Native Studies Review 12, no. 2 (1999)

Quebec Secession and Self-Determination of First Nations

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Those who favor Quebec's secession from Canada regularly focus on competing assertions that on the one hand the entitlement to secede is solely a political matter rather than a legal one, yet on the other a particular legal opinion of five eminent international law professors is heavily cited to support the argument that Quebecers are a people with a recognized right of self-determination at international law. At the same time, the First Nations residing in what is now the province of Quebec have consistently asserted that they possess an inherent right to govern themselves, which is usually framed as being within Canada. Several of these First Nations will declare that they also are recognized at international law as the holder of a right to self-determination.

The purpose of this essay is to explore the implications for existing relationships of First Nations with federal and provincial governments as well as regarding agreements currently in force. Some of the questions to examine include: What would be the impact of secession on federal fiduciary obligations to First Nations? On federal legislation? What constitutional authority would the government of Canada retain, if any, in reference to First Nations of Quebec? What would secession do to existing treaties or other agreements signed by First Nations with the Crown, Canada and/or Quebec in both the pre-Confederation and post-Confederation eras? This paper attempts to canvass the ramifications of these fundamental questions.

La sécession du Québec et l'autodétermination des Premières Nations

Ceux qui favorisent la sécession du Québec du Canada visent régulièrement les revendications compétitives. D'une part, le droit à la sécession n'est qu'une question politique plutôt que légale. Cependant, l'autre part cite souvent une opinion légale particulière de cinq professeurs distingués en droit international, afin d'appuyer l'arguement qu'on

reconnaît les Québécois comme un peuple ayant le droit à l'autodétermination en droit international. En même temps, les Premières Nations habitant ce qui est présentement la province du Québec ont revendiqué de façon consistante qu'ils possèdent un droit inhérent pour se gouverner, ce qui est normalement encadrer comme étant à l'intérieur du Canada. Plusieurs de ces Premières Nations déclareront qu'elles sont aussi reconnues en droit international comme détenant le droit à l'autodétermination.

Le but de cette dissertation est d'explorer les implications des relations existantes entre les Premières Nations et les gouvernements fédéral et provinciaux ainsi que d'examiner les ententes présentement en vigueur. Quelques-unes des questions à étudier incluront: celle de l'impact de la sécession sur les obligations fiduciaires fédérales aux Premières Nations et sur la législation fédérale? Ensuite, quelle autorité consitutionnelle retiendra le gouvernement du Canada, si aucune, en référence aux Premières Nations du Québec? Comment la sécession changera-t-elle les traités existants ou les autres ententes signés par les Premières Nations avec la Couronne, le Canada et/ou le Québec dans les ères précédant et suivant la confédération? Ce document tentera de solliciter ce que seront les ramifications de ces questions fondamentales.

Introduction

Those who favour Québec's secession from Canada regularly emphasize competing assertions. On the one hand, the entitlement to secede is frequently described as being solely a political matter rather than a legal one. On the other hand, the argument that Québecers are a people with a recognized right of self-determination at international law is vigorously urged as compelling before appropriate audiences. At the same time, the Aboriginal peoples residing in what is now the province of Québec have consistently asserted that they possess an inherent right to govern themselves, which is usually framed as being a right they seek to exercise within Canada. When pressured by other governments seeking to suppress their inherent right of self-government, several First Nations declare that they also are recognized at international law as the holder of a right to self-determination (Grand Council of the Crees, 1998).

The purpose of this essay is *not* to examine the validity of these arguments from a political, social or legal perspective. Instead I will explore the implications for the existing relationships that First Nations

have with federal and provincial governments in the context of a post-secession Québec. My intention in choosing this framework is not to suggest that I endorse the political or legal claims advocated by the proponents of Québec secession, which I definitely do not espouse. Nor am I implying that one should adopt a passive approach that the majority of electors will vote *oui* next time so that independence is a virtual *fait accompli*. My objective is to investigate what the legal ramifications of separation could be upon the existing and rapidly evolving relationship between Aboriginal peoples within the current borders of Québec and their non-Aboriginal neighbours. Identifying the many and complex legal questions that would inevitably have to be confronted if secession ever does occur may itself tend to decrease the prospects for such an eventuality – or at least increase the level of appreciation how difficult an exercise that would prove to be.

Some of the questions I will examine will include: what are the options available for Aboriginal peoples to decide their own future? What would the impact of secession be upon federal and provincial fiduciary obligations to First Nations? Upon federal legislation? Upon constitutional arrangements? What constitutional authority would the government of Canada retain, if any, in reference to First Nations in Québec? What would secession do to existing treaties or other agreements signed by First Nations with the Crown, Canada and/or Québec in both the pre-Confederation and post-Confederation eras? How would existing federal-provincial agreements be affected? And what body of law would apply to assess Aboriginal and treaty rights in the future?

Although there is no Canadian jurisprudence that directly addresses these and other related questions, this paper will attempt to canvass the potential ramifications of such fundamental questions. It will seek to draw upon the limited literature to identify the breadth of the issues likely to be raised in the future and provide some initial indications as to what the future could bring if the movement for separation is successful. This is, naturally, a highly speculative endeavour because there is no case law to give guidance and one cannot predict what the aftermath would be if there is resistance to such a move or there are failed negotiations over disengagement.

The Supreme Court of Canada's ruling on the Quebec secession reference (*Re Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada* (1998), 161 D.L.R. (4th) 385 (S.C.C.)) confirmed the illegality of the use of a unilateral declaration of independence as a means of implementing the removal of a province from Canada. The Court made clear that secession

must occur in accordance with the Canadian Constitution, which does not at present allow for the secession of a province. As a result, the Constitution would have to be specifically amended to permit secession to take place, which would require negotiations among the federal and provincial governments resulting in proposed amendments that would need to adhere to the terms of the existing amending formula. On the other hand, the Court declared that a "clear majority" vote in favour of secession within the province "on a clear question" (ibid., p. 448) would give rise to an obligation upon the other provincial governments in concert with the federal government to engage in negotiations regarding secession. These negotiations would have to be undertaken both in good faith and in accordance with the constitutional principles of (1) federalism, (2) constitutionalism and the rule of law, (3) democracy and (4) the protection of minorities. Although the Court made clear that there is a definite legal obligation upon all the governments to pursue negotiations respectfully, there is no legal obligation upon them to reach agreement. The Supreme Court said that it would not be appropriate for the courts to have a role in assessing the adequacy of the content and the process as these are matters for the political actors to address. Similarly, the political leaders are the ones to decide if the preconditions for negotiations being required – namely a clear majority on a clear question – have been met.

Four Aboriginal groups intervened in the Reference and were allocated more time to make oral arguments than were the other governmental interveners.[1] Extensive briefs were filed on their behalf and counsel argued in detail that Aboriginal consent to secession was a necessary pre-condition and Aboriginal participation in any negotiations was essential. Nevertheless, the specific concerns of these Aboriginal peoples were generally lumped in with those of other minority groups in the ultimate decision. The Court did recognize the importance of sections 25 and 35 added to the Constitution in 1982 as an "underlying constitutional value" whether "in their own right or as part of the larger concern with minorties" (ibid., p. 422). Aboriginal peoples were not, however, acknowledged as a "participant" in any negotiations that might transpire on this subject in the future, although the Court also spoke on other occasions of "parties to Confederation" thereby perhaps suggesting that one may be a party although not a full participant. The arguments of the Aboriginal interveners were avoided by the judges on the basis that the conclusions that Québec had no right to secede unilaterally either under domestic or international law rendered it "unnecessary to explore further the concerns of the aboriginal peoples" (ibid., p. 442).

