Assessing the Delgamuukw *Principles: National Implications and Potential Effects in Quebec*

Paul Joffe*

The judgment of the Supreme Court of Canada in *Delgamuukw* v. *British Columbia* should be viewed as a "work in progress." This is especially the case since the fundamental status of Aboriginal peoples and their right to self-determination still need to be fairly addressed. In determining the collective rights of Aboriginal peoples, it is also important that a human rights analysis, encompassing international considerations, be undertaken by the courts.

In the subsequent decision of the Court in the *Quebec Secession Reference*, a number of additional principles that should prove to be of substantial benefit to Aboriginal peoples have been highlighted. These include the constitutional principles of "democracy" and "protection of Aboriginal and treaty rights." The Court's pronouncements on the right to self-determination also serve to reinforce the view that s. 35(1) of the *Constitution Act, 1982* includes the inherent right of Aboriginal peoples of self-government.

Through a consideration of the principles in *Delgamuukw* within the Quebec context, it is concluded that the Quebec government is not respecting the duty to enter into and conduct negotiations in good faith. Any progress in Aboriginal peoples' issues still takes place within an overall unilateral framework that seriously undermines the status and rights of Aboriginal peoples. What seems to be crucial for any future negotiations in Canada is the prior establishment of a principled framework. The establishment of such a framework should be accomplished collaboratively by the parties concerned or, as a last resort, by the courts.

Le jugement de la Cour suprême du Canada dans l'affaire *Delgamuukw* c. *Colombie-Britannique* doit être considéré comme un ouvrage inachevé, particulièrement en raison du fait que le statut fondamental des peuples autochtones et leur droit à l'autodétermination nécessitent toujours d'être abordés équitablement. En déterminant les droits collectifs de ces peuples, il importe également que les tribunaux entreprennent une analyse basée sur les droits de l'homme et tenant compte des aspects internationaux de la question.

La décision postérieure de la Cour dans le *Renvoi relatif à la sécession du Québec* a souligné plusieurs principes supplémentaires qui devraient être d'une utilité considérable aux peuples autochtones, dont les principes constitutionnels de «démocratie» et de «protection des droits des peuples autochtones et des droits issus de traités». Les déclarations de la Cour sur le droit à l'autodétermination appuient également le point de vue selon lequel l'article 35(1) de la *Loi constitutionnelle de 1982* comprend le droit inhérent des peuples autochtones à l'autonomie gouvernementale.

L'examen des principes de *Delgamuukw* dans le contexte québécois mène à la conclusion que le gouvernement du Québec ne respecte pas son obligation d'engager et de poursuivre des négociations de bonne foi. Tout progrès dans les questions relatives aux peuples autochtones a encore lieu dans un cadre généralement unilatéral qui mine gravement leur statut et leurs droits. L'établissement préalable d'un cadre basé sur des principes définis semble capital à toute négociation future au Canada; ce cadre devrait être établi par collaboration entre les parties ou, en dernier ressort, par les tribunaux.

* Member of the Quebec and Ontario bars. An earlier version of this article was submitted for a Fraser Institute conference entitled "The Delgamuukw Case: Aboriginal Land Claims and Canada's Regions", co-hosted by the Canadian Property Rights Research Institute and held in Ottawa, Ontario on May 26-27, 1999. The author wishes to thank the Honourable Judge Mary Ellen Turpel-Lafond and Kerry Wilkins for their helpful comments on an earlier version of this article.

To be cited as: (2000) 45 McGill L.J. 155
Mode de référence : (2000) 45 R.D. McGill 155

Introduction

The Supreme Court of Canada judgment in *Delgamuukw* v. *British Columbia*[1] continues to evoke a wide range of responses from Aboriginal peoples, non-Aboriginal governments, academics and interested observers. Its interpretation, meaning and impact are likely to vary among the different regions of Canada, based on the differing circumstances, conditions and perspectives of all those concerned.

In reflecting upon the significance and implications of the *Delgamuukw* decision, it is prudent to view the decision as a "work in progress".[2] First, like courts in other countries, Canadian courts are still in the process of coming to terms with the fundamental rights of Aboriginal peoples. Therefore, an evolution of the judicial analysis of land-related Aboriginal rights is likely to continue to progress. Second, certain key aspects such as the status[3] of Aboriginal peoples and their rights of self-determination and self-government have yet to be fairly considered in any context.[4] These additional elements could eventually have a profound effect on the approach of, and analysis by, courts in Canada.

Third, new constitutional decisions contribute to the ongoing analysis of Aboriginal rights in Canada. In particular, the judgment of the Supreme Court of Canada in the *Quebec Secession Reference*[5] could prove to have a far-reaching influence on various aspects of the *Delgamuukw* decision. The interpretation in the *Delgamuukw*

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[1] [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193, [1998] 1 C.N.L.R. 14, 37 I.L.M. 268 [hereinafter *Delgamuukw*].

[2] See also the diverse questions raised by Mr. Justice Lambert of the B.C. Court of Appeal in D. Lambert, "*Van der Peet* and *Delgamuukw*: Ten Unresolved Issues" (1998) 32 U.B.C. L. Rev. 249.

[3] For example, B. Slattery has written that "[f]rom the legal perspective, Aboriginal nations are *constitutional entities* rather than ethnic or racial groups" ("First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 at 273 [emphasis in original] [hereinafter "First Nations and the Constitution"]); Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Canada Communication Group, 1996) at 176 (Co-chairs: R. Dussault & G. Erasmus) [hereinafter *Report of the Royal Commission* vol. 2]: "For purposes of self-determination, Aboriginal peoples should be seen as organic political and cultural entities, not groups of individuals united by racial characteristics"; P. Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stan. L. Rev. 1311 at 1324-27 [hereinafter "Distributing Sovereignty"]; and R. Dussault, "Redéfinir la relation avec les peuples autochtones du Canada: la vision d'avenir de la Commission royale" in G.-A. Beaudoin *et al.*, *Le fédéralisme de demain: réformes essentielles/ Federalism for the Future: Essential Reforms* (Montreal: Wilson & Lafleur, 1998) 345 at 350, where it is said that it is erroneous to view Aboriginal peoples as "racial groups" rather than "political and cultural entities."

In the United States, see *Morton* v. *Mancari*, (1974) 417 U.S. 535 at 554 (in self-government context, Indians not a discrete racial group, but "quasi-sovereign tribal entities").

[4] Analysis of Aboriginal peoples' fundamental rights can be severely affected if the status of Aboriginal peoples is underestimated, misconstrued, or ignored.

[5] *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385, 228 N.R. 203, 37 I.L.M 1342 [hereinafter *Quebec Secession Reference*].

judgment of s. 35(1) of the *Constitution Act, 1982*,[6] for example, should not be assessed in isolation. Furthermore, a consideration of other constitutional provisions may be critical in arriving at a more complete understanding of the meaning and implications of the decision in *Delgamuukw* since, as the Supreme Court of Canada has confirmed in other cases, the "Constitution is to be read as a unified whole."[7] Fourth, one can anticipate that international human rights norms will have a growing influence on the interpretation of Aboriginal peoples' rights.[8] Canadian courts have yet to adequately consider these existing and emerging international standards.[9]

In light of the above, this article focuses on a number of related matters. First, some key features of the *Delgamuukw* judgment are summarized, including the limitations on Aboriginal land title devised by the Supreme Court of Canada. Second, additional relevant principles are highlighted from the 1998 decision of the Supreme Court in the *Secession Reference*. Third, the inherent right of Aboriginal peoples to self-government is discussed, particularly in relation to s. 35(1) of the *Constitution Act, 1982*. In this regard, the constitutional significance of the principle of democracy and the right to self-determination is emphasized. Fourth, the importance of analyzing basic Aboriginal rights as inalienable human rights is underlined. Fifth, past and present government actions in Quebec are described, in order to assess their consistency with the Court's rulings in *Delgamuukw* and the *Secession Reference*. Finally, some conclusions and recommendations are put forward for the future.

An underlying premise in this article is that the fundamental status and rights of Aboriginal peoples have received a less than satisfactory treatment from Canadian courts. This may be due in part to the fact that judicial analysis and understanding of

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[6] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[7] *Reference re Remuneration of Judges*, [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577 at para. 107 [hereinafter *Judges Remuneration*]; *Quebec Secession Reference*, *supra* note 5 at para. 50: "The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole."

[8] See *e.g. Mabo* v. *Queensland* (1992), 107 A.L.R. 1 at 29 [emphasis in original], 175 C.L.R. 1 (H.C. Australia) [hereinafter *Mabo* cited to A.L.R.], per Brennan J: "[I]nternational law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration." See also A.F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 85, where the author provides that there is "the common-law presumption and the *necessity* of the court ensuring the conformity of Canadian law, including the Charter, with Canada's international legal obligations where the Charter language permits".

[9] I. Brownlie, *Treaties and Indigenous Peoples: The Robb Lectures 1991* (Oxford: Clarendon Press, 1992) at 35 [emphasis added]: "The principles of human rights have emerged as an objective and general international legal standard. The consequence has been that *the principles of human rights now constitute a standard which is external to the individual states but also intrusive. In other words domestic legal and social values have now become subject to external tests and evaluation*".

Aboriginal rights is in a state of continuous evolution.[10] It is only when new insights and standards become accepted by the courts that the doctrine of Aboriginal rights may be accordingly strengthened.

At the same time, human rights and their central importance are already well-known. These rights have been an integral part of the Canadian domestic and international legal framework for a considerable period of time. Yet, Aboriginal peoples as distinct "peoples" have not had their collective human rights recognized as such by Canadian courts. In the absence of this recognition, violations or denials of Aboriginal rights may be treated too casually. While principles of equality[11] are increasingly accepted, their implementation is too often inadequate. Judicial analysis in Canada has fallen short as a result.

I. Judicial Principles in *Delgamuukw*

The Supreme Court of Canada's judgment in *Delgamuukw* includes a number of significant rulings.[12] While certain interpretations break new ground, others confirm and reinforce prior judicial findings. Some of the key pronouncements may be summarized:

> i) Section 35(1) of the *Constitution Act, 1982* provides a solid constitutional base for negotiations and the Crown "is under a moral, if not a legal,[13] duty to

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[10] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1093, 70 D.L.R. (4th) 385 [hereinafter *Sparrow* cited to S.C.R.]: "[T]he phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time."

[11] The norm of equality and non-discrimination entails a "right to be different": see the first preambular paragraph of the *Draft United Nations Declaration on the Rights of Indigenous Peoples*, in UN Doc. E/CN.4/1995/2—E/CN.4/Sub.2/1994/56 (1994) 105 at 105, (1995) 34 I.L.M. 541: "[I]ndigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such." See also W. McKean, *Equality and Discrimination Under International Law* (Oxford: Clarendon Press, 1983) at 51: "equality has both a negative aspect (non-discrimination) and a positive aspect (special measures of protection). 'Equality in law' no longer means purely formal or absolute equality, but relative equality, which often requires differential treatment."

In Canada, the equality provision s. 15(1) of the *Canadian Charter of Rights and Freedoms* is not a commitment to identical treatment. See *Eldridge* v. *British Columbia (A.G.)*, [1997] 3 S.C.R. 624 at para. 54, 151 D.L.R. (4th) 577: "[S. 15(1)] expresses a commitment ... to the equal worth and human dignity of all persons "and "a desire to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in our society.'"

[12] It is beyond the scope of this article to address all of the Court's key rulings. For additional important aspects, see *e.g.* K. McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask. L. Rev. 431 [hereinafter "Aboriginal Title and the Division of Powers"]; and N. Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 U.B.C. L. Rev. 317.

[13] See also *Quebec Secession Reference*, *supra* note 5 at para. 90, where the Supreme Court of Canada generally indicates that there are underlying "constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities." This important constitutional source of the duty to negotiate is highlighted in G. Tremblay,

enter into and conduct those negotiations in good faith."[14] Since the Court refers generally to s. 35(1), this duty of good faith negotiations can be said to apply to all rights under s. 35(1) and not only to those concerning land.[15] Regardless of what differences might exist in the various regions of Canada, this duty should become increasingly significant in assessing the fairness of any negotiations concerning Aboriginal and treaty rights.

ii) With regard to the use of Aboriginal peoples' oral histories as proof of historical facts, the Court ruled that "this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents."[16] The use of such oral evidence goes beyond cases dealing with the land rights of Aboriginal peoples, and applies generally to the interpretation of their treaties.[17]

iii) Aboriginal title "arises from the prior occupation of Canada by [A]boriginal peoples."[18] As the Court has previously indicated, Aboriginal rights are not dependent on any legislative or executive instrument for their existence.[19]

"Le procédure implicite de modification de la Constitution du Canada pour le cas de la sécession du Québec" (1998) 58 R. du B. 423 at 425. These constitutional principles are not limited to secession issues and serve to reinforce the view that the duty to negotiate under s. 35(1) of the *Constitution Act, 1982* is not solely a moral duty, but a legal and constitutional one as well.

For further support for the existence of a legal duty to negotiate in s. 35(1), see *Report of the Royal Commission* vol. 2, *supra* note 3 at 172 [emphasis added]: *"The right of self-determination gives Aboriginal peoples the right to initiate changes in their governmental arrangements* within Canada and to implement such reforms by negotiations and agreements with other Canadian governments, which have the *duty to negotiate in good faith* and in light of fiduciary obligations owed by the Crown to Aboriginal peoples".

[14] *Delgamuukw*, *supra* note 1 at para. 186. See also *Mushkegowuk Council* v. *Ontario*, [1999] O.J. No. 3170 at para. 18 (Sup. Ct. J.), online: QL (OJ) [hereinafter *Mushkegowuk*]: "[Ontario 'workfare'] legislation ought not to be enacted without meaningful consultation and negotiation, and the concurrence of the [Aboriginal] applicants." See also *Nunavik Inuit* v. *Canada (Minister of Canadian Heritage)* (1998), 164 D.L.R. (4th) 463, [1998] 4 C.N.L.R. 68 at paras. 110, 111, and at para. 122 (F.C.T.D.) [hereinafter *Nunavik Inuit*]: "Where a national park itself is established, the impact will occur on the title, the rights and the use of the land. There is, therefore, a duty to consult and negotiate in good faith [with Aboriginal peoples who claim rights] in such circumstances."

The *Nunavik Inuit* decision was applied in *Gitanyow First Nation* v. *Canada*, [1999] 3 C.N.L.R. 89 (B.C.S.C.) [hereinafter *Gitanyow*] (by Williamson J.). In *Gitanyow*, it was decided that, *if* the Crown enters into negotiations with a First Nation pursuant to B.C.'s treaty process, it has a duty to negotiate in good faith. Similarly, see *Chemainus First Nation* v. *British Columbia Assets and Lands Corp.*, [1999] 3 C.N.L.R. 8 at para. 26 (B.C.S.C.).

[15] E.I.A. Daes has written that "indigenous peoples ... have the right to self-determination, and ... the existing State has a duty to accommodate the aspirations of indigenous peoples through constitutional reforms designed to share power democratically" ("Some Considerations on the Right of Indigenous Peoples to Self-Determination" (1993) 3 Transnat'l L. & Contemp. Probs. 1 at 9).

[16] *Delgamuukw*, *supra* note 1 at para. 87.

[17] *Ibid.*

[18] *Ibid.* at paras. 114, 126.

[19] *Guerin* v. *R.*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 at 355, 6 W.W.R. 481, Dickson J. (as he then was); *Calder* v. *British Columbia (A.G.)*, [1973] S.C.R. 313 at 390, 34 D.L.R. (3d) 145, Hall J.

> iv) Aboriginal title "is a collective right to land held by all members of an aboriginal nation."[20] This suggests that Aboriginal peoples, as distinct and organized societies, must have decision-making processes that are integral to the exercise of self-government.[21]
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> v) Aboriginal title is a proprietary interest which can compete with other proprietary interests.[22]
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> vi) Aboriginal title "encompasses the right to exclusive use and occupation of the land" concerned,[23] including such uses as mineral rights.[24]
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> vii) Lands subject to Aboriginal title may be used by the Aboriginal titleholders for a variety of purposes that "need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures."[25]

With regard to this final pronouncement of the Court in *Delgamuukw*, two notable limitations on the uses of lands subject to Aboriginal title are imposed. First, the "lands pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands."[26] Second, "[i]f aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so."[27]

As Chief Justice Lamer explains it, these limitations derive from "a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time."[28] The rationale is further elaborated in the following terms:

> *Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group.* If lands are so occupied, there will exist a special bond between the group and the

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[hereinafter *Calder* cited to S.C.R.]; *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at para. 30, Lamer C.J.C. [hereinafter *Van der Peet*].

[20] *Delgamuukw*, *supra* note 1 at para. 115.

