secession and Native Territorial Rights," *The Network*, Vol. 2, No.3, 1992, p. 3.

(56) *Ibid*., p. 4.

(57) Dupuis and McNeil (1995), p. 67.

include the rights of aboriginal peoples in a future constitution and conclude an accord with Canada guaranteeing aboriginal peoples the enjoyment of their rights.(58)

CONCLUSIONS

An examination of the principles and norms of international and domestic law relating to aboriginal issues demonstrates the complexity of the debate. With the uncertain political future of Quebec, and the unsettled nature of aboriginal claims, these issues will continue to be significant. Given the evolving nature of international law and the conflicting interests of the parties, aboriginal concerns will be important in future discussions of secession.

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(58) J. Woehrling, "Les aspects juridiques d'une éventuelle sécession du Québec," *The Canadian Bar Review*, Vol. 74, No. 2 (1995), p. 328. As noted previously, the 1995 Quebec bill on sovereignty affirmed that the rights of aboriginal peoples would be guaranteed in a new Quebec constitution.