While former Premier Jacques Parizeau made clear through his initial draft bill[2] and his subsequent comments that he would have pursued a unilateral declaration of independence (UDI) approach if he had been successful in the 1995 referendum, one cannot be certain if the Parti Québecois government would do so under Premier Lucien Bouchard. I will, therefore, attempt to examine these issues in a possible UDI scenario and as if negotiations were ultimately to ensue, with or without Aboriginal participation, if a referendum does pass in the future.

It is hoped that isolating key questions for consideration as well as offering some tentative views may be of some value to the future course of the debate. What is clear, from my view, is that the rights as well as political aspirations of the Aboriginal peoples within Québec cannot be taken for granted.

Impact of Secession on Existing Treaties and Agreements

There are a number of treaties and other intergovernmental agreements in effect that impact upon First Nations and the Inuit within the province of Québec. These include historic treaties, such as the Murray Treaty of 1760,[3] as well as the modern settlements of the James Bay and Northern Québec Agreement (JBNQA) of 1975 and the Northeastern Québec Agreement of 1978. Numerous federal-provincial agreements exist that refer to Aboriginal peoples, such as regarding the provision of social and child welfare services by provincial agencies to status Indians. Pre-confederation treaties entered into by the Crown in right of Great Britain with specific Indian Nations that remain in force now receive constitutional protection through section 35(1) of the *Constitution Act, 1982*, while modern land claims settlements are captured by section 35(3) of the Constitution.

The Crown's obligations pursuant to these historic treaties were transferred to the Government of Canada upon confederation,[4] while all of the agreements since 1867 have been negotiated by the federal government as the primary representative of the Crown in relation to Aboriginal issues as a result of its jurisdiction under section 91(24) of the *Constitution Act, 1867* for "Indians, and Lands reserved for the Indians." Québec is a signatory to the two modern settlements as well as to many federal-provincial agreements in its capacity as a province within Canada. Similarly, Québec has negotiated numerous bilateral agreements over the years with First Nations and the Inuit, as well as with off-reserve Aboriginal groups, in the context of being a provincial government. The basic question is, what is the impact of the transformation of Québec from a province of Canada into an independent state? Is maintenance of Canada as a federal state,

including Québec, with the territory of the First Nations and Inuit remaining part of Canada, an essential term of these agreements such that this type of change requires a formal amendment to each agreement? If so, then basic legal principles dictate that amendments must reflect the wishes of all signatories to the individual agreements for the amendments to be legally effective. If this is not an essential term of these agreements, then would state succession rules apply in the same manner as they have elsewhere in the absence of Indigenous peoples and their rights being a distinct factor to consider?

These questions give rise to related preliminary ones regarding the current legal status of both the older and the modern treaties under Canadian law. The Canadian courts have made it clear that documents which were negotiated jointly by representatives of the Crown and Indian nations, where the individual negotiators possessed the necessary authority from their respective governments to enter into such negotiations in a way that could bind their own governments, when intended to be binding and accompanied by the appropriate level of solemnity would constitute formal treaties. They would have the status of treaties whether or not they were actually called "treaties" and even if only signed by one of the parties, so long as they reflected the results of negotiations (*Regina v. Sioui*). They are not pure private contracts binding only upon the signatories nor are they international treaties that must rely on international law for their enforcement. They also are not mere unenforceable promises either as they do have considerable legal affect under Canadian law. The treaties and the rights they contain possess a special or *sui generis* status under Canadian law. Agreements that meet the test to be regarded as treaties are then protected indirectly by section 35(1) of the *Constitution Act, 1982* with the rights contained within these treaties formally "recognized and affirmed" by section 35(1). As the Constitution of Canada is declared by section 52 of that Act to be the "supreme law of the land," treaties are deserving of the greatest of respect.

The Canadian courts in recent years have begun to distinguish between the historic and the modern treaties in several important respects. At least since the British Columbia Court of Appeal decision in *Regina v. White and Bob* in 1965, the courts have indicated that Indian treaties must be given a liberal and generous interpretation with any ambiguities decided in their favour and the terms being interpreted in a way most likely to reflect the Indian understanding of its terms at the time it was negotiated. The courts have also indicated that legislation directly referable to Aboriginal peoples, such as the *Indian Act*, should be given a fair and liberal interpretation.

The judiciary has, however, begun to make an exception to these general principles of treaty and statutory interpretation when it comes to the

JBNQA. Mr Justice Décary for the federal Court of Appeal has stated:

> We must be careful, in construing a document as modern as the 1975 Agreement, that we do not blindly follow the principles laid down by the Supreme Court in analyzing treaties entered into in an earlier era. The principle that ambiguities must be construed in favour of the Aboriginals rests, in the case of historic treaties, on the unique vulnerability of the Aboriginal parties, who were not educated and were compelled to negotiate with parties who had a superior bargaining position, in languages and with legal concepts which were foreign to them, and without adequate representation.
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> In this case, there was simply no vulnerability. The Agreement is the product of a long and difficult process of negotiation. The benefits received and concessions made by the Aboriginal parties were received and given freely, after serious thought, in a situation which was, to use their counsel's expression, one of "give and take." All of the details were explored by qualified legal counsel in a document which is, in English, 450 pages long. [*Eastmain Band v. Robinson* (1992), 9 C.E.L.R. (N.S.) 257 (F.C.A.), pp. 264–65].

A similar view was voiced by the Québec courts in *Regina v. Otter* ([1992] R.J.Q. 812 (C.Q.)). Thus, it may be that agreements negotiated in recent years by Aboriginal peoples with the benefit of legal counsel will not receive the same generous interpretations favourable to their position in the future that the historic treaties obtain.

Even if this view is sustained by the Supreme Court of Canada in the future, both the Federal and Québec courts have been quite consistent in declaring that the JBNQA is protected by section 35. Furthermore, they have rejected arguments brought from time to time by the Québec and federal governments that the agreement is a mere contract. At the very least, it has been called a "legislated contract" by the Federal Court of Appeal (*Cree Regional Authority v. Robinson* (1991), 81 D.L.R. (4th) 659 (F.C.A.) at 672-3). Thus, it possesses more than simply contractual status as it has been given legal effect by way of complementary federal and provincial legislation. As such, it is "part of the . . . law of Canada" and part of the federal enabling statute (*Cree Regional Authority v. Robinson* (1991), 42 F.T.R. 160 (F.C.T.D.) at 165).[5] By logical extension, this thinking would equally apply to the Northeastern Québec Agreement of 1978 affecting the Naskapis.

It has been clearly determined that historic treaties that affect the territory or the First Nations now within Québec are included within the scope of section 35(1) of the *Constitution Act, 1982*. The obligations

imposed upon Canada and Québec by the terms of the JBNQA are likewise protected as treaty rights under section 35(1), but in their case this occurs by way of the amendment reflecting land claims agreements contained in section 35(3).