[21] K. McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5 Tulsa J. Comp. & Int'l L. 253 at 285ff. (relationship between communal nature of Aboriginal title and self-government) [hereinafter "Aboriginal Rights in Canada"]. See also B. Slattery, "The Definition and Proof of Aboriginal Title" (The Supreme Court of Canada Decision in *Delgamuukw*, Pacific Business & Law Institute—Vancouver, B.C., 12-13 February 1998) [conference materials] 3.1 at 3.6: "[S]ince decisions about the manner in which lands are to be used must be made communally, there must be some internal mechanism of communal decision-making. This internal mechanism arguably provides the core for the right of aboriginal self-government". See further L. Mandell, "The Delgamuukw Decision" (The Supreme Court of Canada Decision in *Delgamuukw*, Pacific Business & Law Institute—Vancouver, B.C., 12-13 February 1998) [conference materials] 10.1 at 10.7-10.8.

[22] *Delgamuukw*, *supra* note 1 at para. 113.

[23] *Ibid.* at para. 117.

[24] *Ibid.* at para. 122.

[25] *Ibid.* at paras. 117 & 124. Further, see *ibid.* at para. 123 of the judgment, where Lamer C.J.C. lists some of the critical literature supporting this point.

[26] *Ibid.* at para. 125.

[27] *Ibid.* at para. 131.

[28] *Ibid.* at para. 126.

> land in question such that the land will be part of the definition of the group's distinctive culture ... [T]hese elements of aboriginal title create an inherent limitation on the uses to which the land, over which such title exists, may be put. For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it).[29]

These limitations to Aboriginal title appear to be paternalistic and inflexible.[30] They may inadvertently undermine Aboriginal societies and legal systems by restricting future options. It would be unfair to demand that Aboriginal peoples, the original occupiers and possessors of the land, choose between relinquishing their Aboriginal title or foregoing certain activities and ventures on their traditional lands. The Supreme Court's objective appears constructive—that is, to ensure adequate protections for Aboriginal peoples against land uses that may be destructive to their relationship with the land. Yet the Court's approach may be seriously questioned. According to the Court's own prescription, the harmful activity could still proceed, as long as the land is surrendered and Aboriginal title is extinguished.[31]

Government practices of extinguishing Aboriginal rights have recently been characterized by the United Nations Human Rights Committee as incompatible with Aboriginal peoples' right to self-determination. According to its April 1999 report, the Committee recommends to Canada that "the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant."[32] This human rights consideration clearly invites governments and courts in Canada to seek a more constructive approach.

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[29] *Ibid.* at para. 128 [emphasis added].

[30] See, for example, R.H. Bartlett, "The Content of Aboriginal Title and Equality Before the Law" (1998) 61 Sask. L. Rev. 377 at 388 ("inherent limit" is paternalistic and inconsistent with the principle of equality). See also T. Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (New York: Oxford University Press, 1999) at 121 ("the high court and government of Canada have not relinquished their falsely assumed right to control indigenous people").

[31] This aspect of the judgment warrants reconsideration in the future. It makes little sense that certain uses, collectively determined by the Aboriginal people concerned, should require mandatory destruction of their existing Aboriginal title or rights contrary to their own wishes and systems of law. In no case should use and development of natural resources on Aboriginal peoples' traditional lands automatically involve "surrender" of Aboriginal title and rights. Rather, consistent with Aboriginal perspectives and values, arrangements of sharing should be explored.

[32] See UN Committee on Human Rights, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, 1999, UN Doc. CCPR/C/79/Add. 105 at para. 8, referring to *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 1, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [hereinafter ICCPR]: "All 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."

Undoubtedly, safeguards against possible destructive uses of Aboriginal peoples' lands should be established. However, they should be incorporated through effective checks and balances in the decision-making process of the peoples concerned rather than through the harmful practice of extinguishment.

In addition, the profound relationship of Aboriginal peoples with their lands and territories is a dynamic one. This relationship includes vital economic, social, cultural, political and spiritual dimensions. It may vary with changing circumstances and conditions, often as a result of actions and events that Aboriginal peoples may not fully control. The relationship thus reflects the priorities and values of the Aboriginal people concerned at a given time. It should therefore not be rigidly defined in terms of any single activity that fulfils a vital purpose at a particular moment. Further, to limit future uses to those compatible with a single activity would take away an element of decision-making that belongs to the people affected. This limitation would only serve to penalize[33] Aboriginal peoples and would be inconsistent with their right to self-determination.

As indicated in the Introduction, the principles articulated in *Delgamuukw* may, however, be affected by other judicial decisions in Canada. In this context, it is useful to briefly examine relevant principles elaborated in the *Quebec Secession Reference*.

II. Additional Relevant Principles in the *Quebec Secession Reference*

The *Quebec Secession Reference* was decided by the Supreme Court of Canada in 1998, subsequent to its ruling in *Delgamuukw*. It is common knowledge that the *Quebec Secession Reference* has tremendous significance for any proposed secession from Canada. What may be less well known is that the judgment may potentially have far-reaching implications for the Constitution of Canada as a whole. In the future, numerous constitutional cases in Canada are likely to be influenced or shaped in some way by the principles highlighted by the Court in the *Quebec Secession Reference*.[34]

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[33] In *Delgamuukw*, *supra* note 1 at para. 132, Lamer C.J.C. emphasizes that the Court's limitation on Aboriginal title "is not ... a limitation that restricts the use of the land to those activities that have been traditionally carried out on it. That would amount to a legal straightjacket." Nevertheless, the limitation still carries what seems to be a severe and unfair "penalty" of surrender for derogating from judicially-prescribed conditions.

[34] Since the *Quebec Secession Reference* decision was rendered by the Supreme Court in August 1998, the underlying constitutional principles highlighted by the Court have been referred to in other cases in a non-secession context: see *e.g. Corbière* v. *Canada (Minister of Indian and Northern Affairs)* (1999), 173 D.L.R. (4th) 1, [1999] 3 C.N.L.R. 19 at para. 116 (S.C.C.) [hereinafter *Corbière*] (link between public discussion and consultation and principles of democracy); *R.* v. *Beaulac*, [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193 at para. 3 (minority language rights); *R.* v. *Campbell*, [1999] 1 S.C.R. 565, 171 D.L.R. (4th) 193 at para. 18 (minority language rights); *Re Eurig Estate*, [1998] 2 S.C.R. 565, 165 D.L.R. (4th) 1 at para. 66 (implicit principles used to expound the Constitution but not to alter thrust of explicit text); *Reference Re Firearms Act* (1998) 164 D.L.R. (4th) 513, [1999] 2 W.W.R. 579 (Alta. C.A.) (principle of federalism); *Coalition des citoyens et citoyennes du Val Saint-*

In the *Quebec Secession Reference*, the Court indicated that the constitutional texts enumerated in s. 52(2) of the *Constitution Act, 1982* "are not exhaustive" and that "[t]he Constitution also 'embraces unwritten, as well as written rules.'"[35] In particular, there are underlying constitutional principles that "animate the whole of our Constitution."[36] These include federalism, democracy, constitutionalism and the rule of law, and respect for minorities.[37]

The judgment generally includes Aboriginal peoples under the constitutional principle of the "protection of minorities".[38] This characterization was likely adopted because Aboriginal peoples are fewer in number [39] than the majority population in Canada or any of its provinces. While Aboriginal peoples generally can avail themselves of minority rights protections,[40] they constitute distinct "peoples" with the right to self-

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François v. *Quebec (A.G.)*, [1999] R.J.Q. 511 (rule of law); *Pfizer Inc.* v. *Canada*, [1999] F.C.J. No. 1122 at para. 59 (T.D.), online: QL (FCJ) (rule of law); *Singh* v. *Canada (A.G.)*, [1999] F.C.J. No. 1056 at para. 66ff (T.D.), online: QL (FCJ) (rule of law); and *Bacon* v. *Saskatchewan Crop Insurance*, [1999] S.J. No. 302 at paras. 23ff. (C.A.), online: QL (SJ) (underlying constitutional principles).

See also *Samson* v. *Canada (A.G.)* (1998), 155 F.T.R. 137, 165 D.L.R. (4th) 342 at para. 7 (F.C.T.D.), McGillis J. (principle of democracy unsuccessfully invoked in seeking to restrain Senate appointment by Governor General of Canada); and *Hogan* v. *Newfoundland (A.G.)*, [1999] N.J. No. 5 (S.C.(T.D.)), online: QL (NJ) (principles of protection of minority rights and rule of law unsuccessfully invoked in claiming invalidity of constitutional amendment concerning denominational rights).

[35] *Quebec Secession Reference*, *supra* note 5 at para. 32. The quote is from *Judges Remuneration*, *supra* note 7.

[36] *Ibid.* at para. 148. See also *Reference Re Amendment of the Constitution of Canada*, [1981] 1 S.C.R. 753 at 874, 125 D.L.R. (3d) 1, where it is said that the Constitution of Canada includes "the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state."

[37] *Quebec Secession Reference*, *ibid.* at para. 32. R. Howse & A. Malkin have written: "These foundational norms ... do not merely form the justification for political conventions but are *binding legal principles which, now that the Constitution has been patriated, structure and govern the exercise of all constitutional change in Canada*" ("Canadians are a Sovereign People: How the Supreme Court Should Approach the Reference on Quebec Secession" (1997) 76 Can. Bar Rev. 186 at 210 [emphasis added]).

[38] See *Quebec Secession Reference*, *ibid.* at para. 82.

[39] I. Schulte-Tenckhoff has written that "one trait is generally viewed as distinctive of Indigenous peoples, namely their historical relationship with the land, especially in former European settler colonies such as Canada—a relationship that is a fundamental component of their peoplehood. *Consequently, while many Indigenous peoples actually happen to be numerical minorities, minorities are not necessarily Indigenous peoples*" ("Reassessing the Paradigm of Domestication: The Problematic of Indigenous Treaties" (1998) 4 Rev. Const'l Studies 239 at 284 [emphasis added]).

[40] The UN Human Rights Committee considers formal complaints of indigenous people, among others, in relation to art. 27 of the ICCPR, *supra* note 32 (minority rights provision). See *e.g.* Committee on Human Rights, *Ominayak* v. *Canada*, ESC Dec. 167/1984, 38th Sess., UN Doc. CCPR/C/38/D/167/1984 (1990) 1 at 29 ("historical inequities ... and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue"). See also *Lovelace* v. *Canada*, (No. 24/1977) *Report of the Human Rights Committee*, UN GAOR, 36th Sess., Supp. No. 40, at 166, UN Doc. A/36/40 (1981); and in

determination and other fundamental collective rights.[41] Evidence that the Court did not intend to imply that Aboriginal peoples are simply "minorities" is found in another recent decision. In *Van der Peet*, Lamer C.J.C. underlined the original occupation of North America by Aboriginal peoples and stated that "[i]t is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status."[42]

Further, with regard to the protection of the Aboriginal and treaty rights of Aboriginal peoples, the Court highlighted in the *Quebec Secession Reference* that "[t]he protection of these rights ... *whether looked at in their own right or as part of the larger concern with minorities*, reflects an important underlying constitutional value."[43] In other words, the safeguarding of Aboriginal and treaty rights may be also be viewed "in their own right" as an additional underlying constitutional principle.[44] As P. Russell has commented,

> The Court also discusses Canada's commitment to the rights of Aboriginal peoples as part of a concern for minority rights. But it says that Aboriginal and treaty rights might also 'be looked at in their own right' (§82) as an important underlying constitutional value. *This latter perspective is more appropriate*

(1981), 68 I.L.R. 17 (denying Indian woman who married a non-Indian the right to live on a reserve is a violation of art. 27 of the ICCPR).

[41] See S.J. Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 100 [emphasis added]:

> International practice ... has tended to treat indigenous peoples and minorities as comprising *distinct but overlapping categories subject to common normative considerations*. The specific focus on indigenous peoples through international organizations indicates that groups within this rubric are acknowledged to have distinguishing concerns and characteristics that warrant treating them apart from, say, minority populations of Western Europe. At the same time, indigenous and minority rights issues intersect substantially in related concerns of nondiscrimination and cultural integrity.

See also J. Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (Cambridge: Cambridge University Press, 1996) at 45: "One of the main differences between a minority and a people is the fact that in the definition of minorities uo relationship with a territory is demanded. A minority may well be long established in the territory of a State, but it need not have a particular attachment to a specific area. ...The louger a minority is established in a given territory, the more chance there is that it will develop a particular attachment to the territory. If a relationship exists, a minority could well constitute a people." For a similar view, see A. Cristescu, Special Rapporteur, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, UN Doc. E/CN.4/Sub.2/404/Rev.1 (1981) at 41, para. 279.

[42] *Van der Peet*, *supra* note 19 at para. 30.

[43] *Supra* note 5 at para. 82 [emphasis added].

[44] This point is made in C.-A. Sheppard, "The Cree Interveution in the Canadian Supreme Court Reference on Quebec Secession: A Subjective Assessment" (1999) 23 Vermont L. Rev. 845 at 856 [emphasis added]: "It may not be too optimistic to consider that there has uow emerged *an additional constitutional principle, distinct from the traditional principle of protection of minorities*, i.e. protection of Aboriginal and treaty rights. [new para.]...*Aboriginal rights should not be viewed merely as a subspecies of minority rights*."

> *given that Aboriginal peoples, unlike other minorities with constitutional rights, have an inherent and inalienable right to self-government which gives them a share of sovereign authority in Canada.*[45]

In conclusion, the principle of safeguarding of Aboriginal and treaty rights may be invoked as part of the constitutional principle of the "protection of minorities" or, more appropriately, as a separate constitutional principle and value. Regardless, it is clear that the principle has equal weight with other underlying constitutional principles. As the Court explained in the *Quebec Secession Reference*, "These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."[46]

All of the underlying constitutional principles elaborated by the Court have the potential to bring about new and important interpretations which may benefit Aboriginal peoples. To what extent this occurs may well depend on the imagination and skills of future Aboriginal negotiators and litigants. As will be illustrated in the discussion on self-government,[47] the principles of democracy and self-determination are especially relevant to Aboriginal peoples.

III. Aboriginal Peoples' Right to Self-Government: A Key Issue to Be Resolved

The Supreme Court concluded in *Delgamuukw* that there was insufficient evidence before it to make any judicial determination in the matter of an Aboriginal right of self-government.[48] Consequently, the Court ruled that this issue should be determined when the case is sent back for a new trial.[49] Lamer C.J.C. cautioned in passing that "rights to self-government, if they existed, cannot be framed in excessively general terms."[50] However, it makes little sense to attempt to determine the parameters of contemporary rights of self-government based on powers which were exercised by a

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[45] P.H. Russell, "The Supreme Court Ruling, A Lesson in Democracy" *Cité Libre*, English ed., 26:4 (October-November 1998) 29 at 30 [emphasis added].

[46] *Supra* note 5 at para. 49. See also para. 91 and also para. 53, where the Court emphasized that "the recognition of these constitutional principles ... could not be taken as an invitation to dispense with the written text of the Constitution" and "there are compelling reasons to insist upon the primacy of our written constitution."

[47] See discussion under Part IV below.

[48] *Supra* note 1 at para. 170, Lamer C.J.C. and at para. 205, La Forest J.

[49] *Ibid.* at paras. 171, 208.

[50] *Ibid.* at para. 170. See generally *R.* v. *Pamajewon*, [1996] 2 S.C.R. 821, (*sub. nom. R.* v. *Jones*) 138 D.L.R. (4th) 204 [hereinafter *Pamajewon*]; B.W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R.* v. *Pamajewon*" (1997) 42 McGill L.J. 1011. See also L.I. Rotman, "Creating a Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada" (1997) 36 Alta. L. Rev. 1 at 2 (Supreme Court's decision in *Pamajewon* focussed on gambling as a discrete issue, rather than as part of the larger right of Aboriginal self-government).

particular people at an earlier point in history.[51] Such an approach would be inappropriate and unfair[52] and it would run counter to the principle of self-determination. As with any self-governing people, the nature and scope of powers exercised by an Aboriginal people in past situations would have varied considerably according to the needs, circumstances, and available resources at any given point in time. As different needs and priorities arise, Aboriginal peoples must be free to exercise self-government powers that would effectively address new and impending challenges.

It would be difficult to conceive of how an Aboriginal people that is considered to be an "organized society"[53] for the purposes of s. 35(1) of the *Constitution Act, 1982* and possessing collective[54] Aboriginal and treaty rights could be determined to have few or no rights of self-government.[55] How else could Aboriginal peoples make col-

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[51] See also *Pamajewon*, *ibid.* at para. 24: "In so far as they can be made under s. 35(1), claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard." In *Van der Peet*, *supra* note 19 at para. 46, the test for identifying Aboriginal rights was said to be as follows: "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."

It is worth noting that, in *Delgamuukw*, *ibid.* at para. 17, the Supreme Court of Canada subsequently decided that lands subject to Aboriginal title may be used by the Aboriginal titleholders for a variety of purposes that "need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures." Therefore, it is possible that the right to self-government on Aboriginal title lands would also be interpreted by the Court as including a wide range of powers that are not necessarily linked to Aboriginal practices, customs, and traditions integral to Aboriginal culture. In other words, the tests in *Van der Peet* and *Pamajewon* may not automatically be applied by the Court, in the case of Aboriginal title lands, for the purposes of determining Aboriginal peoples' right to self-government pursuant to s. 35(1) of the *Constitution Act, 1982*.