What is the impact of secession upon these treaties and agreements? For the purposes of this essay, let us assume that Québec is ultimately successful in becoming recognized internationally as a nation state. It may become necessary to distinguish among those historic treaties in which the Crown of France or of Great Britain was the European party and those which were formally entered into by the Crown acting on behalf of Canada.

Some sovereignists or separatists assert that the state succession doctrine would simply apply regarding all international treaties entered into by Canada such that an independent Québec would be classified as a successor state to Canada in part and, therefore, would adhere to all treaties that are relevant to its internal or international needs and obligations. It could, then, be suggested that this approach would apply concerning treaties with Aboriginal peoples. At most, I suggest that this argument might be persuasive in relation to treaties negotiated by the Imperial Crown that have continuing meaning as existing treaties under section 35(1) involving lands within the present province or regarding First Nations therein. This would include the Murray Treaty of 1760[6] and the Treaty of Swegatchy of 1760,[7] along with potentially many others that have not yet seen the light of day through the courts. It should also be realized that the French Crown entered into treaties in Tadoussac in 1603 and in Montreal in 1701, although the judiciary has not yet had an occasion to comment upon their continuing legal significance. If the state succession doctrine was to apply, which is by no means free from doubt, then all of these treaties would continue in force until terminated by mutual agreement between the successors on both sides in the same way that they passed from the Imperial Crown to the Crown in right of Canada after Confederation. As a result, the Crown's obligations would pass to the new government of Québec.

A switch in status from provincehood to independent nationhood would obviously impact in a very different way upon any agreement that was signed by both Canada and Québec with First Nations. Firstly, these agreements were presumably entered into by the Aboriginal party with the expectation that they would operate within the existing political regime. In the absence of clear evidence to the contrary, one would predict that the Aboriginal signatories could make compelling arguments that they negotiated the treaties or other intergovernmental agreements after 1867

with the understanding that they would be effective within a federal state. It is not clear if these arguments would be successful in domestic courts, however, they do have considerable merit. The simple presence of federalism provides some semblance of added protection to Aboriginal peoples as there are two levels of government in place, thereby increasing the possibility that at least one level of government might respect their wishes despite their lack of voting or economic power. Furthermore, the Canadian constitutional structure divides heads of jurisdiction between the federal and provincial spheres in a way that provides added comfort to First Nations as the provinces get the lion's share of jurisdiction over lands and natural resources while the government of Canada has an express mandate not only over "Indians"[8] but also regarding "Lands reserved for the Indians." This latter phrase means far more than reserves under the *Indian Act* as it reflects the predominant role of Parliament and the executive branch to enter into treaties concerning previously unsurrendered lands and sustain relations with Aboriginal nations.

Tripartite agreements almost inevitably divide Crown obligations between the federal and provincial government parties. Advocates for secession would argue that independence for Québec simply has the effect of terminating federal participation in such agreements with Québec taking on the benefits and burdens that formally accrued to the federal party. Even if that position might be seen as having a practical appeal, it still contains within it the tacit recognition that the terms of the original agreement would have been fundamentally altered by such a dramatic political change. Can such a fundamental change be made without the consent of the other parties? I would suggest that the answer is a firm no, although there is no case law on this point. General principles of contract law indicate that unilateral alteration of agreements constitutes a breach. Even the presence of an agreement between the federal and Québec governments over the terms of secession would not be sufficient nor would an Aboriginal-Québec entente.[9]

The impact of constitutional recognition of treaties may play a special role in this situation. Prior to 1982, it was clear that Indian treaties could be breached or unilaterally amended by Parliament. Even after patriation, Canadian courts have upheld the provisions of the Natural Resources Transfer Agreements (NRTAs) of 1929 that both expanded the territorial reach of treaty protected harvesting rights while simultaneously minimizing their scope through eliminating harvesting for commercial purposes. The implementation of the NRTAs through the *Constitution Act, 1930* has been seen as ample justification for these changes made without Indian knowledge let alone consent even after the introduction through the

Sparrow decision of a requirement upon the Crown to justify its legislative interference with aboriginal and treaty rights. [10]

I would argue that this line of reasoning should not apply in reference to any legislative or other efforts *after* 1982 to amend any treaties protected by section 35(1). Post-1982, only the federal government could expressly infringe upon treaties in a fundamental way through new legislation and only then if it can meet the justification test set out in *Sparrow*. I would further suggest that even this option does not apply in relation to JBNQA and other modern land claims agreements by virtue of their unique status. They are recognized by section 35(3) so as to be brought within section 35(1). Any amendment to their terms is, thus, an amendment to documents constitutionally protected by section 35(3). The suitable vehicle for such amendments is to take advantage of section 35(1) as it contains imbedded within it an amending formula for section 35(3) agreements. This approach, though, requires the consent of the Aboriginal parties.

Even if the justification test does apply and Aboriginal consent is not an absolute requirement but merely a factor a court can consider in weighing the balance of competing interests, it would be hard to see that a unilateral declaration of independence (UDI) without Aboriginal involvement could meet the criteria set out in *Sparrow*, including the use of a mechanism involving the least infringement possible of the rights protected by section 35(1). To date, all available evidence discloses almost universal opposition by Aboriginal peoples within Québec to any proposals for Québec secession or even the milder sovereignty-association concept. This does create an immense political problem for separatists who have yet to develop an effective strategy to attract Aboriginal support.

Other intergovernmental agreements that do not qualify as treaties would have to be assessed individually. Some of these contain expiration dates such that they may simply come to an end. Others may contain explicit termination clauses or are dependent upon the continued allocation of funds by Parliament and/or the National Assembly such that these clauses could be invoked to bring them to a close, thereby allowing the new country to seek to negotiate replacements if it was so inclined. None of these types of escape valves are present within the two modern claims agreements affecting northern Québec such that either amendments would have to be negotiated among all signatories or else the question regarding the legal effect of separation on the agreements would be directly encountered.

Constitutional Implications

Independence would also trigger other questions of a constitutional nature. Issues would arise both under the existing Canadian Constitution as well as concerning the new one that Québec would require.

A First Ministers' Conference

It is clearly arguable that secession, whether via UDI or a negotiated settlement, would trigger the process mandated by section 35.1 of the *Constitution Act, 1982*. This section requires the Prime Minister of Canada to convene a conference to discuss any proposed amendments to section 91(24) of the *Constitution Act, 1867*, to section 25 of the *Charter of Rights and Freedoms* or to Part II of the *Constitution Act, 1982* (which contains sections 35 and 35.1). The provincial premiers are to be participants in such a first ministers' conference (FMC) and the prime minister is to invite "representatives of the Aboriginal peoples to participate in the discussion" (s. 35.1(b)).

The counter-position would be that none of these sections is being formally amended as they would continue to exist as is in relation to the rest of Canada. In other words, only their geographic scope will have changed but not their constitutional import as far as the new boundaries of what constitutes a diminished Canada is concerned. It would also be asserted that the effect of separation is that one independent country has merely succeeded another such that s. 35.1 is inapplicable.