[52] See P. Hogg, *Constitutional Law of Canada*, looseleaf ed., vol. 1 (Toronto: Carswell, 1997) at 27-21 [hereinafter *Constitutional Law*]: "These restrictions [in *Pamajewon*] ... are singularly inappropriate to the right of self-government. In order to give meaning to self-government in a modern context, it should be couched in much wider terms."

Furthermore, fundamental rights can take on new meanings over time. In the human rights context, see *Canada (A.G.)* v. *Mossop*, [1993] 1 S.C.R. 554 at 621, 100 D.L.R. (4th) 658 [hereinafter *Mossop* cited to S.C.R.], L'Heureux-Dubé J.: "[C]oncepts of equality and liberty which appear in human rights documents are not bounded by the precise understanding of those who drafted them. Human rights codes are documents that embody fundamental principles, but which permit the understanding and application of these principles to change over time."

[53] *Calder*, *supra* note 19 at 328: "[T]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries." This passage is cited with approval in *Delgamuukw*, *supra* note 1 at para. 189.

[54] *Delgamuukw*, *ibid.* at para. 115, Lamer C.J.C.: "[Aboriginal title] is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests."

[55] Legal literature in favour of recognition of Aboriginal rights to self-government includes the following: "Aboriginal Rights in Canada", *supra* note 21; Lambert, *supra* note 3 at 268; P.W. Hogg & M.E. Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues"

lective decisions concerning their land tenure systems or any other matters affecting the peoples and their traditional territory?[56] How would such peoples collectively determine their economic, social, cultural, and political development? How would they maintain societal order, in accordance with their own perspectives and values? Yet, the Privy Council stated in 1912 in the *Appeals Reference* that "there can be no doubt that under this organic instrument [the *Constitution Act, 1867*] the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada."[57] This does not mean that there is no constitutional space for Aboriginal self-government. First, the "doctrine of exhaustiveness was developed without regard for the Aboriginal reality in Canada...[and] developed in the context of federal-provincial jurisdictional disputes in which Aboriginal peoples played no role."[58] Second, the doctrine relates to the scope

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(1995) 74 Can. Bar Rev. 187; P. Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 Queen's L.J. 173; A. Lafontaine, "La coexistence de l'obligation fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones" (1995) 36 C. de D. 669; P. Hutchins, C. Hilling & D. Schulze, "The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine" (1995) 29 U.B.C. L. Rev. 251; K. McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95; B. Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681; H. Foster, "Forgotten Argumcnts: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act* Cases" (1992) 21 Man. L.J. 343; P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382; B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308.

See also R.K. Wilkins, *Unchartered Territory: Fundamental Canadian Values and the Inherent Right of Aboriginal Self-Government* (LL.M Thesis, University of Toronto 1999) [unpublished]. In addition, in the now-defunct Charlottetown Constitutional Accord, all of the federal, provincial and territorial governments in Canada agreed to recognize explicitly in Canada's Constitution the inherent right of Aboriginal peoples to self-government. See Draft Legal Text, October 9, 1992, s. 35.1 (recognition of inherent right of self-government), which is reproduced in K. McRoberts & P.J. Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) at 348-49.

[56] Mr. Justice Lambert, *supra* note 2 at 268, has commented that "since *Delgamuukw* decided that aboriginal title was a communal right ... , there is an implied recognition that the aboriginal society must have at least the degree of self-government necessary to allocate the use of the land to which aboriginal title extends". See also C. Bell & M. Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) 38 at 66ff. (at the time of the assertion of British sovereignty, Aboriginal peoples lived in organized societies and had jurisdiction over members and territory).

[57] *Ontario (A.G.)* v. *Canada (A.G.)*, [1912] A.C. 571 at 581, (*sub nom. Privy Council Appeals Reference*) 3 D.L.R 509 [hereinafter *Appeals Reference* cited to A.C.], Earl Loreburn (on behalf of the Court). See also *Murphy* v. *C.P.R.*, [1958] S.C.R. 626 at 643, 15 D.L.R. (2d) 145, Rand J.: "It has become a truism that the totality of effective legislative power is conferred by the Act of 1867, subject always to the express or necessarily implied limitations of the Act itself."

[58] Hogg & Turpel, *supra* note 55 at 192.

of federal and provincial powers, and not to their exclusiveness.[59] Third, until the latter half of the twentieth century, universal human rights norms, such as the right of peoples to self-determination, were hardly recognized within independent states such as Canada. Consistent with the principles of justice[60] and the doctrine of progressive interpretation,[61] these standards must now be considered in interpreting the right to self-government under Canada's Constitution. As Chief Justice Lamer has stated generally in *Delgamuukw*, "the constitutionalization of common law aboriginal rights by s. 35(1) does not mean that those rights exhaust the content of s. 35(1)."[62]

Furthermore, in the1912 *Appeals Reference*, it would appear that the context for determining self-government in Canada was limited to the powers "bestowed ... within the limits of the *British North America Act*."[63] As Lord Loreburn indicated on behalf of the Privy Council:

> [I]t is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominiou or to the provinces, within the limits of the *British North America Act*.[64]

It is hardly surprising that the *British North America Act, 1867* (now the *Constitution Act, 1867*[65]) was the context for the Privy Council's analysis. As the Supreme Court of Canada has recently confirmed in the *Quebec Secession Reference* with regard to federal and provincial governments, "their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source."[66] However, the same cannot be said of Aboriginal rights. As al-

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[59] Canada, Royal Commission on Aboriginal Peoples, *Partners in Confederation:Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993) at 32 [hereinafter *Partners*].

[60] See *e.g. Mabo*, *supra* note 8 at 19, Brennan J.: "[N]o case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system."

[61] For a discussion of this doctrine, see text accompanying note 148.

[62] *Supra* note 1 at para. 136. In the same paragraph, the Chief Justice also quotes his earlier words in *R.* v. *Côté*, [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385, [1996] 4 C.N.L.R. 26 at para. 52 [hereinafter Côté]: "Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive [A]boriginal societies if it only protected those defining features which were fortunate enough to have received the legal recognition and approval of European colonizers."

[63] *Supra* note 57 at 583-84. This point is also raised in Hutchins, Hilling & Schulze, *supra* note 55 at 281.

[64] *Appeals Reference*, *ibid.*

[65] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[66] *Supra* note 5 at para. 72.

ready discussed,[67] the Aboriginal rights of Aboriginal peoples are pre-existing rights and do not rely upon Canada's Constitution for their existence.

Consequently, when the Privy Council considered the powers of self-government that were "bestowed"[68] in Canada by the *British North America Act, 1867*, Aboriginal self-government would have remained outside this limited context. In any event, the Privy Council made no attempt in the *Reference Appeal* to consider the rights or concurrent[69] powers of Aboriginal peoples. Moreover, there were no Aboriginal interveners involved in the case and no legal arguments pertaining to Aboriginal peoples were raised by either the federal or Ontario government parties.

To date, there has been no "clear and plain" intention[70] by the Canadian or Imperial Parliament to purportedly extinguish the rights of Aboriginal peoples to self-government.[71] Nor did Aboriginal peoples give up these pre-existing rights. Such outright destruction or alienation of fundamental rights may not even be possible.[72] It is now recognized that it was in the context of the brutal realities of an ongoing process of colonization that served to unjustly deny Aboriginal peoples their rights to both land and jurisdiction. As the Royal Commission on Aboriginal Peoples has emphasized,

> Regardless of the approach to colonialism practised ... the impact on indigenous populations was profound. Perhaps the most appropriate term to describe that impact is "displacement." Aboriginal peoples were displaced physically—they were denied access to their traditional territories and in many cases actually forced to move to new locations selected for them by colonial authorities. They were also displaced socially and culturally ... which undermined their ability to pass on traditional values to their children ... In North America they were also displaced politically, forced by colonial laws to abandon or at least disguise traditional governing structures and processes in favour of colonial-style municipal institutions.

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[67] See cases cited in *supra* note 19.

[68] See *Black's Law Dictionary*, 6th ed., *s.v.* "bestow": "To give, grant, confer, or impart."

[69] Slattery has said that "Aboriginal governments and the Federal government have concurrent powers" over the matters specified in section 91(24) of the *Constitution Act, 1867* ("First Nations and the Constitution", *supra* note 3 at 282). See also *Sparrow*, *supra* note 10 at 1109 (federal legislative powers must now be read together with s. 35(1) of the *Constitution Act, 1982*).

[70] "Clear and plain" intent on the part of the Crown is said to be required when Aboriginal rights are allegedly extinguished by the Parliament of Canada. See, for example, *Delgamuukw*, *supra* note 1 at para. 180, Lamer C.J.C.

[71] See also the analysis in Hutchins, Hilling & Schulze, *supra* note 55 at 254-62, where it is concluded that neither the French regime in Canada nor the assertion of British sovereignty had the effect of extinguishing Aboriginal rights to self-government.

[72] See text accompanying note 133. See also W. Moss, "Inuit Perspectives on Treaty Rights and Governance" in Canada, Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Minister of Supply and Services Canada, 1995) 55 at 92, where the inherent right of self-government from an Inuit viewpoint is described as "a pre-existing and fundamental human right and therefore not subject to extingnishment."

> ... Aboriginal peoples lost control and management of their own lands and resources, and their traditional customs and forms of organization were interfered with in the interest of remaking Aboriginal people in the image of the newcomers. This did not occur all at once across the country, but gradually.[73]

A similar view has been acknowledged by the government of Canada:

> Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices ... We must acknowledge that *the result of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations.*[74]

The right to self-determination, including self-government, is a crucial element to the ongoing survival[75] and development of Aboriginal peoples as distinct peoples. Adequate realization of this right is essential to the healing[76] and strengthening of Aboriginal societies, as well as to their reconciliation in Canada. Arrangements for both exclusive and shared jurisdiction will likely prove to be a necessity in many situations in the Canadian federation.[77] It would be radical in the extreme for any government or court

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[73] Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Canada Communication Group, 1996) at 139-40 [hereinafter *Report of the Royal Commission* vol. 1].

[74] "Statement of Reconciliation" in Canada, Indian Affairs and Northern Development *Gathering Strength—Canada's Aboriginal Action Plan* (Ottawa: Minister of Public Works and Government Services, 1997) at 4 [emphasis added].

[75] C.M. Brölmann & M.Y.A. Zieck, "Indigenous Peoples" in C. Brölmann, R. Lefeber & M. Zieck, eds., *Peoples and Minorities in International Law* (Boston: Kluwer Academic, 1993) 187 at 218-19: "The survival of indigenous peoples requires more than merely the protection of their territorial basis. Their institutions, customs and laws, in short, their distinct cultures, need protection as well ... It is rather difficult to envisage how a culture in its broadest sense can be protected without granting some form of autonomy."

[76] Canada, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol. 3 (Ottawa: Canada Communication Group, 1996) at 5 [hereinafter *Report of the Royal Commission* vol. 3]: "Current social problems are in large part a legacy of historical policies of displacement and assimilation, and their resolution lies in recognizing the authority of Aboriginal people to chart their own future within the Canadian federation." See also at 109, 201.

See also Canadian Medical Association, *Bridging the Gap: Promoting Health and Healing for Aboriginal Peoples in Canada* (Ottawa: Canadian Medical Association, 1994) at 14: "It is recognized that self-determination in social, political and economic life improves the health of Aboriginal peoples and their communities. Therefore, the CMA encourages and supports the Aboriginal peoples in their quest for resolution of self-determination and land use." See at 13: "The health status of Aboriginal peoples in Canada is a measurable outcome of social, biological, economical, political, educational and environmental factors."

[77] Hogg & Turpel, *supra* note 55 at 211 (agreements on self-government do not create the right, but settle mutually acceptable rules to govern the relationship between the three orders of government).

to determine that an Aboriginal people, as a "people", gave up their right to govern themselves and to freely determine their economic, social and cultural development.[78]

In *Van der Peet*, Madame Justice L'Heureux-Dubé referred to reserve lands, Aboriginal title lands, and Aboriginal rights lands in raising the issue of Canadian sovereignty. She stated that

> [t]he common feature of these lands is that the Canadian Parliament and, to a certain extent, provincial legislatures have a general legislative authority over the activities of aboriginal people, which is the result of the British assertion of sovereignty over Canadian territory. There are, however, important distinctions to draw between these types of lands with regard to the legislation applicable and claims of aboriginal rights.[79]

However, what still has not been adequately addressed is the sovereignty of Aboriginal peoples within the Canadian constitutional context.[80] The Supreme Court of Canada has consistently concluded that Aboriginal peoples in Canada were recognized and treated as sovereign nations in earlier periods of history.[81] This sovereignty

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[78] *Report of the Royal Commission* vol. 1, *supra* note 73 at 679: "There is no more basic principle in Aboriginal traditions than a people's right to govern itself according to its own laws and ways. This same principle is considered fundamental in the larger Canadian society and underpins the federal arrangements that characterize the Canadian Constitution." See also C. Bell, "New Directions in the Law of Aboriginal Rights" (1998) 77 Can. Bar Rev. 36 at 71-72.

[79] *Supra* note 19 at para. 117.

[80] "From the perspective of both formal and substantive equality of peoples, indigenous peoples of North America can advance powerful claims for a degree of sovereignty over their individual and collective identities" ("Distributing Sovereignty", *supra* note 3 at 1367). See also Canada, *Report of the Royal Commission on Aboriginal Peoples: Renewal: A Twenty-Year Commitment*, vol. 5 (Ottawa: Canada Communication Group, 1996) at 162 [hereinafter *Report of the Royal Commission* vol. 5]: "[Aboriginal, provincial and federal governmeuts] share the sovereign powers of Canada as a whole, powers that represent a pooling of existing sovereignties."

See generally "Aboriginal Sovereignty and Imperial Claims", *supra* note 55; P. Joffe & M.E. Turpel, "Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives" (A Study Prepared for the Royal Commission on Aboriginal Peoples) vol. 1 (1995) at 134-93 (c. 4: "Contending Sovereignties") [archived with author]; A. Bissonnette, "Le droit à l'autouomie gouvernementale des peuples autochtones: un phénix qui renaîtra de ses cendres" (1993) 24 R.G.D. 5 at 22.

McNeil has commented that "[n]o Canadian court has yet come up with a convincing explanation of what happened to Aboriginal sovereignty, or how that sovereignty can be denied ..." ("Aboriginal Rights in Canada", *supra* note 21 at 298).

[81] *Van der Peet*, *supra* note 19 at para. 37 (Lamer C.J.C.), and at para. 106 (L'Heureux-Dubé J.); *Côté*, *supra* note 62 at para. 48 (Lamer C.J.C.); *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1052-1053, 70 D.L.R. (4th) 427, [1990] 3 C.N.L.R. 127 [hereinafter *Sioui* cited to S.C.R.].

See also A. Lajoie, *et al.*, *Le statut juridique des peuples autochtones au Québec et le pluralisme* (Cowansville, Qc.: Yvon Blais, 1996) at 95, 127, and 140, where it is indicated that, on occasion, the French had explicitly recognized the sovereignty of Aboriginal peoples (*e.g.* when negotiating the Great Treaty of Peace of 1701).

has never been expressly relinquished.[82] Yet, despite growing support for incorporation of Aboriginal sovereignty in the present constitutional framework,[83] this sovereignty has not been the subject of adequate examination and acknowledgement by the courts. As long as this serious omission continues, an imbalanced and unjust view of sovereignty in favour of federal and provincial governments may well result.[84]

In the *Quebec Secession Reference*, the Supreme Court indicated that "with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy."[85] With regard to Aboriginal peoples, the adoption of s. 35 of the *Constitution Act, 1982* has also contributed to this transformation in a substantive and far-reaching manner.[86] Consequently, the notion of parliamentary supremacy does not

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[82] See *e.g.* M. Morin, *L'Usurpation de la souveraineté autochtone: le cas des peuples de la Nouvelle-France et des colonies anglaises de l'Amérique du Nord* (Montreal: Boréal, 1997) at 266; Canada, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec: Domestic Dimensions*, vol. 2 (Paper prepared as part of the Research program of the Royal Commission on Aboriginal Peoples) by R. Dupuis & K. McNeil (Ottawa: Minister of Supply and Services Canada, 1995) at 50.

[83] See also Hogg & Turpel, *supra* note 55; K.C. Yukich, "Aboriginal Rights in the Constitution and International Law" (1996) 30 U.B.C. L. Rev. 235; P. Macklem, "Aboriginal Rights and State Obligations" (1997) 36 Alta. L. Rev. 97 at 109 (respect for Aboriginal sovereignty underlies many arguments in favour of the inherent right of self-government).

[84] Slattery has written that "native American peoples held sovereign status and title to the territories they occupied at the time of European contact and ... this fundamental fact transforms our understanding of everything that followed" ("Aboriginal Sovereignty and Imperial Claims", *supra* note 55 at 690). See also P.H. Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence" (1998) 61 Sask. L. Rev. 247 at 275-76 (sovereignty in Canada should be shared); and M.D. Becker, "'We Are an Independent Nation': A History of Iroquois Sovereignty" (1998) 46 Buffalo L. Rev. 981.

[85] *Supra* note 5 at para. 72.

[86] Rights to self-government of Aboriginal peoples were recognized by colonial authorities as early as 1763, when the *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1, was issued: see Lafontaine, *supra* note 55 at 727ff.; D. Johnston, "First Nations and Canadian Citizenship" in W. Kaplan, ed., *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal: McGill-Queen's University Press, 1993) 349 at 353; B.A. Clark, *Indian Title in Canada* (Toronto: Carswell, 1987) at 98-99; R.N. Clinton, "The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs" (1989) 69 B.U. L. Rev. 329 at 381-85; and R.P. Chambers, "Judicial Enforcement of the Federal Trust Respousibility to Indians" (1975) 27 Stan. L. Rev. 1213 at 1246 (Chief Justice Marshall of the U.S. Supreme Court "correctly discerned that the basic gnarantee of the United States was the territorial and governmental integrity of the tribes").

The uniform application in Canada of the rights confirmed in the *Royal Proclamation of 1763* is emphasized by La Forest J. in *Delgamuukw*, *supra* note 1 at para. 200: "In essence, the rights set out in the *Proclamation*...were applied in principle to aboriginal peoples across the country." See also *Sioui*, *supra* note 81 at 1055 [emphasis added], Lamer J. (as he then was; on behalf of the Court): "The British Crown recognized that the Indians had certain *ownership rights over their land*, it sought to establish trade with them which would rise above the level of exploitation and give them a fair re-

pose any barrier to recognizing Aboriginal sovereignty as one of three orders of sovereignty in Canada's constitutional system.[87]

Clearly, principles of sovereignty must be adequately enunciated if we are to effectively address the self-government rights of Aboriginal peoples in the Constitution of Canada.[88] In developing a principled legal framework for the consideration of Aboriginal self-government, it is also critical to examine the underlying constitutional principle of democracy, as well as the right to self-determination. These basic principles are of ceutral importance to Aboriginal peoples and are addressed below.

IV. Democracy and Self-Determination in the Canadian Constitutional Context

In receut times, both the Royal Commission on Aboriginal Peoples and the government of Canada have concluded that section 35(1) of the *Constitution Act, 1982*

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turn. It also allowed them *autonomy in their internal affairs*, intervening in this area as little as possible".

[87] The legitimacy of applying the notion of parliamentary supremacy to deny Aboriginal peoples' inherent rights may be seriously questioned. G. Winterton has written that parliamentary supremacy "was justified by the theory that because 'the people' elected Parliament, its supremacy meant, in effect, the 'sovereignty of the people'" ("The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) 92 L.Q. Rev. 591 at 596). However, until 1960, Indians did not have the right to vote. In many instances, they are still denied the right to effective representation today, so many individuals refuse to vote. See also *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 at 183, 81 D.L.R. (4th) 16, McLachlin J.: "[T]he purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se*, but the right to 'effective representation'. Ours is a representative democracy. ... Representation comprehends the idea of having a voice in the deliberations of government."

[88] As P.H. Russell has written, "It is only by sharing sovereignty that the relationship of Aboriginal peoples to the nation-states in which they live can move to one that is fundamentally federal rather than imperial" ("Aboriginal Nationalism and Quebec Nationalism: Reconciliation Through Fourth World Decolonization" (1997) 8:4 Const. F 110 at 116); R. Whitaker has written that "[s]overeignty, Aboriginal voices are telling us, is not an absolute, not a zero-sum of authority; it is something that can, and should, be shared" ("Aboriginal Self-Determination and Self-Government: Sovereignty by Inclusion" (1997) 5 Canada Watch 69 at 73).

See also *Report of the Royal Commission* vol. 2, *supra* note 3 at 172: "The right of self-determination is held by all the Aboriginal peoples of Canada ... It gives Aboriginal peoples the right to opt for a large variety of governmental arrangements within Canada, including some that involve a high degree of sovereignty." In addition, see G. Erasmus, "Towards a National Agenda" in F. Cassidy, ed., *Aboriginal Self-Determination Proceedings of a Conference Held September 30-October 3, 1990* (Lantzville, B.C.: Oolichan Books, 1991) 171 at 173: "[W]e have already a divided sovereignty in Canada. If we can put in place a process that would allow for peaceful negotiations, we conld finally recognize that First Nations can continue to enjoy their original responsibility and sovereignty. If so, we could end up in a situation where Canada would have a number of sources of sovereignty and it could be practical—it could work."

includes the inherent right of Aboriginal peoples to self-government.[89] As the Royal Commission underlines:

> At the heart of our recommendations is recognition that Aboriginal peoples *are* peoples, that they form collectivities of unique character, and that they have a right of governmental autonomy. Aboriginal peoples have preserved their identities under adverse conditions. They have safeguarded their traditions during many decades when non-Aboriginal officials attempted to regulate every aspect of their lives. *They are entitled to control matters important to their nations without intrusive interference. This authority is not something bestowed by other governments. It is inherent in their identity as peoples.* But to be fully effective, their authority must be recognized by other governments.[90]

If principles of democracy and self-determination were also considered, it would be difficult to reach any other conclusion. In the *Quebec Secession Reference*, the Supreme Court of Canada underlined throughout the judgment that "democracy" is one of the underlying constitutional principles governing interpretation of the Constitution.[91] The Court indicated that values inherent in the notion of democracy include a "commitment to social justice and equality", as well as "respect for cultural and group identity".[92] These specific factors are directly relevant to the Aboriginal self-

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[89] For a similar conclusion, see K. McNeil, "Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*" (1996) 34 Osgoode Hall L.J. 61 at 64-65; B. Ryder, "Aboriginal Rights and *Delgamuukw* v. *The Queen*" (1994) 5:1 Const. Forum 43 at 45-46; D.G. Lenihan, G. Robertson & R. Tassé, *Canada: Reclaiming the Middle Ground* (Montreal: Institute for Research on Public Policy, 1994) at 95-96; "First Nations and the Constitution", *supra* note 3 at 278-87; Lafontaine, *supra* note 55 at 744; B. Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right to Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990) at 191ff. [hereinafter *Native Liberty*]; and D. Sanders, "Remembering Deskaheh: Indigenous Peoples and International Law" in I. Cotler & F.P. Eliadis, eds., *International Human Rights Law: Theory and Practice* (Montreal: Canadian Human Rights Foundation, 1992) 485 at 491-92: "Yet the Supreme Court of Canada has accepted the early status of the First Nations as sovereign and as nations. These terms suggest that the Supreme Court could uphold rights of self-government as surviving aboriginal and treaty rights, based on pre-contact Indian sovereignty."

See also *Mushkegowuk*, *supra* note 14 at para. 22, Pitt J.: "The 'constitutionalization' of Aboriginal and Treaty Rights under s. 35(1) of the Constitution Act, 1982 may have been the first explicit legislative recognition of Aboriginal governments as one of three orders of government."

[90] *Report of the Royal Commission* vol. 5, *supra* note 80 at 1-2 [emphasis added]. See also Canada, Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Federal policy guide) (Ottawa: Public Works and Government Services, 1995); Hogg & Turpel, *supra* note 55 at 211; *Constitutional Law*, *supra* note 52, vol. 1 at 27-46, n. 166; P.J. Monahan, *Constitutional Law* (Concord, Ontario: Irwin Law, 1997) at 36. See also P. Thibault, "Le rapport Dussault-Erasmus et le droit à l'autonomie gouvernementale des peuples autochtones: synthèse et commentaire" (1998) 9 N.J.C.L. 159 at 221-22.

[91] *Supra* note 5.

[92] *Ibid.* at para. 64. In this regard, the Court cited *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 at para. 64. Similarly, see *M.* v. *H.*, [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577, 238 N.R. 179 at para. 77; *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 at para. 140.

government debate.[93] The Court also added in general terms that "democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government."[94] This link between democracy and self-determination is recognized not only under Canadian constitutional law, but also at international law. As T.M. Franck explains: "*Self-determination is the oldest aspect of the democratic entitlement ...* Self-determination postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement."[95]

Since self-determination is intimately tied to the democratic principle, one might ask whether the right of self-determination is a part of the internal law of Canada. In the *Quebec Secession Reference*, it is stated that "[t]he existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond 'convention' and is considered a general principle of international law."[96] The term "general principle of international law" is highly significant. According to international jurists, this term refers at least to rules of customary international law.[97] The term may also overlap with other principles.[98] However, the sentence and overall context in which the Supreme Court used the term, as well as the references cited on this point in the judgment,[99] lead to the conclusion that the

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[93] For a brief summary of other aspects of the judgment in the *Quebec Secession Reference* that are relevant to Aboriginal peoples, see P. Joffe, "Quebec Secession and Aboriginal Peoples: Important Signals from the Supreme Court" in D. Schneiderman, ed., *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto: James Lorimer, 1999) 137.

[94] *Quebec Secession Reference*, *supra* note 5 at para. 64. In addition, the principle of democracy, as an underlying constitutional principle, has been "emphasized as an important remedial consideration" in *Corbière*, *supra* note 34 at para. 117; and *Vriend*, *supra* note 92 at para. 134.

[95] "The Emerging Right to Democratic Governance" (1992) 86 Am. J. Int'l L. 46 at 52 [emphasis added]. See also R. Stavenhagen, "Self-Determination: Right or Demon?" in D. Clark & R. Williamson, eds., *Self-Determination: International Perspectives* (New York: St. Martin's Press, 1996) 1 at 8: "[T]he denial of self-determination is essentially incompatible with true democracy. Only if the peoples' right to self-determination is respected can a democratic society flourish."

[96] *Supra* note 5 at para. 114.

[97] See J.-M. Arbour, *Droit international public*, 3d ed. (Cowansville, Qc.: Yvon Blais, 1997) at 116, where it is said that the expressions customary international law and principles of international law are exactly equivalent and should not be distinguished. See also N.Q. Dinh, P. Dallier & A. Pellet, *Droit international public*, 5th ed. (Paris: Librairie Générale de Droit et de Jurisprudence, 1994) at 341.

See also Bayefsky, *supra* note 8 at 10: "International jurisprudence sets two conditions for the existence of a customary rule of international law: (1) evidence of a sufficient degree of state practiee, and (2) a determination that states conceive themselves as acting under a legal obligation."

[98] I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at 19.

[99] In support of its position, the Supreme Court cites two authors: A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) at 171-172; K. Doehring, "Self-Determination" in B. Simma, ed., *The Charter of the United Nations: A Commentary* (New York: Oxford University Press, 1995) 56 at 70. In both instances, the authors make no specific reference to "general principles of international law." Instead, both authors go further and describe the

Court was describing the right to self-determination as nothing less than customary international law.[100] Canadian case law also suggests that norms of customary international law are "adopted" directly into Canadian domestic law, without any need for the incorporation of these standards by statute.[101] This is true, as long as there is no conflict with statutory law or well-established rules of the common law.[102] In this way, the right of self-determination can be said to be a part of the internal law of Canada.[103] This has far-reaching and positive implications that go beyond the Quebec secession context, for any Aboriginal people who demonstrates it is a "people"[104] under international law.

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right to self-determination as now acquiring the status of a peremptory norm, i.e. *jus cogens*. Peremptory norms are described as "rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect" in Brownlie, *ibid.* at 515.

It is not clear whether the Supreme Court of Canada necessarily views the right to self-determination as a peremptory norm, since it did not expressly use this term. However, the references cited by the Court clearly support the view that the term "general principle of international law", as used by the Court, refers at the very least to a rule of customary international law.

[100] Duursma, *supra* note 41 at 77: "There is little doubt that the phrase [in the international human rights covenants] 'all peoples have the right of self-determination' is an accepted customary rule of international law."

As S.J. Anaya has written, "Beyond its textual affirmation, self-determination is widely held to be a norm of general or customary international law, and arguably *jus cogens* (a peremptory norm)" ("Indigenous Rights Norms in Contemporary International Law" (1991) 8 Ariz. J. Int'l & Comp. Law 1 at 29-30).

[101] For a discussion of Canadian case law, see Bayefsky, *supra* note 8 at 5-10. See also Arbour, *supra* note 97 at 177; and G. Otis & B. Melkevik, *Peuples autochtones et normes internationales: Analyse et textes relatifs au régime de protection identitaire des peuple autochtones* (Cowansville, Qc.: Yvon Blais, 1996) at 4.

[102] Bayefsky, *ibid.* at 5.

[103] These positions were argued by the intervener Grand Council of the Crees in the *Quebec Secession Reference*, *supra* note 5 (Factum of the Intervener Grand Council of the Crees (Eeyou Estchee) at para. 76) and (Factum of the Intervener Grand Council of the Crees (Eeyou Estchee)—Reply to Factum of the *Amicus Curiae* at para. 83). Facta are available online: QL (SCQR). For a brief description of Cree and Inuit positions, see A. Orkin & J. Birenbaum, "The Aboriginal Argument: the Requirement of Aboriginal Consent" in Schneiderman, *supra* note 93 at 83.

See also *Slaight Communications* v. *Davidson*, [1989] 1 S.C.R. 1038 at 1051, 59 D.L.R. (4th) 416: "[T]he fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective."

[104] While there is no legal definition of what constitutes a "people", the practice of the United Nations is to retain a very broad meaning of the term "people" for questions pertaining to self-determination. Both objective elements (*e.g.* common language, history, culture, race or ethnicity, way of life, and territory) and subjective elements (the will of a particular group to identify and assert its existenee as a people) have been identified. See generally Secretariat of the International Commission of Jurists, "East Pakistan Staff Study" (1972) 8 Int'l Comm. Jur. Rev. 23 at 42-52. See also M.J. Bryant, "Aboriginal Self-Determination: The Status of Canadian Aboriginal Peoples at International Law" (1992) 56 Sask. L. Rev. 267 at 285 ("Indigenous peoples ... in Canada ... unquestionably constitute 'peoples' for the purposes of self-determination status").

Historically, non-Aboriginal governments in Canada have failed to recognize and respect the right of self-determination of Aboriginal peoples. However, in October 1996, the government of Canada formally declared in United Nations fora in Geneva that "[a]s a state party to the U.N. Charter and the Covenants, Canada is ... legally and morally committed to the observance and protection of this right [of self-determination]" and that "this right applies equally to all collectivities, indigenous and non-indigenous, which qualify as peoples under international law."[105] This public declaration by Canada may be binding under international law, in accordance with the principle of good faith.[106]

Further, with respect to the right to self-determination, the Attorney General of Canada expressed the following position in the *Quebec Secession Reference*:

> [T]he principles of customary law relating to the right of self-determination are applicable in the present case, because they do not conflict with the applicable Canadian domestic law. *Since these principles of customary law can be 'incorporated' into domestic law by Canadian courts, it is respectfully submitted that Canadian courts unquestionably have jurisdiction to apply them.*[107]

Just as the *Canadian Charter of Rights and Freedoms* can provide avenues for the enforcement of customary international law within Canada,[108] so too can the recognition and affirmation of Aboriginal and treaty rights in s. 35 of the *Constitution Act, 1982*. This is especially true of the exercise within Canada of the right to self-determination by Aboriginal peoples as a customary law principle.[109] As K. Roach

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[105] *Statements of the Canadian Delegation*, Commission on Human Rights, 53rd Sess., Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, 2nd Sess., Geneva, 21 October—1 November 1996, cited in *Consultations Between Canadian Aboriginal Organizations and DFAIT in Preparation for the 53rd Session of the UN Commission on Human Rights, February 4, 1997* (statement on art. 3, right to self-determination, on 31 October 1996). This formal declaration is cited by Pitt J. in *Mushkegowuk, supra* note 14 at para. 25 as evidence of the Canadian government's commitment to Aboriginal self-government.

[106] *Nuclear Tests (Australia v. France)*, [1974] I.C.J. Rep. 253 at para. 46: "Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration." See also at para. 43: "An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding." P. Joffe has discussed this issue in "International Practice, Québec Secession and Indigenous Peoples: The Imperative for Fairness, Non-discrimination and Respect for Human Rights" (1997) 8 N.J.C.L. 97 at 99-101.

[107] *Reply By the Attorney General of Canada to Questions Posed By the Supreme Court of Canada* at para. 8 [emphasis added], online: QL (SCQR).

[108] G.V. La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 Can. Y.B. Int'l L. 89 at 97.