It is impossible to say with any certainty what a future court would do with such arguments if there is no formal amendment under discussion. While debates occurred during the Meech Lake process as to whether or not the Meech Lake Accord triggered section 35.1, they were inconclusive and one cannot suggest that a prevailing view among lawyers developed. The prime minister of the day would likely make a political decision as to whether to call for the conference. If negotiations are underway concerning secession, then this issue would likely get lost in the shuffle; whereas if Québec has opted for a UDI, then its premier would probably refuse to attend in any event unless it appeared that such a move would damage Québec's international image. The primary factor in such a politically charged atmosphere might well be the mood of the Aboriginal peoples of Québec. If they pressed hard for the FMC and simultaneously both federalists and separatists were seeking Aboriginal support while the international community was closely observing developments, then the political winds might line up in a way that all sides favoured holding the FMC, albeit for different reasons.

In the absence of such political will, would a court uphold a demand for a FMC emanating from Aboriginal peoples in Québec? I must confess that I am dubious about the judiciary getting involved in this way. Not only is the argument uncertain but it would also be rather hard to persuade the judges that they actually could provide a meaningful remedy by way of a declaration if the first ministers are unwilling to participate voluntarily. Further, section 35.1 is procedural only as it merely requires that a meeting be held to discuss the amendments but not that consent is required before the amendments could go forward. The minimal manner in which the requirement of section 49 of the *Constitution Act, 1982* (to have a FMC within fifteen years to review the amending formula) was fulfilled would tend to suggest that arguments based upon section 35.1 might not get much attention from the courts in such a highly charged environment. On the other hand, those who oppose secession vociferously would likely give serious consideration to invoking this clause and reasonable arguments could be made in support such that it should not be discounted.

Federal Trust Lands

First Nations within Québec possess minute blocks of land for their exclusive use. Most of these lands are regular or special reserves under the *Indian Act*. The federal and provincial governments have never fully clarified the titleholding situation of Indian reserves within Québec after the infamous *St. Catherines Milling & Lumber Co. v. The Queen* ((1888), 14 A. C. 46 (J.C.P.C.)) as has been done in the remaining original three provinces. Each reserve in Québec has its own unique history such that one has to explore that background to determine who possesses the underlying title. Nevertheless, these reserves are all held for the use and benefit of the specific First Nation concerned whether it is the federal Crown that holds them in trust or not. They are all affected by the terms of the *Indian Act* and most if not all will also be subject to unextinguished aboriginal title. In addition, the nine Cree communities also have Category IA lands that are set out by the JBNQA and recognized as a form of federal lands somewhat akin to reserves. A similar arrangement exists for the Naskapi First Nation. These lands are not held subject to the *Indian Act*, as the relevant federal legislation is the *Cree-Naskapi (of Quebec) Act*.

Both by statue and by virtue of the underlying aboriginal title, these lands have a severe restraint on their alienability as they can only be conveyed to the Crown in right of Canada by the First Nation concerned through a vote of its citizens. Even then, the First Nation must clearly be informed of how and to whom the lands might subsequently be disposed as well as benefit directly from any re-conveyance by the federal government.

These are lands within federal jurisdiction under section 91(24) and are without doubt subject to strict fiduciary obligations. Canada could not relinquish its fiduciary duties and convey administrative control or title to them to an independent Québec even if it wished to do so, unless so directed by the affected First Nation. Although Québec might effectively become recognized by the international community as a successor state, in my view this would not empower the government of Canada to renounce its role as a fiduciary. By analogy with the private law of trusts, such a move would require Aboriginal consent or judicial approval.

Therefore, what would the impact of secession be upon designated Aboriginal lands. The use of UDI would not on its face affect their legal position. As indicated, any agreement between Québec and Canada would be insufficient to alter their legal nature without informed Aboriginal consent. It would appear that the most likely legal outcome – to the degree that any outcome could ever be framed as "likely" within these uncharted waters – would be that the lands would remain, at least until Québec effectively repudiates all of the Canadian domestic law regarding Aboriginal peoples, set aside for the exclusive use and benefit of the First Nation concerned. In those few cases where title is currently held by the Crown in right of Canada, then the status quo would be maintained. (The title to most reserve lands are held by the province of Québec.) Where title is held by someone else but the lands are "administered" (if it can be called that) as special reserves by the federal government, then again this arrangement would be sustained.

It is, of course, possible that all of the affected parties could agree to a new arrangement whereby the lands would be held by the First Nation in some form of inalienable freehold, or by Québec on their behalf, or by a new entity under a statutory trust. Other possibilities could obviously be created. Any change to the present situation would at a minimum require a vote by an informed electorate in each First Nation.

What if the Aboriginal communities do not wish to sanction a change or no agreement is reached (as all evidence to date suggests is highly probable)? We would again be in the land of the unknown. The federal legislation that outlines some of the rules that govern the administration of these lands would presumably no longer have effect as federal law within an independent Québec. The Parti Québecois' plans simply to adopt all relevant federal statutes in force on the date of secession would create an *Indian Act* and a *Cree-Naskapi (of Québec) Act* as Québec law, but this would not on its face empower the now foreign government of Canada to administer these lands within Québec. The adoption of the federal acts would also not serve

automatically to transfer the federal trustee role to Québec, in my opinion. Thus, one might well find a situation in which the federal government must carry out its trustee responsibility regarding these lands without a statutory base or guidance. The underlying law would then apply to fill in the blanks. Ascertaining what that underlying law would be is another question to consider shortly.

Québec Constitutional Requirements

An obvious starting point for a consideration of what provisions would be needed within a new constitution for an independent Québec is to examine the Canadian Constitution. The only constitutional provision in the original *British North America Act* of 1867 was section 91(24). It owes its existence to the demands of federalism. That is, having two levels of sovereign governments means one must divide up powers between them; hence 91(24) was included to clarify that it was the federal government that would possess the jurisdiction to legislate and to engage in relations with Aboriginal peoples. Since Québec would likely become a unitary state, there would be no necessity to have an equivalent to section 91(24). Nevertheless, the new constitution could contain a variation of such a clause so as to make explicit that no subordinate order of government could enact laws in reference to these two topics.

Would an equivalent to section 35 be created? Various PQ and Bloc Québécois representatives have indicated that a new constitution would go beyond the Canadian Constitution in guaranteeing the unique rights of the Aboriginal population. Frequent references are made to the Resolution of the National Assembly of 1985, which recognizes the right of the different Indian Nations and Inuit of Québec to self-determination within Québec as an example in this regard. One might, therefore, assume that a new constitution would contain provisions that at least match those in section 35. The Parizeau draft bill of December 1994 proposed in section 3 that the National Assembly would draft a constitution with "a charter of human rights and freedoms." It also was to "recognize the rights of Aboriginal nations to self-government on lands over which they have full ownership," although what would constitute "full ownership" was not explained. Section 8 of the subsequently tabled Bill 1 included similar language.

On the other hand, Aboriginal representatives are unlikely to be satisfied by simply assuming that constitutional protection for their rights will be maintained, especially in a unitary state that may be able to amend its constitution more easily than has been reflected in the Canadian experience. Failure to provide such guarantees would be contrary to section 35 itself under Canadian law and would also likely be viewed unfavourably

by other nations in light of developments made in international standards concerning indigenous rights over the last fifteen years.

It is not as clear that section 25 of the Canadian Charter of Rights and Freedoms would be replicated in a constitutional entrenchment of the Québec Charter or its successor. Aboriginal peoples would likely insist upon it as a protection for their fragile languages and cultures as well as a means to ensure that their collective rights could coexist with an emphasis upon individual liberties as well as the rights of the dominant collective. The introduction of Bill 101 was a source of major conflict for the provincial government with the Inuit and Cree especially. Although tension concerning this issue has declined considerably over the years, one should still anticipate that Aboriginal peoples would remember that conflict so vividly as to want to have that general matter addressed definitively for the future.

What Law Would Apply?

A natural assumption that almost all would hold is that an independent Québec would be an exclusively civil law system as all vestiges of common law would be left behind in Canada. While that may be a thoroughly reasonable belief to possess at first instance, it is not as straightforward as might be thought.

The proposal previously announced by the Parti Québecois in late 1994 for a transition period was to referentially incorporate all relevant federal legislation until the new Québec could go through each statute one by one and decide which to keep, amend or repeal (s. 10). This approach would inevitably import a considerable degree of common law principles and rules that are impliedly or expressly caught within the parameters of many federal laws. This, of course, would primarily be a temporary approach to serve on an interim basis until a more comprehensive legislative strategy could be unveiled, although some common law ideas and principles have already been incorporated within the *Civil Code*. Implementing a "continuity of laws" approach has been quite common in Canadian history when colonies have joined the federation and new provinces and territories were created.[11]

The field of Aboriginal and treaty rights arguably raises more subtle and complex permutations. The body of case law that has developed over the decades in Canada concerning Aboriginal title, Aboriginal rights, treaties and customary Aboriginal law has all reflected the common law tradition rather than the civil law one. The courts, including in Québec, have repeatedly characterized these subjects as being ones that are primarily governed by the principles and rules of the common law as supplemented by any relevant statutory and constitutional enactments. The very first decision

after confederation regarding Aboriginal legal issues was by the Superior Court of Québec, which declared that Cree marriage law of the west governed a marriage occurring in what is now Alberta between a Cree woman and a Canadian from Montreal. It did so by stating that the common law would recognize the Cree customary law as valid for common law purposes.[12] The latest pronouncement from the Supreme Court in the *Delgamuukw* decision ((1998), 153 D.L.R. (4th) 193 (S.C.C.)) has once again reiterated that Aboriginal title is part of the Canadian law through its recognition by the common law.

Both of these two decisions separated by over 130 years do something beyond declaring that the common law – rather than the civil law – is the foundation for dealing with Aboriginal issues. They also indicate that the source of the substantive laws and rules that are obtaining recognition and legal force through the common law are emanating from the original laws of the Aboriginal nation concerned. As the Australian High Court indicated six years ago in its landmark *Mabo* decision ((1992), 107 A.L.R. 1), the courts must turn to the customary or traditional law of the Aboriginal group concerned to ascertain the nature or the incidents of the property interests that are being enforced through the common law.

To compound the complexity here, the Supreme Court has previously held that the common law regarding Aboriginal legal issues is federal common law rather than provincial common law (*Roberts v. Canada*, [1989] 1 S.C.R. 322). This decision has been followed subsequently upon a number of occasions. In *Regina v. Coté* ([1996] 3 S.C.R. 139), Chief Justice Lamer summarized the import of *Roberts* in these words:

> Indeed, this Court has held that the law of Aboriginal title represents a distinct species of federal common law rather than a simple subset of the common or civil law or property law operating within the province.

Lamer CJ concluded in *Coté* that the French "colonial law governing the proprietary relations between private individuals" survived the advent of the British regime, however, this did not apply to the "French colonial law governing relations with Aboriginal peoples." Instead, the common law recognizing aboriginal title "displaced the pre-existing colonial law governing New France" as the former was a "necessary incident of British sovereignty." In this regard, he quoted an article by Brian Slattery with apparent favour in which the latter suggested that the doctrine of aboriginal rights was received in a colony not as part of the English common law narrowly defined but rather as a special component of the common law system reflected as foundational constitutional law that itself determined

how the common law would apply to a colony and what segments of it would have legal force.

Thus, it appears that the domain of Aboriginal and treaty rights, including Aboriginal title, in Canada now consists of federal common law and aspects of the traditional laws of the original Indian Nations (as well as the Inuit). Therefore, an independent Québec would face a scenario in which it would have to sustain federal common law on Aboriginal legal matters along with the traditional laws of the eleven Aboriginal Nations within its current borders through a formal incorporation of federal common law; or codify the Canadian law and add it to the Civil Code; or have the Québec courts create a new civil law doctrine; or terminate this area of law with all of the political consequences that would follow such an unlikely move.

In assessing its options, the government of Québec would need to consider the content of applicable traditional Aboriginal laws. Do the substantive laws of any of the eleven Aboriginal nations accept that relations can be imposed upon their governments and their peoples? It is not illogical to presume that none of the Aboriginal nations' laws recognize that an external government can either impose treaty or other relations unilaterally upon them or sever the relations that they may possess with another government. It is likely that all of these Nations ground their laws upon the principle of mutuality of consent in the forging or terminating of relations. If correct, this would mean that any move toward secession without the consent of the eleven Aboriginal Nations would be a violation of the laws of those Nations.

The next question would be whether such a violation of Aboriginal law would constitute a violation of the doctrine of Aboriginal rights that has become constitutionally protected. To date, the Canadian courts have only indicated that traditional Aboriginal law is relevant in ascertaining the validity of marriages and adoptions, in assessing the losses suffered in tort and in determining the nature of the property rights that are recognized by common law Aboriginal title. It would, therefore, entail a review of this issue for the first time in Canadian legal history. It is clearly possible that a court might conclude that violating the Aboriginal law's requirement for Aboriginal consent in order to establish or alter existing treaty relations with other governments would itself violate federal common law in terms of the latter's recognition of traditional Aboriginal law. The next logical step would be to assert that the latter contravention would constitute a breach of Québec law, at least if an independent Québec does sustain or expressly incorporate the federal common law on Aboriginal rights.

Required Transformations

Successor to the Crown

One of the ironic aspects perhaps related to Québec's separation is the necessity to address the place of the Crown in Canadian law. Not only is the entire constitutional structure predicated upon the existence of the Crown as a fundamental and distinct entity, but so is the colonial constitutional law theory in which the doctrine of discovery and Crown assertions of sovereignty in relation to the lands and external sovereignty of the First Nations are embedded. Furthermore, the essential strains of Canadian law on Aboriginal issues, such as underlying Crown title in relation to Aboriginal title, fiduciary obligations and the overall concept of the "honour of the Crown" being at stake in all dealings by federal or provincial governments with Aboriginal peoples, are all built upon the idea of the Crown as an overarching institution that is separate and apart from the legislative, executive and judicial branches of government. Aboriginal people have themselves always and repeatedly emphasized the significance of the Crown as a human being as well as a symbol with whom they have their special relationship rather than it merely being a relationship which is held with governments.