[109] The right to self-determination has the status of an international human right, both in customary international law and in conventions signed and ratified by Canada. For the purposes of interpreting federal and provincial legislation in Canada, it is stated in R. Sullivan, ed., *Dreidger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 330 that "the legislature is presumed to re-

suggests, "In devising remedies, courts should be sensitive to the purposes of aboriginal rights, including the role of treaty-making and self-determination, while also recognizing that they have a duty to enforce aboriginal rights."[110]

In the *Quebec Secession Reference*, the Supreme Court of Canada stated that "[t]he recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through *internal* self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state."[111] To a significant extent, Aboriginal peoples address their political, economic, social, and cultural development through the exercise of their Aboriginal and treaty rights. Therefore, it is logical that s. 35 would provide one of the key means of achieving the recognition and enforcement of their right to self-determination.[112] As R. McCorquodale explains, self-government is an important political component of internal self-determination: "The 'internal' aspect of the right concerns the right of peoples within a State to choose their political status, the extent of their political participation and the form of their government ...."[113]

In their response to the specific questions[114] posed in the *Quebec Secession Reference*, the Supreme Court did not deem it necessary to elaborate on whether Aborigi-

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spect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read."

This statement is quoted with approval by L'Heureux-Dubé J. (majority opinion) in *Baker* v. *Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193, [1999] S.C.J. No. 39 at para. 70, online: QL (SCJ). In the same paragraph, M[me] Justice L'Heureux-Dubé indicates that, even where an international convention has not been implemented in Canada and its provisions have no direct application within Canadian law, "international human rights law may help inform the contextual approach to statutory interpretation and judicial review."

[110] K. Roach, *Constitutional Remedies in Canada* (Aurora, Ont.: Canada Law Book, 1999) at 15-1. Roach adds at 15-3: "A purposive approach to remedies for aboriginal rights will recognize that both the history and future of aboriginal rights involve elements of self-determination."

[111] *Supra* note 5 at para. 126. Exercise of the right to self-determination of "peoples" in a sovereign state such as Canada is not always restricted to the framework of the existing state. Rather, as indicated in *Quebec Secession Reference* at paras. 122, 138, 154, a right to secession could arise on an exceptional basis in various situations outlined by the Court.

[112] See also Dussault, *supra* note 3 at 349.

[113] R. McCorquodale, "Self-Determination: A Human Rights Approach" (1994) 43 I.C.L.Q. 857 at 864. See also draft *UN Declaration on the Rights of Indigenous Peoples*, reprinted in (1995) 34 I.L.M. 541, art. 31: "Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government"; Anaya, *supra* note 41 at 109 ("[s]elf-government is the overarching political dimension of ongoing self-determination"); *Report of the Royal Commission* vol. 2, *supra* note 3 at 175; A. Buchanan, *Federalism, Secession, and the Morality of Inclusion*, (1995) 37 Arizona L. Rev. 53 at 54.

[114] The three questions referred by the federal government to the Supreme Court of Canada at para. 2 (*supra* note 5) were:

> 1. Under the Constitution of Canada, can the National Assembly, legislature or Government of Quebec effect the secession of Quebec from Canada unilaterally?

nal peoples in Quebec constitute distinct "peoples" with the right to self-determination. Nonetheless, the Court shared some of its views. First, it indicated that the characteristics of a "people" include a common language and culture.[115] Second, in direct response to the question concerning the right to self-determination at international law, the Court stressed "the importance of the submissions made ..., respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession, as well the appropriate means of defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples."[116] This suggests that Aboriginal peoples' status and rights have a direct and substantial bearing on the question of self-determination under Canadian and international law.

Similarly, the Supreme Court in *Delgamuukw* did not engage in any in-depth analysis of the status of the Gitksan and Wet'suwet'en peoples involved. Yet, Lamer C.J.C. effectively recognized that their members share a common language and culture. In particular, the Chief Justice linked the oral histories of Aboriginal peoples to their distinct identity and uniqueness as peoples: "there are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people."[117]

The importance to Aboriginal peoples of the right of self-determination, including the right of self-government, is hardly surprising. As H. Gros Espiell explains, "[H]uman rights and fundamental freedoms can only exist truly and fully when self-determination also exists. Such is the fundamental importance of self-determination as a *human right* and a *prerequisite for the enjoyment of all the other rights and freedoms*."[118] Moreover, countries such as Canada have a positive duty to recognize and respect the right of self-determination. Both international human rights covenants specifically provide that "State Parties to the present Covenant ... shall promote the

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2. Does international law give the National Assembly, legislature or Government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or Government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or Government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

[115] *Quebec Secession Reference*, *supra* note 5 at para. 125.

[116] *Ibid.* at para. 139.

[117] *Delgamuukw*, *supra* note 1 at para. 85.

[118] H. Gros Espiell, Special Rapporteur, *The Right to Self-Determination: Implementation of United Nations Resolutions*, Study for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/405/Rev.1 at 10, para. 59 (1980) [emphasis added]. In this UN study, Gros Espiell also took the view that the right to self-determination did not extend to peoples already organized in an independent state not under colonial or alien domination. However, today this limited perspective enjoys little acceptance among international jurists. A much broader view has been expressed by the Supreme Court of Canada in *Quebec Secession Reference*, *supra* note 5 at para. 138, and recently by the government of Canada.

realization of a right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."[119]

In order for Aboriginal peoples to safeguard their collective rights and interests, including those relating to their lands and territories, it is insufficient to possess title alone.[120] Historically, Aboriginal peoples governed themselves as an integral part of their inherent rights. As confirmed by the Supreme Court of Canada, Aboriginal rights are pre-existing rights not dependent for their existence on any executive order or legislative enactment.[121] It is essential that the constitutional right of Aboriginal peoples to self-government be recognized.[122] This conclusion becomes all the more compelling when the human right of self-determination and the democratic principle underlying the Constitution of Canada are applied in a just manner[123] to Aboriginal peoples. In *Delgamuukw*, the Supreme Court has characterized the stewardship responsibility of Aboriginal peoples over their lands both in terms of present and future generations.[124] The fulfilment of this responsibility would hardly be feasible in the absence of adequate self-government powers.

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[119] Art. 1, para. 3 of both the ICCPR, *supra* note 32 and the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, art. 1, Can. T.S. 1976 No. 46 (entered into force 3 January 1976, accession by Canada (9 May 1976)) [hereinafter ICESCR]). *Report of the Human Rights Committee*, UN GAOR, 39th Sess., Supp. No. 40, UN Doc. A/39/40 (1984), para. 6: "[A]ll State parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination ... consistent with the States' obligations under the Charter of the United Nations and under international law."

[120] In *Delgamuukw*, *supra* note 1 at para. 176, Lamer C.J.C. recognized (as did the courts below) that "separating federal jurisdiction over Indians from jurisdiction over their lands would have a most unfortunate result—the government vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples would find itself unable to safeguard one of the most central of native interests—their interest in their lands." Analogously, it would make little sense to recognize Aboriginal peoples' jurisdiction in respect to themselves but not their territories, lands and resources.

[121] See cases cited in *supra* note 19. See also *New Brunswick Broadcasting* v. *Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 365, 100 D.L.R. (4th) 212, where Lamer C.J.C. indicates that "inherent" parliamentary privileges are those "which are not dependent on statute for their existence."

[122] House of Commons, "Report of the Special Committee on Indian Self-Government"(Ottawa: Queen's Printer, 1983) (Chairman K. Penner) at 44: "The Committee recommends that the right of Indian peoples to self-government be explicitly stated and entrenched in the Constitution of Canada." See also *Draft United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 11 at article 3: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

In addition, see Canadian Human Rights Commission, *Annual Report 1993* (Ottawa: Minister of Supply and Services Canada, 1994) at 23: "[T]he inherent right to self-government must be agreed to exist; but more formal constitutional recognition of the fact would nevertheless contribute to the creation of a successful partnership."

[123] E.-I.A. Daes, "Equality of Indigenous Peoples Under the Auspices of the United Nations—Draft Declaration on the Rights of Indigenous Peoples" (1995) 7 St. Thomas L. Rev. 493.

[124] *Supra* note 1 at paras. 154, 166.

V. Aboriginal Rights as Inalienable Human Rights

It should be acknowledged that there are still governments who favour, in one form or another, the surrender and extinguishment of Aboriginal rights. As the debate in Canada now shifts to self-government, there are claims that any such pre-existing Aboriginal right has been extinguished. This position is exceedingly difficult to sustain,[125] particularly if it is assessed in a human rights context.

As an examination of contemporary international instruments would suggest,[126] basic indigenous rights are human rights.[127] International instruments that explicitly address the fundamental rights of indigenous peoples, such as the *Draft United Nations Declaration on the Rights of Indigenous Peoples*, complement existing human rights standards in the *International Bill of Rights*.[128] They do so, by providing the social, economic, cultural, political, and historical context relating to indigenous peoples.[129] In particular, the right of self-government constitutes a vital political aspect of the right of self-determination, which is itself a human right.[130] The Supreme Court of

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[125] See *e.g.* Hutchins, Hilling & Schulze, *supra* note 55 at 288, 300, where the authors conclude that the Aboriginal peoples' right to self-government has not been extinguished in Canada (assuming such extinguishment is even possible).

[126] See generally the *Draft United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 11. To the extent that the content of specific norms in the draft Declaration qualify as customary international law, such norms are binding on states, regardless of treaty ratification: see S.J. Anaya, "The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs" (1994) 28 Ga. L. Rev. 309 at 338.

See also the *Indigenous and Tribal Peoples Convention, 1989*, ILO Convention No. 169, 76th Sess., reprinted in (1989) 28 I.L.M. 1382 (not yet in force in Canada). Although an international convention such as Convention No. 169 has not yet been implemented in Canada, it may still influence the interpretation of non-implementing domestic legislation: see *Re Canada Labour Code*, [1992] 2 S.C.R. 50 at 90, 91 D.L.R. (4th) 449, La Forest J; and Sullivan, *supra* note 109 at 464.

[127] See I. Cotler, "Human Rights Advocacy and the NGO Agenda" in I. Cotler & F.P. Eliadis, *supra* note 89, 63 at 66: "A ninth category [of human rights], one distinguishably set forth in the Canadian *Charter*—and increasingly recognized in international human rights law—is the category of *aboriginal rights*."

[128] The *International Bill of Rights* is said to include the *Universal Declaration of Human Rights*, the ICCPR and the ICESCR.

[129] Similar arguments are made in regard to the role of regional human rights instruments in reinforcing universal human rights norms: see *e.g.* C. Anyangwe, "Obligations of State Parties to the African Charter on Human and Peoples' Rights" (1998) 10 R.A.D.I.C. 625 at 625. J.P. Kastrup has written that "[i]nternational indigenous rights may be considered as a more specific body of human rights, which target a more defined group of people and are derived from the more general body of human rights principles" ("The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective" (1997) 32 Tex. Int'l L.J. 97 at 106).

[130] All of the major international human rights instruments include references to the right to self-determination. See *e.g. Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7; [1976] Yrbk. U.N. 1043; 59 Stat. 1031, T.S. 993, arts. 1, 55; ICCPR, *supra* note 32 at art. 1; ICESCR, *supra* note 119 at art. 1; United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 25 June 1993, UN Doc. A/CONF.157/24 (Part I) 20 at 22 (1993), 32 I.L.M. 1661

Canada has confirmed in the *Quebec Secession Reference* that the right of self-determination "has developed largely as a human right".[131] In the future, it will be important to analyze Aboriginal rights in a manner that fully includes a human rights perspective. If a human rights analysis were fully and consistently applied to Aboriginal rights, it is likely that their denial or infringement would be treated more seriously by governments and the judiciary.[132]

It is important to note that human rights have been repeatedly declared by the international community to be inalienable.[133] Clearly, they are not intended to be extinguished or otherwise destroyed.[134] Human rights instruments generally include provisions for some limitation to, or derogation from, certain rights,[135] but not the actual destruction of fundamental rights.[136]

Both of the International Covenants make clear that nothing in the Covenants can be construed as permitting the "destruction" of human rights.[137] Similarly, any "limita-

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at 1665, art. 2, para. 2 (denial of self-determination considered as a violation of human rights). See also Anaya, *supra* note 41 at 90, n. 19 (references re: self-determination is a human right); and U.O. Umozurike, *Self-Determination in International Law* (Hamden, Connecticut: Archon Books, 1972) at 46ff.

[131] *Supra* note 5 at para. 124.

[132] See *e.g.* "Aboriginal Title and the Division of Powers", *supra* note 12, where the author aptly questions the coherency of current judicial analyses that allow Aboriginal peoples' rights to be intruded upon by governments.

[133] See *e.g.* the *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, first preambular paragraph: "*Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Similar wording is found in the preamble of the two international human rights Covenants: ICCPR, *supra* note 32 and ICESCR, *supra* note 119. See also *Charter of Paris for a New Europe, A New Era of Democracy, Peace and Unity*, Conference on Security and Co-operation in Europe (CSCE) 21 November 1990, (1991) 30 I.L.M. 190 [emphasis added]: "*Human rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law.* Their protection and promotion is the first responsibility of government. Respect for them is an essential safeguard against an over-mighty State. Their observance and full exercise are the foundation of freedom, justice and peace".

In particular, in regard to the right to self-determination as asserted in art. 1 of the ICCPR, see *Report of the Human Rights Committee*, *supra* note 119 at para. 2: "Article 1 enshrines an inalienable right of all peoples."

[134] *Black's Law Dictionary*, 6th ed., *s.v.* "extinguishment": "The destruction or cancellation of a right."

[135] See *e.g.* the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 1 ("reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society") and s. 33 (derogation permitted solely in certain cases).

[136] See also *Draft United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 11, art. 44: "Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire."

[137] Art. 5, para. 1 of the Covenants, *supra* notes 32 & 119 [emphasis added]: "*Nothing in the present Covenant may be interpreted as implying* for any State, group or person any right to engage in any

tions" to the rights in the ICESCR must be "compatible with the nature of the rights concerned".[138] In the ICCPR, State parties are permitted certain derogations from their human rights obligations under the Covenant "[i]n time of public emergency which threatens the life of the nation and the existence of which is publicly proclaimed."[139] However, any such derogations must be exercised without discrimination and are contemplated as being temporary. As A.C. Kiss explains, "[L]imitations, like derogations, are exceptional, to be construed and applied strictly, and not so as to swallow or vitiate the right itself."[140]

Extinguishment of indigenous title, to the extent that it dispossesses indigenous peoples of their lands and resources and entails a loss of control over their own development, also denies Aboriginal peoples the exercise of their right of self-determination. This point has recently been underlined by the UN Human Rights Committee in its concluding recommendations to Canada:[141]

> With reference to the conclusion by [the Royal Commission on Aboriginal Peoples] that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-government requires, *inter alia*, that all peoples must be able to dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence.[142]

Not only has the Human Rights Committee directly applied the right to self-determination to Aboriginal peoples in Canada, but it has also highlighted the inextricable link between Aboriginal self-government and the adequacy of Aboriginal lands and resources. Moreover, with regard to the right to self-determination, the Committee "urges [Canada] to report adequately on implementation of article 1 of the [*International Covenant on Civil and Political Rights*] in its next periodic report."[143] In this way, the Committee has emphasized that the Aboriginal rights of Aboriginal peoples in Canada are human rights, which require government support and not neglect or extinguishment.[144]

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activity or to perform any act aimed at the *destruction of any of the rights or freedoms recognized herein*, or at their limitation to a greater extent than is provided for in the present Covenant".

[138] *Supra* note 119, art. 4 [emphasis added]: "[T]he State may subject such rights only to such *limitations* as are determined by law *only in so far as this may be compatible with the nature of these rights* and solely for the purpose of promoting the general welfare in a democratic society".

[139] *Supra* note 32, art. 4, para. 1.

[140] "Permissible Limitations on Rights" in L. Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 290 at 290.

[141] See text accompanying note 32.

[142] See *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, *supra* note 32, art. 1, para. 2.

[143] *Ibid.* at para. 7.

[144] Extinguishment and other government policies have deprived First Nations access to an extended land and resource base outside their reserves. These policies have generated and perpetuated widespread poverty and undermined the integrity of their societies. See *e.g. Partners*, *supra* note 59 at 42: "As a result of the historical processes that accompanied colonization, many Aboriginal peoples have

As outlined above, there is no specific authority to extinguish or otherwise destroy human rights. Rather, the Canadian Constitution expressly requires the recognition and affirmation of Aboriginal and treaty rights as fundamental rights.[145] The Crown's fiduciary responsibility in relation to Aboriginal peoples also serves to reinforce Canada's national and international obligations and commitments concerning human rights. As D. McRae explained, in his 1993 commissioned report to the Canadian Human Rights Commission, "At the very least, such a [fiduciary] standard requires observance by the government of Canada of minimal standards for the protection of human rights. ... In this regard there is an undoubted commitment in Canadian public policy to a high standard in the recognition and protection of human rights in respect of all peoples in Canada."[146]

Recently, the UN Committee on Economic, Social and Cultural Rights has highlighted the human rights of Aboriginal peoples, criticized Canada's extinguishment policies, and endorsed the recommendations of the Royal Commission on Aboriginal Peoples ("RCAP"). In its December 1998 Report, the Committee highlights the urgency of the situation in concluding that

> [t]he Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people from their lands, as recognized by the RCAP, and endorses the recommendations of the RCAP that policies which violate Aboriginal treaty obligations and extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party. Certainty of treaty relations alone cannot justify such policies. The Committee is greatly concerned that the recommendations of the RCAP have not yet been implemented in spite of the urgency of the situation.[147]

It can be concluded, based on the foregoing analysis, that Canada's obligations to respect human rights require that Aboriginal rights be explicitly recoguized and respected in government policy and practice. It is unjustifiable for federal and provincial governments to insist upon the surrender of these rights through "agreements" with Aboriginal peoples, especially since s. 35(1) of the *Constitution Act, 1982* calls for their recognition and affirmation. Nor is it compatible with human rights considerations to suggest that Aboriginal self-government as a right bas been extinguished or is

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been deprived of their original lands and means of livelihood and confined to small areas with little economic potential."