While one readily presumes that the preference of separatists is to establish a republican form of government rather than to maintain Queen Elizabeth II and her successors as the Crown in right of Québec, there will be a special need to resolve this matter in relation to Aboriginal peoples and Aboriginal legal issues. It is, of course, possible to turn to the United States for a precedent as it was compelled to undergo such a transformation. The law has evolved in the U.S. in such a way that the president and the executive branch have taken on the role of fiduciary in reference to the Indian tribes, albeit using the language of trusteeship rather than fiduciary duties.[13] Similarly, the Aboriginal title doctrine has been maintained with a concept of radical title being in the possession of the federal government where the treaty-making role also rests. The Royal Proclamation of October 7, 1763 (R.S.C. 1985, App. II, No. 1) and the policies it reflected could not formally be relied upon to be the centre point of the new country's legal regime in relation to Indian nations after having waged a revolution to break away from the same Crown that issued the Proclamation. Thus, Congress had to create somewhat of an alternative if it wished to forge any military and economic alliances with the Indian nations, or even just to have peace. The Northwest Ordinance of 1790 served as a partial substitute and the judiciary did the rest. These principles are based in part upon a few vague passages in the U.S. Constitution that have been utilized by the courts to justify the development of a comprehensive body of federal Indian law that declares

Congress to possess a general plenary power to do what it wishes so long as it does so expressly (Williams, Jr., 1986).

It is important to realize, however, that the law that has been established in reference to Indian issues in the U.S. was created over a 200-year period. Virtually all of the seminal decisions of the courts were written in succeeding generations such that they reflected the circumstances as they evolved. There was no need to consider how to deal with the Crown's fiduciary obligations as the very concept of such a relationship was not even considered until many years after independence. One also cannot underestimate the importance of the autonomy of the executive and legislative branches under the American version of republicanism that is unequalled in few other republics and is so different from a parliamentary system.

In a post-secession context for Québec, one would assume that the idea of an underlying or radical Crown title would be maintained, as the status quo currently benefits the Crown in right of the province under Canadian law. There would no doubt be the inevitable change made that the beneficiary of that underlying title would become the new nation of Québec. The likely tendency would also be for the new nation to assert that the fiduciary obligations resting upon both the federal and provincial Crowns would be transferred to the national executive branch. Similarly, the new country would likely declare that it is undertaking the "honour of the Crown" standard onto itself or assert that this is merely a further elaboration of the fiduciary duty with no additional significance. The key, it would presumably argue, is that the content of the standard of behaviour that is intended by this phrase would be honoured by the new country. One would expect that First Nations and the Inuit would not take these shifts placidly.

Protections of Federalism

In addition to the spiritual ties the Aboriginal peoples have repeatedly spoken of over the generations as being part of their connection to the Crown, they often articulate a sense that the existence of the Crown as distinct from the executive or the legislature provides some added protection to them. It tends to insulate them to a degree from the vagaries of shifting political winds that cannot be resisted effectively at the ballot box when their voting strength is so minimal. It allows them to make an appeal based on historic relations and historic service to the Queen that has little resonance to the ears of modern officials, politicians and technocrats.

Although the Queen rarely responds directly or through her representatives in the form of the governor general or the lieutenant governors to any pleas or petitions from Aboriginal people, it does occur on occasion and its potential, with the embarrassment factor that that could

carry for the government of the day, may offer some pause to those who might plan to ride roughshod over Aboriginal concerns. It is at least arguable that the existence of this relationship helped to persuade non-Aboriginal politicians that it would be wise to recognize Aboriginal and treaty rights in the proposed constitution in January of 1981, and also to restore it prior to patriation after the original section 34 was deleted at the insistence of some premiers in November of that same year.

It may be possible to assuage some of these concerns if the Québec nation has a head of state who is sufficiently independent from the legislature that she or he can serve as a break upon any potential instances of a tyranny of the majority. Such an individual could be seen as the repository of the pre-existing unique relationship with First Nations as well as serving as the new bearer of the honour of the Crown. This will not be an easy role to craft, nor will it be a simple task to persuade First Nations that it has actually been created once established. Even the existence of such a figure still will not provide the equivalent benefits that are available through federalism as a protection for local diversity and the liberty of minorities or individuals who espouse unpopular views. Only a federalist state can offer a political check and balance that offers a level of comfort to minority populations.

Fiduciary Obligations

The Supreme Court of Canada has definitively declared that the Crown in right of Canada possesses a fiduciary relationship with Aboriginal peoples that emanates from the doctrines of discovery and aboriginal title. Since the Crown asserted overall sovereignty over the territory of the Aboriginal peoples unilaterally coupled with the claim for the underlying title with a monopoly on the acquisition of the Aboriginal interest, the courts easily concluded that the Crown had put itself in a position in which it owed fiduciary obligations to Aboriginal peoples.

The fiduciary relationship is an overarching one that guides how the Crown must relate to Aboriginal peoples. The courts have indicated that the "honour of the Crown" is always at stake in its dealings so that it cannot engage in any sharp practices or take advantage of First Nations in any way. While liability will only flow when specific fiduciary duties have been breached, the courts have said that they are prepared to monitor the Crown's conduct to ensure that it has consulted effectively with Aboriginal peoples before taking decisions that may affect their interest. The federal government is expected to inform Aboriginal communities fully about any pertinent information prior to First Nations making decisions about their lands and

resources. In general, the federal government is expected to advance and protect the interests of Aboriginal peoples rather than place itself in any position of conflict of interest (Rotman, 1996).

On the other hand, the courts have also acknowledged that the federal government does have responsibilities to the country and its citizens as a whole such that there may be times when it will inevitably decide that certain other priorities may take precedence over Aboriginal interests. These circumstances will not automatically generate a breach of fiduciary duty as the government might be acting properly within its authority. The Supreme Court set out a test in *Sparrow* that attempts to reconcile these competing demands upon the federal and provincial governments. Where there appears to be a violation of aboriginal or treaty rights, or likewise other Crown obligations owed by statute or at common law, yet the government is acting within its legislative competence, then the courts will impose an obligation upon the Crown to justify its interference with these rights or failure to adhere to its obligations. The Crown may be able to persuade the court that it has a legitimate and a compelling reason as to why it has done what it has even though its actions may constitute a breach of its duties. The courts have indicated that the onus is squarely on the government to justify its conduct and that the standard to be met is a very high one. Nevertheless, the judiciary has recognized that it can be met in appropriate circumstances, such as where essential to conserve natural resources as this would benefit all Canadians, including the Aboriginal peoples affected. The government seeking to meet this justification test must demonstrate that it has consulted with the Aboriginal groups concerned prior to taking action, that it has selected the least intrusive method possible to meet its objective, and that compensation has been made available where suitable to reflect the loss of any rights on a permanent or prolonged basis.

While the case law has primarily concentrated upon federal fiduciary obligations to First Nations, due to the more active relationship and frequent improper actions of the Department of Indian Affairs and its antecedents in the past, the jurisprudence does suggest that provincial governments also owe similar obligations in circumstances where their actions impact upon the rights and resources of First Nations (Rotman, 1994).

Québec's potential secession either by UDI or through an agreement with the federal and other provincial governments would naturally have implications for the fiduciary relationship. Unless secession obtains Aboriginal consent, one would anticipate that some First Nations and the Inuit would argue loudly that the fiduciary obligations owed to them by both governments would have been breached.

We are still uncertain as to the precise parameters of the fiduciary relationship and the obligations that flow from it for the Crown. It clearly encompasses the administration and transfer of reserve lands and Indian trust moneys such that any conveyance of reserves by the federal government triggers its fiduciary duties. Any effort to expropriate, seize or otherwise claim the reserve lands by Québec would likely violate its obligations as well as give rise to federal duties to take some action to protect the assets of this quasi-trust. It is logical that the same results would arise if any alteration in the current legal status were to occur in relation to the Category IA lands under the James Bay and Northern Québec Agreement (JBNQA) or concerning Category IA-N lands under the Northeastern Québec Agreement.

We do know also that the fiduciary relationship imposes both positive duties on the Crown to act on behalf of Aboriginal peoples as well as negative duties in the sense that it restricts the exercise of other constitutionally mandated powers, as it is the first factor to consider under the *Sparrow* justification test. Madame Justice McLachlin has stated in the *Apsassin* case that "loyalty and care [are] at the heart of the fiduciary obligation.' (*Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344). Thus, one can readily envision particular Aboriginal groups in Québec asserting their loyalty to Canada and calling on the federal government to demonstrate similar loyalty to them.

Given that the precise nature and extent of the specific duties has not been fully canvassed by the courts, there are naturally many unanswered questions in the normal context of Aboriginal-Crown relations, not to mention the extraordinary circumstances contemplated by separation. It is an open question as to whether or not the federal fiduciary duty would extend so far as to require it to intervene to protect aboriginal or treaty rights from provincial interference or the appearance of potential intrusions to come. I would submit that the federal government would be clearly breaching its obligations if it were to transfer *Indian Act* reserves or the Category IA and IA-N lands without the consent of the First Nations concerned. Any such transfers could only be pursued with consent, and only after the relevant surrender process required by federal law has been invoked, which requires a majority vote in favour of the surrender by the adults within the affected First Nation. Further, it would be a breach if the federal government renounced or relinquished its fiduciary relationship without Aboriginal consent. Likewise, I believe it would constitute a breach if it failed to seek to protect aboriginal and treaty rights, as well as their constitutional recognition and affirmation by section 35(1) of the *Constitution Act, 1982*.

It can be argued that these rights include at their core what makes Aboriginal Nations distinctive, such as their languages, cultures, religious beliefs, arts, ways of life and laws.

The harder issues centre on what actions the federal government must take to avoid infringing its duties. If the Aboriginal beneficiaries demand it, must the federal government take some form of military or police actions of a defensive nature to protect the First Nations and the lands set aside for their use under federal jurisdiction? It may be that there are also some old military alliances set out in 17th and 18th century treaties that might require this type of reciprocal action on demand. While it is possible that the fiduciary relationship does go this far, I would regard it as unlikely that a court would state that the government of Canada must take armed action, even of a defensive nature, when this inevitably involves risk to the lives of soldiers and/or the RCMP. It is more conceivable that the court would confirm such action as being permissible but not compulsory, although even this is doubtful. It is also unlikely that a Canadian court would order the Crown to provide the necessary financial resources so that the beneficiaries could engage in self-defence.

On the other hand, provincial ministers have said in the past that they would countenance the use of military and police force to protect the territory that they would claim for an independent Québec from any resistance displayed by Aboriginal peoples. They have also recognized that international law requires a government asserting that it is a nation state to prove that it is exercising effective control over its territory, which includes the need for some form of a military. Establishing its own armed forces and police would clearly not constitute a breach of a fiduciary duty by Québec, however, using them in an aggressive way against Aboriginal peoples would, if the latter are not themselves engaged in initiating the armed conflict.

It is naturally far more comfortable to consider less extreme measures and situations than this. What could the federal government do, if it was so inclined, in furtherance of its fiduciary relationship? On the domestic front, the government or Parliament could issue a declaration that Québec is still within Canada even after its issuance of a UDI. Legislation could be passed to implement such a federal declaration that would seek to reconfirm the continued existence of federal laws, services and even federal lands within Québec. It could expressly state that it is its intent to sustain the Crown-Aboriginal relationship. It might even contemplate expanding that relationship where First Nations so desire through the negotiation of new agreements pursuant to section 35 regarding self-

government, recognition of traditional law or other matters.

On the international stage, it could naturally lobby other nations to refuse to recognize the new republic of Québec. Aboriginal groups within Québec would likely launch an active campaign in this regard to try to preclude widespread international recognition being extended to Québec. It could be expected that some First Nations might invoke international law conventions and fora to seek redress. Complaints would likely be filed with the United Nations Human Rights Committee for alleged violations of Articles 1(2) and 27 of the International Covenant on Civil and Political Rights through the Optional Protocol. Since Québec may not immediately adhere to the latter, there may be some jurisdictional hurdles to be overcome initially, however, the Canadian government could step forward as a willing respondent so as to clothe the committee with authority to proceed. Similarly, First Nations would need the sponsorship of a member state to invoke the jurisdiction of the International Court of Justice in The Hague. Even if such a sponsor was forthcoming, suing Québec in that arena would implicitly be to recognize Québec as possessing the status of a state, thereby rendering this an unlikely avenue in which to seek a hearing. Although other international instruments specifically relating to indigenous peoples are under development within the U.N. and the Organization of American States, they do not yet exist and cannot be invoked. The International Labour Organization has brought into force Convention 169 through sufficient ratifications; however, Canada is still not a party.

Litigation Questions

The unique nature of this entire topic raises profound and challenging questions of a procedural nature as well as substantive ones. Where would First Nations go if they wished to sue for breach of their rights? They obviously can go to the federal Court of Canada if they wish to sue the federal government and can meet that Court's requirements, as they did in the *Robinson* cases. They have also successfully sued the provincial government in the superior courts of Québec in matters involving the JBNQA. The latter court system has also accepted jurisdiction where both governments were sued (*Cree School Board v. Canada (Attorney General)*, [1998] 3 C.N.L.R. 24). It is not, however, merely deciding which court is suitable under the current state of the law that matters, as the rules would be changed fundamentally by secession. The federal Court would clearly have no authority over the new republic unless the latter expressly attorned to its jurisdiction, which is thoroughly unlikely. Although the existing superior courts of Québec might cease to exist with federally appointed

judges, it is presumed that they would be immediately reappointed under a new Québec statute. The courts themselves would also probably acquire whatever jurisdiction that is presently allocated to the federal Court under those federal laws that are sustained by the new state.

Could the First Nations sue Québec for violating provincial fiduciary obligations when it is no longer a province? Again one must presume that the new republic would speedily pass a law indicating that all existing causes of action against the province could be sustained against the new state, but would this apply to litigation not yet officially filed? Would such a scheme even fit when it is tied to an event that has not legally happened until the moment that the former province ceases to exist? How does one frame the cause of action in this situation? The previous proposal to adopt all existing federal laws does not necessarily address this problem unless it includes federal common law.