See also B.H. Petawabano *et al.*, *Mental Health and Aboriginal People of Quebec/La santé mentale et les autochtones du Québec* (Boucherville, Qc.: Gaetan Morin, 1994) at 114: "By confining Amerindian communities to small reserves, Canada and Quebec contribute to the perpetuation of the tragic unemployment situation and its deleterious effects on individual and community mental health."

[145] *Constitution Act, 1982, supra* note 6, s. 35(1).

[146] D. McRae, "Report on the Complaints of the Innu of Labrador to the Canadian Human Rights Commission" (Ottawa, 18 August 1993) at 5 [archived with author].

[147] Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant*, UN ESCOR, 20th Sess., UN Doc. E/C.12/1/Add.31 (1998) at para. 18.

extinguishable. In addition, increased respect and protection for Aboriginal rights as human rights is consistent with existing principles of constitutional interpretation. In particular, the doctrine of progressive interpretation[148] includes the "living tree" approach to constitutional interpretation. As originally stated by the Privy Council in *Edwards* v. *A.-G. Canada*: "The [*Constitution Act, 1867*] planted in Canada a living tree capable of growth and expansion within its natural limits."[149] This doctrine has been consistently reiterated by the Supreme Court of Canada. It is clearly applicable to the principles underlying Canada's Constitution, including the principles of democracy and the protection of Aboriginal and treaty rights.

As the Supreme Court stipulated in the *Quebec Secession Reference*, "observance of and respect for these [underlying constitutional] principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a 'living tree', to invoke the famous description in *Edwards v. Attorney-General for Canada*."[150] Moreover, in *Mossop*, the Court has indicated that this doctrine "is particularly well-suited to human rights legislation" and that human rights considerations "must be examined in the context of contemporary values."[151] Further, the Court in *Hunter* v. *Southam Inc.* has explained how Canada's Constitution must be forward-looking—always capable of growth and development in ways that may have originally been unforeseen:

> A constitution ... is drafted with an eye to the future. ... Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these cousiderations in mind.[152]

Consequently, what is presently needed is a substantially revised approach to existing judicial analysis of Aboriginal peoples' fundamental rights. It is evident that Canadian courts should not rely excessively on the past activities of Aboriginal peo-

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[148] *Constitutional Law*, *supra* note 52, vol. 2 at 33-17: "It is never seriously doubted that progressive interpretation is necessary and desirable in order to adapt the Constitution to facts that did not exist and could not have been foreseen at the time when it was written."

[149] [1930] A.C. 124 at 136, [1930] 1 D.L.R. 98 (P.C.).

[150] *Supra* note 5 at para. 52.

[151] *Mossop*, *supra* note 52 at 621, where the Court was examining enumerated grounds of discrimination. A similar perspective is found in international law. See R. Higgins, "Time and the Law: International Perspectives on an Old Problem" (1997) 46 Int'l & Comp. L.Q. 501 at 517, where it is said that "the inter-temporal principle of international law, as it is commonly understood, does not apply in the interpretation of human rights obligations". The principle of "inter-temporal law" is described by Huber J. in *Island of Palmas* (*sub nom. United States* v. *The Netherlands*) (1928), 2 R. Int'l Arb. Awards 829 at 845 as follows: "A judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time such a dispute in regard to it arises or falls to be settled."

[152] [1984] 2 S.C.R. 145 at 155, 11 D.L.R. (4th) 641.

ples in order to determine their contemporary rights and powers.[153] While it remains important to adopt a contextual approach,[154] it is imperative to give increased weight to human rights and to the underlying constitutional principles recently highlighted by the Supreme Court of Canada. In this way, the "new social, political and historical realities" faced by Aboriginal peoples could be effectively addressed through their own powers and initiatives.

It should be noted that in the *Mabo* case, Brennan J. of the High Court of Australia stated that "[i]n discharging its duty to declare the common law of Australia, this court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency."[155] However, in Canada, it is not simply a matter of declaring the common law of this country. Aboriginal rights are explicitly protected by the Constitution and the "protection of Aboriginal and treaty rights" has been characterized by the Supreme Court of Canada as both an underlying constitutional principle and as a constitutional value.[156] Moreover, as previously discussed, the right of self-determination, including the right of self-government, is a

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[153] See J. Borrows & L.I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36 Alta. L. Rev. 9 at 39. Mr. Justice Lambert has written that "[w]e should not close the door on rights being proven in other ways than by the demonstrated exercise of a custom, tradition or practice" and that "a little more emphasis on the question of rights and a little less emphasis on the question of customs might well have supported a different outcome in *Van der Peet*" (*supra* note 2 at 260, 261).

[154] See also *Delgamuukw*, *supra* note 1 at para. 201, La Forest J. ("approach adopted under s. 35(1) is a highly contextual one"); and *Edmonton Journal* v. *Alberta (A.G.)*, [1989] 2 S.C.R. 1326 at 1355-56, 64 D.L.R. (4th) 577, Wilson J. ("contextual approach" emanates from the interpretation clause in s. 1 of the *Charter*).

In regard to the inherent Aboriginal right to self-government, a contextual clause was included in a substantive provision of the now defunct Charlottetown Accord. See Draft Legal Text, October 9, 1992, s. 35.1 (3) (contextual statement) in McRoberts & Monahan, *supra* note 55 at 348. In s. 35.1 (3) of the Draft Legal Text, it was provided that

> [t]he exercise of the [inherent] right [of self-government within Canada] includes the authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction,
>
> (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and
>
> (b) to develop, maintain and strengthen their relationship with their lands, waters and environment,
>
> so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies.

On the usefulness of a contextual approach concerning Aboriginal self-government, see Hogg & Turpel, *supra* note 55 at 192-96; Bissonnette, *supra* note 80 at 7-9.

[155] *Mabo*, *supra* note 8 at 18.

[156] See text accompanying note 44.

human right[157] and is intimately tied to the principle of democracy.[158] The Supreme Court has also ruled that values inherent in the notion of democracy include a "commitment to social justice and equality".[159]

Consequently, in relation to the Aboriginal right of self-government, it cannot be said that the adoption of rules which would accord with contemporary notions of justice and human rights might "fracture the skeleton of principle which gives the body of our law its shape and internal consistency."[160] Under Canada's Constitution, human rights, democracy and the rule of law are profoundly interrelated. Underlying constitutional principles, such as democracy and the protection of Aboriginal and treaty rights "infuse our Constitution and breathe life into it."[161] In the Supreme Court's own words, "The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood."[162]

In *Delgamuukw*, Chief Justice Lamer cautions that "accommodation [of Aboriginal rights and perspectives] must be done in a manner which does not strain 'the Canadian legal and constitutional structure".[163] Yet, for the reasons outlined above, the recognition and protection of Aboriginal peoples' inherent right to self-government are an integral part of both Canada's constitutional structure, and the constitutional principles and values which sustain it. While it is said that "aboriginal rights are truly *sui generis*",[164] this characterization should not be used in a manner that would generate double standards on the principles of democracy, self-determination, and other human rights. The *sui generis* characterization may instead help to accommodate Aboriginal perspectives and should not serve as a pretext for undermining Aboriginal peoples' inherent rights.

VI. *Delgamuukw* and the *Secession Reference* in the Quebec Context

A consideration of the principles and rulings in *Delgamuukw* and the *Secession Reference* in the Quebec context yields certain observations. First, many policies and actions of the Quebec government in relation to Aboriginal peoples were implemented a number of years before these important Supreme Court decisions were rendered. Quebec may therefore be reluctant to revisit past actions, regardless of their

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[157] See discussion in *supra* note 130.

[158] See text accompanying *supra* note 95.

[159] *Ibid.*

[160] *Mabo*, *supra* note 8 at 18. Hutchins, Hilling & Schulze have written that "in asserting the inherent right to aboriginal self-government, there is no risk of fracturing 'the skeleton of principle ...'. On the contrary, we bring the skeleton of principle and its body of law back in touch with its soul" (*supra* note 55 at 252).

[161] *Quebec Secession Reference*, *supra* note 5 at para. 50.

[162] *Ibid.* at para. 51.

[163] *Delgamuukw*, *supra* note 1 at para. 82. The quote was citing *Van der Peet*, *supra* note 19 at para. 49.

[164] *Ibid.*

degree of unfairness. Second, as will be demonstrated below, there is a common theme of unilateralism in government policies and actions both prior and subsequent to *Delgamuukw*. This unilateralism, as a means of government control, continues to breed distrust among Aboriginal peoples. Third, government policies and strategies in Quebec are determined to a large extent by its political agenda of moving towards independence. Regardless of human rights considerations, Aboriginal peoples' status and rights are recognized solely in a manner that may not affect Quebec's secessionist aspirations.

As in other regions of Canada, positive government initiatives are occurring from time to time in Quebec, in relation to Aboriginal peoples. Yet, when one considers the wide range of urgent measures recommended by the Royal Commission on Aboriginal Peoples,[165] government efforts in Quebec (as in other regions of Canada) must be considered as lacking in many important respects.[166]

Any "advances" still tend to take place in a legal and political framework that reinforces the ultimate domination and control of the Quebec government and the National Assembly. This continuing government trend to unilaterally impose an overall framework and conditions for negotiations is self-serving and colonial in its nature. It violates the duty of governments to conduct negotiations in good faith.[167] Rather than encourage recognition of and respect for Aboriginal and treaty rights, contemporary government policies in Quebec seek their eventual demise or disappearance. Several examples provide evidence of such attempts, each of which are dealt with in turn and which illustrate a unilateral imposition by the Quebec government of a framework for negotiation which undermines the inherent rights of Aboriginal peoples:

i) ***Denial of Cree and Inuit Aboriginal rights during land claims negotiations***

Under the 1912 statutes concerning Quebec boundaries extension, the Quebec government had a constitutional obligation to recognize the territorial rights of Aboriginal peoples in northern Quebec, while negotiating an agreement with the peoples concerned.[168] However, during the whole period

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[165] *Report of the Royal Commission* vol 5., *supra* note 80 at 141ff. (summary of recommendations).

[166] For example, a major shortcoming is the lack of an adequate land and resource base among Aboriginal peoples in Quebec.

[167] See *supra* note 14.

[168] Identical duties are provided in s. 2(c) of *The Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45 and in s. 2(c) of the Schedule in *The Quebec Boundaries Extension Act*, 1912, S.Q. 1912, c. 7 [hereinafter the two statutes cited together as *Quebec Boundaries Extension Acts* of 1912]:

> That the province of Québec will recognize the rights of the Indian inhabitants of the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditures in connection with or arising out of such surrenders.

See also the terms and conditions in the December 1867 Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada, being Schedule A to the Rupert's Land

of land claims negotiations, the Quebec government refused to recognize that the Crees and the Inuit had any Aboriginal title or rights in their vast traditional territories. As a result, the Aboriginal parties were compelled to negotiate an agreement while being told that they had no Aboriginal rights. This failure to recognize Aboriginal title to land on the part of governments and Crown corporations has been recognized by the Supreme Court of Canada.[169] It was only after the *James Bay and Northern Quebec Agreement*[170] was signed by the parties in 1975 that the Quebec government admitted that the Crees and the Inuit had fundamental rights[171] and that the government had constitutional obligations[172] under the *Quebec Boundaries Extension Acts* of 1912.

ii) ***Unfair land selection criteria imposed***

The Cree and Inuit parties in the *JBNQA* negotiations were denied the right to select their own traditional lands for harvesting purposes by Quebec,[173] if the lands selected had any known mineral potential.[174] As recounted by the Grand Council of the Crees:

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and North-Western Territory Order, 1870, reprinted in R.S.C. 1985, App. II, No. 9, Sch. A [emphasis added]: "[U]pon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines".

[169] *Sparrow*, *supra* note 10 at 1103-1104: "[T]he James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument; see the *Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45."

[170] *James Bay and Northern Quebec Agreement and Complementary Agreements*, 1997 ed. (Quebec: Les Publications du Québec, 1996) [hereinafter *JBNQA*].

[171] Quebec, Assemblée nationale, *Journal des débats* (21 June 1976) at 1597 (J. Cournoyer). Apparently, these types of misrepresentations have characterized the treaty process since the early 1800s. See *Native Liberty*, *supra* note 89 at 202 [emphasis added]: "The treaties since the early 1800s were made by colonials. *To drive hard bargains the colonials led the natives to believe that they did not already have any strictly legal rights. The natives were induced to enter these treaties in order to acquire some legal rights, at least to small portions of the Indian territory, which small portions would be called their reserves*".

[172] See the *ex post facto* statement of J. Ciaccia in the "Philosophy of the Agreement" in the *JBNQA*, *supra* note 170 at xx [emphasis added]: "The Québec government has taken the position in these negotiations that it wanted to do all that was necessary to protect the traditional culture and economy of the native peoples, *while at the same time fulfilling its obligations under the Act of 1912*".

[173] Reference is being made here to Category II lands, which are lands selected under *JBNQA* by the Aboriginal peoples concerned, where they are recognized to have exclusive hunting, fishing and trapping rights.

[174] See N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James* (Quebec: Association Inuksiutiit Katimajiit & Centre d'études nordiques de l'Université Laval, 1978) at 122, where this policy of Quebec is described and criticized.

> During the negotiation of the *JBNQA*, the Quebec government unjustly imposed specific criteria for land selection that excluded all Cree and Inuit traditional lands with mineral potential. This denied the Crees "the inherent right [...] to enjoy and utilize fully and freely their natural wealth and resources."[175] It constituted a major violation of the aboriginal right to economic self-determination. It still serves to perpetuate our dependency. No land claims agreement in Canada has prohibited aboriginal peoples from selecting lands with resource potential.[176]

iii) ***Purported extinguishment of Aboriginal rights***[177]

Although a number of Aboriginal peoples were not party to the *James Bay and Northern Quebec Agreement*,[178] their rights in and to the territory in northern Quebec were purportedly extinguished by federal legislation approving and declaring valid the Agreement.[179] This third party "extinguishment" was insisted upon by the Quebec government.[180] It is of doubtful con-

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[175] ICCPR, *supra* note 32, art. 47.

[176] Grand Council of the Crees (of Quebec), *Submission: Status and Rights of the James Bay Crees in the Context of Quebec's Secession from Canada* (Submission to the UN Commission on Human Rights, February 1992) at 100.

[177] Canada, Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Supply and Services Canada, 1995) at 17 [hereinafter *Treaty Making*]: "In light of divergent understandings of extinguishment clauses and the jurisprudence on treaty interpretation ... it cannot always be said with certainty that the written terms of an extinguishment clause will determine the clause's legal effect".

In regard to the *JBNQA*, see generally S. Vincent & G. Bowers, eds., *Baie James et Nord québécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Quebec, 1988), where it is demonstrated that there is no common understanding whatsoever among representatives of the federal government, Quebec government and various Aboriginal peoples as to what any purported "extinguishment" of rights under *JBNQA* might mean.

[178] *JBNQA*, *supra* note 170.

[179] Third party indigenous peoples affected by such purported "extinguishment" include: Innu (Montagnais), Algonquins, Atikamekw, Crees of Mocreebec (now in Ontario), Labrador Inuit, Labrador Innu, and Inuit in the Belcher Islands, Nunavut. The *JBNQA*, *supra* note 170, s. 2.14 includes an undertaking by the Quebec government to negotiate with third party indigenous peoples, in respect to any "claims" which they may have in and to the northern territory. However, to date, no treaties have been signed with Aboriginal third parties pursuant to this undertaking.

[180] Quebec, Commission des droits de la personne, *The Rights of Aboriginal Peoples: We Must Respect the Rights of Native Peoples and Deal With Them Accordingly*, Doc. 1 (1978) at 9-10 [emphasis added, hereinafter *The Rights of Aboriginal Peoples*]:

> [T]he Québec government played a major role in inserting and maintaining the third party rights extinguishment clause in the federal bill [i.e. s. 3(3) of the federal enabling legislation]. This issue was debated thoroughly while Bill C-9 was being studied, precisely because of the many protests it raised. These protests prompted the federal government to say it was prepared to review the provision. It informed the Québec authorities of its intention, but the latter refused to review this condition of the agreement, which they deemed essential.

stitutionality[181] and has been repeatedly denounced by the Commission des droits de la personne du Québec.[182] The effect of such actions by the government were described by the Opposition Party (Parti Québécois) at that time, as being "extremely draconian".[183] Nevertheless, the government voted to defeat a motion to hear the views of Aboriginal third parties on the issue of extinguishment.[184] In this way, the Quebec government acted in a manner that gravely violated the principles of fundamental justice as well as the human rights of the Aboriginal peoples concerned.

It is also worth noting that the Commission des droits de la personne du Quebec has indicated to the Royal Commission on Aboriginal Peoples that extinguishment, as a necessary pre-condition to any negotiation of territorial rights, is "unacceptable".[185] Extinguishment of indigenous peoples' rights has also been described as "another relic of colonialism".[186] While the *Programme du Parti Québécois* has for many years indicated that agreements will be concluded without extinguishment of the rights of Aboriginal peo-

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In summary, Québec played a decisive and dominant part in the overall affair, and took action with direct and far-reaching implications for the territorial rights of the aboriginal peoples, the signatories and non-signatories of the agreement.

[181] Joffe & Turpel, *supra* note 80 at 315ff. Grounds for challenging the constitutionality of legislative provisions purporting to extinguish the rights of Aboriginal third parties include, *inter alia*: i) failure to respect the constitutional obligations arising from the *Rupert's Land and North-Western Territory Order*, R.S.C. 1985, App. II, No. 9; and ii) failure of the governments of Canada and Quebec to act in conformity with their respective fiduciary obligations.

[182] See *e.g. The Rights of Aboriginal Peoples*, *supra* note 180 at 21-23; Commission des droits de la personne du Québec, *Mémoire de la Commission des droits de la personne présenté à la Commission royale sur les peuples autochtones* (Montreal: La Commission, November 1993) at 14-15, 26 [hereinafter *Mémoire de la Commission*].

[183] Quebec, Assemblée nationale, Commissions parlementaires, Commission permanente des richesses naturelles et des terres et forêts, "Entente concernant les Cris et les Inuit de la Baie James" in *Journal des débats*, No. 176 (6 November 1975) at B-6069 (J.-Y. Morin).

[184] Assemblée nationale, Commissions parlementaires, Commission permanente des richesses naturelles et des terres et forêts, "Entente concernant les Cris et les Inuit de la Baie James" in *Journal des débats*, No. 177 (7 November 1975) at B-6075. One should question equally the role of the federal government, who failed to ensure adequate safeguards for the rights of Aboriginal third parties.

[185] *Mémoire de la Commission*, *supra* note 182 at 14. See also *ibid.* at 43, the Commission's recommendation to permanently cast aside any pre-conditions requiring the extinguishment of rights.

[186] D. Sambo, "Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?" (1993) 3 Transnat'l L. & Contemp. Probs. 13 at 31. The author continued, "No other peoples are pressured to 'extinguish' their rights to lands. This is racial discrimination. The practice of extinguishment must be eliminated" (at 32). See also M. Seymour, *La Nation en question* (Montreal: Hexagone, 1999) at 158 (old method of extinguishment of Aboriginal rights must be abandoned by Quebec).

Studies that recommend alternatives to extinguishment include: *Treaty Making*, *supra* note 177; M. Jacobson, "A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements" (Report Prepared for the Royal Commission on Aboriginal Peoples) (1994); Joffe & Turpel, *supra* note 80, 3 vols.

ples,[187] the Parti Québécois government has never acted on this commitment and still insists on extinguishment.

iv) ***Imposition of the 1985 National Assembly Resolution on Aboriginal Rights***[188]

In March 1985, the National Assembly adopted a resolution on Aboriginal peoples' fundamental status and rights despite the express objections of the peoples concerned.[189] The government unilaterally terminated negotiations on the text of the Resolution when Aboriginal leaders would not agree to Quebec's proposed wording.[190] It would appear that a principal reason for imposing this Resolution on Aboriginal peoples was purportedly to demonstrate to the international community and Canadians how well the Quebec government treats the first peoples in Quebec.[191]

Notwithstanding the unilateral nature of the 1985 National Assembly Resolution, it has now been explicitly made a basis for Quebec's 1998 policy on Aboriginal affairs.[192] Also, despite the rulings of the Supreme Court of Canada,[193] the 1985 Resolution does not recognize that Aboriginal peoples

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[187] *Programme du Parti Québécois: des idées pour mon pays* (Montréal: Parti Québécois, 1994) at 21 [hereinafter *Des idées pour mon pays*]. Similarly, see also Parti Québécois, *La volonté de réussir: Programme et statuts du Parti Québécois* (Montreal: Parti Québécois, 1997) at 22 [hereinafter *La volonté de réussir*].

[188] Sec Quebec, National Assembly, "Motion for the recognition of aboriginal rights in Québec" in *Votes and Proceedings*, No. 39 (20 March 1985).

[189] Sec Quebec, Assemblée nationale, *Journal des débats* (19 March 1985) at 2504, 2527-2528, where the objections of the Crees, Inuit, Mi'kmaq, Mohawks and Naskapis are brought to the attention of the Members of the National Assembly. All Liberal MNAs voted against the adoption of the Resolution, since it was said that the instrument had little or no content. Sec also Grand Council of the Crees, *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Québec* (Nemaska, Quebec: Grand Council of the Crees, 1995) at 96-97 [hereinafter *Sovereign Injustice*].

[190] The Quebec government removed all draft provisions negotiated with Aboriginal peoples that it did not favour, *e.g.* the existence of the federal fiduciary responsibility in relation to Aboriginal peoples. Moreover, the Resolution expressly provides that all future negotiations are to be based on the responses of the government to the positions of Aboriginal peoples (and not also on Aboriginal peoples' positions).

[191] See *e.g.* J. Parizeau, *Pour un Québec souverain* (Montreal: VLB, 1997) at 319, where the 1985 Resolution is referred to as an example of how "sensitive" the Quebec government is to "minorities living on Québec territory."

[192] Quebec, Aboriginal Affairs, *Partnership, Development, Achievement* (Quebec Government Guidelines) (Quebec: Gouvernement du Québec, 1998) at 17 [hereinafter *Partnership*], where it is said that the National Assembly's resolution on the recognition of Aboriginal rights provides in part the "underpinning of Québec's action and identif[ies] the basic gnidelines and principles for the strategic choices and proposed framework for intervention".

[193] In respect to judicial recognition of the pre-existing rights of Aboriginal peoples, sec cases cited *supra* note 19.

have inherent or pre-existing rights. Such rights would only be recognized after an agreement has been reached on them with Quebec. These government strategies serve to unfairly manipulate any future negotiation process and show little respect for Aboriginal peoples and their fundamental rights.

v) *Terra nullius and indigenous peoples' rights*

In June 1996, in *Côté*,[194] the Quebec government argued before the Supreme Court of Canada that no Aboriginal peoples have possessed any Aboriginal rights in any part of the province for the past 450 years.[195] Consequently, the government alleged that s. 35 of the *Constitution Act, 1982* had no application in Quebec with regard to the protection of Aboriginal rights. To support its argument, the government urged the Supreme Court to apply the doctrine of *terra nullius*[196] and attempted unsuccessfully to distinguish the *Mabo* case[197] from Australia. *Mabo* had condemned the use of this doctrine against indigenous peoples citing it as being racially discriminatory and colonial.[198] In response to this dispossession strategy, the Chiefs of the Assembly of First Nations of Quebec and Labrador have unanimously condemned the discriminatory[199] positions taken in *Côté* by the Bouchard government.[200]

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[194] *Supra* note 62.

[195] The defendants in this important Aboriginal and treaty fishing rights case were Algonquins, members of the Kitigan Zibi Anishinabeg (Desert River Band). As it has done in other cases, the Quebec government was seeking far-reaching judicial conclusions denying the fundamental rights of other indigenous peoples, who were not parties to the case and where specific territories and land-related rights were not the subject of this litigation. Such practice is a violation of the rules of natural justice (*audi alteram partem*).

[196] "*Terra nullius*" means "land belonging to no one". The government also urged the Supreme Court of Canada to interpret the *Royal Proclamation of 1763*, so as to preclude the recognition of indigenous land rights rather than to confirm them. In *Calder*, *supra* note 19 at 395, Hall J. refers to the *Royal Proclamation* as the "Indian Bill of Rights".

[197] *Mabo*, *supra* note 8.

[198] As Brennan J. of the High Court of Australia provides in *Mabo*, *ibid.* at 42 [emphasis added]: "Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, *an unjust and discriminatory doctrine of that kind can no longer be accepted*".

In rejecting Quebec's argument in *Côté*, *supra* note 62 at para. 53 [emphasis added], Chief Justice Lamer of the Supreme Court of Canada quoted the above words of Brennan J. and ruled as follows: "[T]he [Québec government's] proposed interpretation risks undermining the very purpose of s. 35(1) [of the *Constitution Act, 1982*] by *perpetuating the historical injustice suffered by Aboriginal peoples at the hands of colonizers* who failed to respect the distinctive cultures of pre-existing Aboriginal societies".

[199] *Report of the Royal Commission* vol. 1, *supra* note 73 at 695: "To state that the Americas at the point of first contact with Europeans were empty uninhabited lands is, of course, factually incorrect. To the extent that concepts such as *terra nullius* and discovery also carry with them the baggage of racism and ethnocentrism, they are morally wrong as well."

vi) ***Denial of Aboriginal peoples' status as distinct "peoples"***[201]

Unlike its previous policy programmes, the 1997 *Programme* of the Parti Québécois ("PQ") now classifies Aboriginal nations, along with the anglophone community, under the sub-heading "Historical Minorities".[202] Moreover, for purposes of self-determination and Quebec sovereignty, the "Quebec people" is simply declared to include all of its citizens.[203] In other words, there allegedly exists only a single people in all of Quebec. This PQ position is erroneous and undemocratic. In particular, it invalidly strips Aboriginal peoples of their right to self-identification[204] in the self-determination context.

With respect to Aboriginal peoples in Quebec, their cultures and spirituality are not those of Quebecers. Aboriginal peoples each have their own way of life. They each clearly choose to identify as a distinct people themselves. While French-Canadians in Quebec are likely to constitute "a people" for the purposes of self-determination,[205] there is no Canadian or inter-

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As S.R. Ratner has written, "*Terra nullius*, however, has no place in contemporary law. In the most literal sense, it is anachronistic...But more important, the broader idea that the long-term inhabitants have no legally cognizable claim or title to it is profoundly at odds with international human rights law and thus legally obsolete" ("Drawing a Better Line: *Uti Possidetis* and the Borders of New States" (1996) 90 A.J.I.L. 590 at 615).

[200] Secretariat of the Assembly of the First Nations of Quebec and Labrador, *Discriminatory and Colonial Positions Taken by the Government of Québec Before Supreme Court of Canada: Denial of the Existence of Aboriginal Rights Inside of Québec*, Res. 11/96 (17 October 1996).

[201] E.-I.A. Daes, *Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1993/26/Add.1, at 2, para. 7.: "Indigenous groups are unquestionably 'peoples' in every political, social, cultural and ethnological meaning of this term. They have their own specific languages, laws, values and traditions; their own long histories as distinct societies and nations; and a unique economic, religious and spiritual relationship with the territories in which they have lived. It is neither logical nor scientific to treat them as the same 'peoples' as their neighbours, who obviously have different languages, histories and cultures."

[202] *La volonté de réussir*, *supra* note 187 at 18. The sub-heading "Historical Minorities" is placed under the heading "Citizenship." See also B. Melkevik, "Le droit à l'identité et normes internationales: minorités et peuples autochtones" ("Le Défi Identitaire", Seminaire International, Université de Marrakech, 2-5 November, 1995) (1996) 1 Cahiers d'études constitutionnelles et politiques de Montpellier 44 at 75 (Aboriginal peoples are "peoples" with economic, cultural and political heritages).

[203] *La volonté de réussir*, *ibid.* at 1: "The Quebec people, composed of all of its citizens, is free to decide itself its status and its future" [translated by author]. See also *Des idées pour mon pays*, *supra* note 187 at 1, where it merely states that "[l]e peuple québécois existe," exists, without indicating who is included and whether there are other peoples in the province.

[204] *Indigenous and Tribal Peoples Convention, 1989* (No. 169), art. 1, para. 2, where "Self-identification" of indigenous and tribal peoples is regarded as "a fundamental criterion." See also McCorquodale, *supra* note 113 at 867. In F. Dumont, *Raisons communes* (Montreal: Boréal, 1995) at 63-64, the author seriously questions how Aboriginal peoples, against their will, can be included in the term "Québec nation" through the "magic of vocabulary."

[205] See *e.g.* J. Brossard, *L'accession à la souveraineté et le cas du Québec: conditions et modalités politico-juridiques*, 2d ed. (Montreal: Les presses de l'Université de Montréal, 1995) at 182, where it is suggested that the best position to take is that the French-Canadian nation as a whole should exer-

national law principle that would compel Aboriginal peoples to identify as one people with Quebecers against their will.[206]

vii) *Denial of Aboriginal peoples' right to self-determination*

As long as Aboriginal peoples in Quebec choose to self-identify as distinct peoples, it cannot be said that there is a single "Quebec people" in the province with the right to self-determination.[207] The current PQ government apparently believes that if it refers to Aboriginal peoples as "nations" and not "peoples", it can continue to deny the first peoples their right of self-determination.[208] This position is as unjust[209] as it is futile. For purposes of

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cise the right to self-determination; L. Dion, *Le Duel constitutionnel Québec-Canada* (Montreal: Boréal, 1995) at 350 (French-Canadians form a nation); L. Gagnon, "Débat: les mots tabous" *La Presse* (13 September 1994) B3 (true base of the Quebec independence movement is the French-Canadian nation centred in Quebec); M. Venne, "Le facteur culturel" *Le Devoir* (23 April 1999) A8 (Quebecers' French-Canadian origins and the concept of founding peoples are the foundation of the sovereignist movement); P. Lemieux, "Être québécois, c'est être étatiste avant tout" *Le Devoir* (3 May 1999) A7 (author prefers to be referred to as "canadien-français," fears that definition of "québécois" reflects above all the values that a majority seeks to impose on others); and J.-M. Léger, "Il n'y a pas de nation québécoise" *Le Devoir* (8 October 1999) A11. Of course, nothing precludes French-Canadians or others from self-identifying freely as Quebecers.

[206] See also D. Lessard, "Les souverainistes cherchent un divorce à l'amiable" *La Presse* (27 March 1999) B1, where a CROP poll taken in Montreal between 11-21 March 1999 indicates more Quebecers are of the view that the Crees and Inuit constitute a people (80%) and that Canadians constitute a people (86%) than they are that Quebecers constitute a people (77%).

[207] An increasing number of authors have concluded that there exist numerous "peoples" including Aboriginal peoples, for purposes of self-determination in Quebec: see *e.g.* B. Schwartz, *Last Best Hope: Québec Secession—Lincoln's Lessons for Canada* (Calgary: Detselig Enterprises, 1998) at 25; P. Hogg, "Principles Governing the Secession of Quebec" (1997) 8 N.J.C.L. 19 at 31 [hereinafter "Principles Governing Quebec Secession"]; Seymour, *supra* note 186 at 155 (there are eleven Aboriginal peoples and the Quebec people living in whole or in part within the province of Quebec); P. Russell & B. Ryder, *Ratifying a Postreferendum Agreement on Quebec Sovereignty* (Toronto: C.D. Howe Institute, 1997) at 4; G. Bertrand, *Plaidoyer pour les citoyens* (Montreal: Balzac, 1996) at 40 (G. Bertrand, *Enough is Enough: An Attorney's Struggle for Democracy in Quebec*, trans. M.T. Blanc (Toronto: ECW Press, 1996) at 39); and M.E. Turpel, "The Cultural Non-Homogeneity of Quebec: Secessionism, Indigenous Legal Perspectives and Inseparability" in Clark & Williamson, *supra* note 95, 284.

[208] See *e.g. Partnership, supra* note 192, where Quebec's latest policy fails to refer to Aboriginal peoples as "peoples" with the right to self-determination. See also T. Ha, "Quebec's borders are safe within Canada: Chrétien" *The [Montreal] Gazette* (25 May 1994) A1 at A2, where Lucien Bouchard, then leader of the Bloc Québécois, is quoted as follows: "The natives of Québec don't have a right of self-determination. It doesn't belong to them."