Conclusions

A few things are certain. Firstly, lawyers would have a field day debating the many procedural as well as substantive aspects that directly flow from secession generally, not to mention the added complexities that arise in the Aboriginal law context. Secondly, dramatic and far-reaching arguments would be made, many of which cannot be dreamt of yet given the uncertainties surrounding how the secession might occur and on what terms. I would expect that the Cree or the Inuit or both would challenge the validity of the secession in Canadian and Québec courts, in the international arena and in the court of public opinion. They may also seek to maintain their position as part of Canada or proclaim their own independence. I would also not be surprised to see arguments raised that the JBNQA and other treaties have been so fundamentally breached that they cease to be in effect, such that the Aboriginal title that previously existed or has been dormant during the life of the treaty has been resurrected. Other First Nations might join in these actions or launch their own.

The last thing of which I am certain is that it will be a mess. Few divorces ever go smoothly, particularly when passions run high, debts are huge, disagreements over assets and liabilities are widespread, and family treasures are many and impossible to divide. The turmoil will inevitably be compounded by the absence of clear rules and the belief by each side that they have the power as sovereign governments to make up whatever rules they wish anyway, as they have too often tended to do in other spheres. The infrequency with which non-Aboriginal governments have included Aboriginal peoples and their leaders in discussions over fundamental issues affecting the

country will likely increase the distrust and uncertainty that will be present – yet excluding them would be thoroughly inappropriate if not impossible.

I am hopeful that this paper truly reflects the epithet version of being "academic" in that none of what it canvasses ever come to be.

Acknowledgements

I would like to thank my research assistant, Wallace McLean, for his considerable help as well as Professor Jean-Paul Lacasse (University of Ottawa, Faculty of Law, Civil Law Section) and James Zion (Solicitor to the Navajo Nation Supreme Court) for their invaluable comments. All of the opinions and errors contained herein, however, are my own responsibility.

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Notes

1 The interveners included: the Kitigan Zibi Anishnabeg (a First Nation in western Québec), the Makivik Corporation (which represents the political and economic interests of the Inuit of the Nunavik region of northern Québec), the Grand Council of the Crees (of Québec) and the Chiefs of Ontario.

2 An Act Respecting the Sovereignty of Québec made public by Premier Parizeau on 6 December 1994 but never tabled in the National Assembly as it was replaced by a different bill that reflected the political agreement of June 12, 1995 among Parizeau, Mario Dumont and Lucien Bouchard. *An Act Respecting the Future of Québec* (Bill 1) was tabled on 7 September 1995 and later died on the Order Paper in December of 1995.

3 This Treaty was upheld by the Supreme Court of Canada in Regina v. Sioui, [1990] 1 S.C.R. 1025.

4 The English courts were called upon to address this issue during the patriation debate and concluded that all obligations upon the Crown flowing from Indian treaties rested upon the shoulders of the Crown in right of Canada after independence. See, Ex parte Indian Association of Alberta [1982] 4 C.N.L.R. 86.

5 The most recent example of such an argument, despite its previous rejection by the courts, occurred in *Commission scolaire crie c. Canada (Procureur-général)*, [1998] A.Q. no. 189 (C.S.Q.).

6 This was the treaty before the courts in Regina v. Sioui For an interesting discussion of the efforts made to locate the original treaty, which was successful only six years after the Supreme Court had upheld its legality based upon a copy see, David Schulze, "The Murray Treaty of 1760: The Original Document Discovered" [1998] 1 C.N.L.R. 1. For a somewhat different view see, Denis Vaugeois, *La fin des alliances franco-indiennes* (Montreal: Boreal/ Septentrion, 1995).

7 This treaty was given legal recognition for the first time by the Québec Court of Appeal in *Coté v. Regina*, [1993] R.J.Q. 1350 even though neither the original nor a copy has yet been located. This decision was upheld by the Supreme Court in R. v. *Coté*, [1996] 3 S.C.R. 139.

8 The term "Indians" within section 91(24) of the Constitution Act, 1867 has been judicially interpreted to extend beyond the way in which this label has been defined under the Indian Acts in force from time to time. At the very least it encompasses the Inuit and non-status Indians and may extend so as to include all Aboriginal peoples as section 35(2) of the *Constitution Act, 1982* defines them as "Indian, Inuit and Metis peoples." See, e.g., *Reference Re Eskimos*, [1939] 2 D.L.R. 417 (S.C.C.).

9 In such circumstances, the federal government may not be inclined to press its rights as a party to the initial agreement to seek to exercise a veto or demand to be a party to the amendments that transform it from a tripartite into a bilateral agreement. It is also possible, of course, that no agreement among any of the parties is required in a situation in which UDI is permitted under international law.

10 The most recent example of this is Regina v. Badger, [1996] 1 S.C.R.771.

11 See, e.g., Quebec Act, 1774, 14 Geo. III, c.83 (U.K.) (R.S.C. 1985, Appendix No. 2), s.18; *Constitutional Act*, 1791, 31 Geo. III, c.31 (U.K.) (R.S.C. 1985, Appendix No. 3), s.33; *Union Act*, 1840, 3&4 Vic., c.35 (U.K.) (R.S.C. 1985, Appendix No. 4), s.46; *British North America Act, 1867*, 30&31 Vic., c.3 (U.K.) (R.S.C. 1985, Appendix No. 5), s.41 (federal elections laws), s.84 (Ontario and Quebec election laws) and s.122 (customs), s.129; *Rupert's Land Act*, 1869, 32-33 Vic., c.3 (Canada) (R.S.C. 1985, Appendix No. 7), s.5; *Manitoba Act*, 1870, 33 Vic., c.3 (Canada) (R.S.C. 1985, Appendix No. 8), s.27 (customs); *North*

West Territories Act, 1871, 34 Vic., c.16, s.4; *Boundaries of Manitoba Extension Act*, 1881, 44 Vic., c.14 (Canada), s.3 (continued NWT laws in force in the new areas); *British Columbia Terms of Union*, 1871 (R.S.C. 1985, Appendix, No. 10), No.7 (customs) and No.14 (constitution of executive and legislature); *Prince Edward Island Terms of Union*, 1873 (R.S.C. 1985, Appendix No. 12); *Yukon Territory Act*, 1898, 61 Vic., c.6 (Canada) (R.S.C. 1985, Appendix No. 19), s.9; *Alberta Act*, 1905, 4-5 Ed. VII, c.3 (Canada) (R.S.C. 1985, Appendix No. 20), s.16; *Saskatchewan Act*, 1905, 4-5 Ed. VII, c.42 (Canada) (R.S.C. 1985, Appendix No. 21), s.16; *Newfoundland Terms of Union*; Schedule to the *Newfoundland Act*, 1949, 13 Geo. VI, c.1 (Canada), 12-13 Geo. VI, c.22 (U.K.) (R.S.C. 1985, Appendix, No. 32), Terms 18(1), 18(2) and 22; *Nunavut Act*, 1993, 40-41-42 Eliz. II, c.28 (Canada), s.29.

12 Connolly v. Woolrich and Johnson, [1867] 11 L.C.J. 197; aff'd, [1869] 1 R.L. 253. This decision discussed at some length an earlier and unreported decision of the Superior Court of Lower Canada, *Tranchemontagne v. Monteferrand* (October 27, 1854), that maintained a similar point of view .

13 For a general discussion on the American law in reference to Indian tribes or nations, see, Rennard Strickland, ed., Felix Cohen's *Handbook on Federal Indian Law* (1982 ed.).