[209] R. Guglielmo has written that "[d]enial of well-articulated Cree arguments for self-determination has forced the Québécois secessionist movement to adopt a blatant double-standard and a line of reasoning fraught with contradictions, which greatly undermines the legitimacy of their own claims and reveals the racist strain which often underlies the *realpolitik* application of self-determination theory" ("Three Nations Warring in the Bosom of a Single State [:] An Exploration of Identity and Self-Determination in Québec" (1997) 21 Fletcher F. World Aff. 197 at 198).

self-determination, the term "peoples" includes "nations". This view is supported not only by international jurists,[210] but also by others in the context of Canadian domestic law.[211] In addition, it is racially discriminatory to deny Aboriginal peoples their status as "peoples" in order to deny them their human right to self-determination.[212]

viii) ***Forcible inclusion of Aboriginal peoples in a sovereign Quebec***

The Quebec government is of the view that it can include Aboriginal peoples and their traditional territories in any future Quebec "state", without the consent[213] of the peoples concerned.[214] Despite its lack of legitimacy or

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See also Assemblée nationale, *Journal des débats*, Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, 9 Oct. 1991, No. 5, at CEAS-137 (testimony of D. Turp) [translated by author], where in regard to self-determination and legitimacy, Turp indicates that "the aboriginal nations on their territory, are quite ahead of the francophones of Quebec, the anglophones of Quebec, all the Europeans and other nationalities on this territory".

[210] W. Ofuatey-Kodjoe, "Self-Determination" in O. Schachter & C.C. Joyner, eds., *United Nations Legal Order*, vol. 1 (Cambridge: Cambridge University Press, 1995) 349 at 354; H.S. Johnson, *Self-Determination Within the Community of Nations* (Leyden: A.W. Sijthoff, 1967) at 55: "In the discussions in the United Nations concerning the definition of the terms 'people' and 'nation' there was a tendency to equate the two. When a distinction was made, it was to indicate that 'people' was broader in scope. The significance of the use of this term centered on the desire to be certain that a narrow application of the term 'nation' would not prevent the exteusion of self-determination to dependent peoples who might not yet qualify as nations." See also discussion of "nations" and "peoples" in Duursma, *supra* note 41 at 14.

[211] *Report of the Royal Commission* vol. 2, *supra* note 3 at 178: "[T]he three Aboriginal peoples identified in section 35(2) encompass nations that also hold the right of self-determination." Further at 182: "Aboriginal peoples are entitled to identify their own national units for purposes of exercising the right of self-determination. Given the variety of ways in which Aboriginal nations may be configured and the strong subjective element, any self-identification initiative must necessarily come from the people actually concerned." See also Seymour, *supra* note 186 at 16 ("peoples" and "nations" used almost synonymously).

Also, in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 at 552 (1832), 8 L. Ed. 483 [emphasis added], Marshall C.J. provides that "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original rights, as the undisputed possessors of the soil from time immemorial ... *The very term 'nation,' so generally applied to them, means 'a people distinct from others.'*"

[212] See *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195 at 216, 5 I.L.M. 352 [emphasis added] (entered into force 4 January 1969):

> In this Convention, the term 'racial discrimination' shall mean any distinction, *exclusion, restriction* or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing*, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

[213] This position of the Quebec government is not shared by other commentators: see R. Janda, *La double indépendance: la naissance d'un Québec nouveau et la renaissance du Bas-Canada* (Montreal: Varia, 1998) at 93 (in regard to transferring Aboriginal peoples in the 1898 and 1912 territories

validity,[215] this extreme and destabilizing strategy has never been repudiated by the government.

In relation to existing treaties, such as the *James Bay and Northern Quebec Agreement*, the Quebec government takes the position that it can unilaterally assume the obligations of the federal government and subject these treaties to a new Constitution in a secessionist Quebec. However, in such a scenario, the rights of Aboriginal peoples under existing treaties would take on different and uncertain interpretations that were never negotiated or agreed upon by the parties.[216] With reference to the *JBNQA* in particular, such unilateral alteration would constitute a fundamental breach,[217] contrary to its express terms and conditions as well as its spirit and intent.[218]

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to a new Quebec state, their consent would be required); "Principles Governing the Quebec Secession", *supra* note 207 at 44 (in view of their treaty rights, consent of the Crees and Inuit would be required regarding their northern territories). See generally Seymour, *supra* note 186 at 180-81 (Quebec people cannot, in principle, have Quebec aecede to sovereignty without the consent of Aboriginal peoples) and at 184 (at the moment when Quebec declares its sovereignty, Aboriginal peoples would seem justified to exercise a right of association with Canada, but a response to their claims can avoid this). Should Aboriginal peoples not agree to join a sovereign Quebec, secession might still be achieved for a portion of what is now the province of Quebec. This could be the result of constitutional negotiations, in accordance with the legal framework and principles set out by the Supreme Court of Canada in the *Quebec Secession Reference*, *supra* note 5.

[214] On the possible use of force by the Quebec government, see *Sovereign Injustice*, *supra* note 189 at 156-64; R. Séguin, "Iron hand possible, Quebec minister says" *The Globe and Mail* (30 January 1997) A4. See also Statement of the Minister of Intergovernmental Affairs, Jacques Brassard, in Quebec, Assemblée nationale, *Journal des débats* (12 November 1997). For a strong criticism of Brassard's approach and argument, see A. Dubuc, "Babar et la partition" *La Presse* (15 November 1997) at B2.

[215] See *e.g.* Seymour, *supra* note 186 at 186, where the author states that Quebec must not try to impose a sovereign state by force on Aboriginal peoples without trying simultaneously to satisfy their claims. Even Seymour's position is inadequate, since the Quebec government would not have the right to use force regardless of any simultaneous effort to satisfy Aboriginal peoples' claims.

[216] *Sovereign Injustice*, *supra* note 189 at 277-80.

[217] Hogg in "Principles Governing Quebec Secession", *supra* note 207 at 44 [emphasis added] has written that

> [the *JBNQA*] was negotiated in a federal context, and it provides for continuing Government obligations, some of which are owed by the Government of Canada ... and others by the Government of Quebec. ... Since Canada's obligations could no longer be fulfilled in an independent Quebec, and would have to be assumed by the new state of Quebec, a secession would constitute a breach of the Agreement. *The Agreement can be amended, of course, but only with the consent of the Aboriginal nations who are parties to it.*

Howse & Malkin, *supra* note 37 at 210, n. 87, have written that "[u]nilateral secession of Quebec would mean that one level of government ... would no longer be able to carry out its obligations under the [*JBNQA*], and thus would constitute a fundamental breach of its terms".

[218] In accordance with s. 35 of the *Constitution Act, 1982*, it is a constitutional requirement that Cree and Inuit treaty rights under *JBNQA* not be amended respectively without Cree or Inuit consent.

ix) *Undermining future treaty-making by Aboriginal peoples in Quebec*

Quebec's 1998 policy on Aboriginal affairs proposes the "recognition of responsibilities according to a so-called contractual jurisdiction concept".[219] Under this concept, agreements signed in the future "would not be covered by constitutional protection" and only the "provisions relating to land aspects of a comprehensive land claim agreement will receive constitutional protection".[220] Thus, the "contractual jurisdiction" approach would serve to severely limit the treaty-making capacity of Aboriginal peoples in Quebec, both now and in the future.

Moreover, the policy expressly provides that "if one of the parties withdraws from an agreement already reached, Quebec exercises its full jurisdiction."[221] This approach to Aboriginal jurisdictional issues is likely to perpetuate uncertainty and insecurity concerning Aboriginal peoples' basic rights and powers. It is reminiscent of anachronistic and illegitimate positions whereby non-Aboriginal governments have argued that the existence of Aboriginal rights is "dependent on the will of the Sovereign".[222] It is the antithesis of an inherent rights perspective.

The "contractual jurisdiction" approach is intended to seriously restrict, if not circumvent, the application of s. 35 of the *Constitution Act, 1982*. Presently, s. 35 confers constitutional protection on treaty rights of First Nations. It does not limit such protection to "land aspects." In this regard, Quebec's new approach contradicts the 1985 National Assembly Resolution on Aboriginal Rights.[223] The strategy to move away from signing treaties

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Every chapter of *JBNQA* expressly requires the consent of the interested Aboriginal party, in the event of a proposed amendment.

[219] *Partnership, supra* note 192 at 22.

[220] *Ibid.* Recently, the Mi'kmaq nation of Gespeg in the Gaspé region of Quebec has signed a framework agreement with the Quebec and federal governments to negotiate self-government. However, any eventual agreement will not be considered a treaty in the sense of the *Constitution Act, 1982*: see R. Dutrisac, "Entente-cadre avec les Micmacs de Gespeg" *Le Devoir* (19 May 1999) A6.

[221] *Partnership, supra* note 192 at 22. Similar statements are found *ibid.* at 29 and at 31. The capacity of the parties to withdraw at any time has been inserted as a term and condition in a recent agreement entered into between the Quebec government and the Innu of Natashquan: see R. Dutrisac, "Les territoires montagnais voués à la pourvoirie sont étendus" *Le Devoir* (23 May 1999) A2.

[222] See *e.g. Mabo, supra* note 8 at 67 [emphasis added], Deane and Gaudron JJ., where, in relation to any "permissive occupancy" pertaining to common law Aboriginal title, it is declared: "Acceptance of that, or any similar, proposition would deprive the traditional inhabitants of any real security since they would be liable to be dispossessed at the whim of the Executive, however unjust ... [T]he weight of authority ... and considerations of justice seem to us to combine to compel its rejection".

[223] The 1985 National Assembly Resolution, *supra* note 188 stipulates "[t]hat this Assembly: ... Considers these [land claims] agreements and all future agreements and accords of the same nature to have the same value as treaties." In addition, the 1985 Resolution urges the government to enter into agreements "guaranteeing" Aboriginal peoples the exercise of self-government and other fundamental rights. The text of this Resolution is reproduced in *Partnership, supra* note 192 at 17-18.

with Aboriginal peoples appears to be a part of the official programme of the Parti Québécois.[224]

x) *Self-serving principles in Québec's new Aboriginal policy*

In its 1998 policy on Aboriginal affairs, the Quebec government imposes certain "fundamental reference points" that entail significant constraints for First Nations. The reference points specified are the "territorial integrity" of Quebec, "sovereignty of the National Assembly," and "legislative and regulatory effectivity." Although the Crown is prohibited from "sharp dealing,"[225] no explanation is offered in Quebec's policy as to what each of these terms would mean.

The policy paper repeatedly emphasizes the notion of the "territorial integrity" of Quebec,[226] despite its inappropriateness in a domestic context.[227] "Territorial integrity," as used by the Quebec government, could have exten-

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[224] See *La volonté de réussir*, *supra* note 187 at 22 [translated by author] (in making the transition to a sovereign Quebec, existing "treaties" with Aboriginal peoples will be respected until they are replaced by new "agreements").

[225] *Sparrow*, *supra* note 10 at 1107, Dickson C.J.C.: "[T]he honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned," quoting *R.* v. *Taylor and Williams* (1981), 34 O.R. (2d) 360 at 367, [1981] 3 C.N.L.R. 114 (C.A.). See also *R.* v. *George*, [1966] S.C.R. 267 at 279, 55 D.L.R. (2d) 386 (Cartwright J. dissenting); and *Gitanyow*, *supra* note 14 at para. 74, where it is said that this duty to negotiate in good faith "must include at least the absence of any appearance of 'sharp dealing'... disclosure of relevant factors ... and negotiation 'without oblique motive'." Similarly, in regard to judicial interpretation of treaties, see *R.* v. *Badger*, [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77 at para. 41 ("[n]o appearance of 'sharp dealing' will be sanctioned"). The honour of the Crown and the prohibition against "sharp dealing" is also addressed in *R.* v. *Marshall*, [1999] S.C.J. No. 55 at paras. 49-51, online: QL (SCJ) [hereinafter *Marshall*].

As J.Y. Henderson has written, "It makes no difference whether the sharp dealings are in the negotiations or drafting of the treaties, or in the implementation of them. The courts have firmly stated that they do not tolerate or condone such conduct by the Crown" ("Interpreting *Sui Generis* Treaties" (1997) 36 Alta. L. Rev. 46 at 80).

[226] *Partnership*, *supra* note 192 at 11, 12, 19, 21.

[227] There is no articulated concept of "territorial integrity" of a province in Canadian law. As long as Quebec remains a province, its boundaries are protected under Canada's Constitution: see *Constitution Act, 1871* (U.K.), 34 & 35 Vict., c. 28, s. 3, reprinted in R.S.C. 1985, App. II, No. 11 and *Constitution Act, 1982*, *supra* note 6, s. 43. How the Quebec government chooses to use the notion of "territorial integrity" in its 1998 policy on Aboriginal affairs is not explained.

At international law, the principle of "territorial integrity" applies to independent states and not provinces. In addition, this principle is not absolute and can only be successfully invoked if certain conditions are met: see *Quebec Secession Reference*, *supra* note 5 at paras. 130, 154. See also T.D. Musgrave, *Self-Determination and National Minorities* (Oxford: Clarendon Press, 1997) at 235 ("maintenance or alteration of internal boundaries within an independent state is a matter which falls within the domestic jurisdiction of that state; it does not fall within the jurisdiction of international law"); and T. Bartoš, *"Uti Possidetis, Quo Vadis?"* (1997) 18 Aus. Y.B. Int'l L. 37 at 73 ("this principle [of territorial integrity] applies only with respect to limits established between existing States, not to administrative boundaries within a State").

> sive implications in international law. To date, the Quebec government has invoked this principle to suggest that Aboriginal peoples and their territories would be forcibly included in an independent Quebec.[228] Such matters go far beyond the stated objectives of Quebec's 1998 policy.[229]
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> Similarly, for the Quebec government to impose such "reference points" as the "sovereignty of the National Assembly" and "legislative and regulatory effectivity" is blatantly self-serving. These terms strongly imply that Aboriginal peoples and governments would be subjugated or subordinated to the jurisdiction of the National Assembly. At international law, "effectivity" usually means "effective control," which suggests that ultimate control must rest with the National Assembly.[230] Also, in the context of Quebec unilateral secession, "effective control" is what Quebec authorities would need to demonstrate in seeking international recognition as an independent state.[231]

In summary, the Quebec government has shown little respect to date for the fundamental rights of Aboriginal peoples. One-sided principles have been imposed by the government to regulate future negotiations. Any "progress" in Aboriginal peoples' issues still takes place within an overall unilateral framework which seriously undermines Aboriginal peoples' status and rights. In this context, the duty of Quebec to enter into and to conduct negotiations in good faith is not being respected. Although Quebec's 1998 policy has been unanimously rejected by First Nations in the province,[232] the government has shown no signs of willingness to revise its document in conjunction with the peoples directly affected.

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[228] Even if Quebec could invoke the principle of territorial integrity, it likely would not be able to do so against the interests of the Aboriginal peoples concerned. See Umozurike, *supra* note 130 at 234 [emphasis added], where it is said that "*the ultimate purpose of territorial integrity is to safeguard the interest of the peoples of a territory*. The concept of territorial integrity is therefore meaningful so long as it continues to fulfill that purpose to all the sections of the people".

[229] While the policy document of Quebec highlights the difficult socioeconomic and other conditions facing First Nations, it exploits this urgent situation by seeking to slip in the government's highly controversial political agenda. Future agreements with First Nations on such basic aspects as essential services and community development should not be subject to such "reference points" as "territorial integrity." This is not only inappropriate but also unconscionable.

[230] Evidence of such ultimate control by Quebec has been incorporated into its 1998 policy. See *e.g. Partnership, supra* note 192 at 22: "[S]hould no agreement [with an Aboriginal nation] be negotiated or reached, of if one of the parties withdraws from an agreement already reached, Québec exercises its full jurisdiction." Further, *ibid.* at 21: "The agreements reached with aboriginal people must respect Québec's territorial integrity and government effectivity over its territory."

[231] The international law principle of "effectivity" is discussed in the *Quebec Secession Reference, supra* note 5 at paras. 140-46.

[232] E. Thompson, "First Nations Reject New Policy" *The [Montreal] Gazette* (20 May 1998) A5; M. Cloutier, "Les Premières Nations rejettent les propositions de Chevrette" *Le Devoir* (20 May 1998) A1. This does not mean that no agreements of any nature are being signed by First Nations and Quebec. In relation to the Mohawks of Kahnawake, see K. Deer, "Québec Cabinet Signs Agreements" *The Eastern Door* [Kahnawake] (26 March 1999) 1; A. Jelowicki, "Mohawks' tax picture changes"

This unjust situation is further exacerbated by a recent hardening in the position of the separatist government in Quebec. Since August 1998, when the Supreme Court issued its historic judgment in the *Secession Reference*, the government has extolled the benefits of the Court's ruling.[233] However, in October 1999, the government abruptly altered its approach, declaring that Quebec is "absolutely not" bound by the Supreme Court's decision.[234] In direct contradiction to what the Supreme Court decided in the *Secession Reference*,[235] the Quebec government also insists that the collective will of Quebecers prevails over the rule of law.[236]

This position is erroneous[237] and disingenuous[238] at the same time. Both the professed legitimacy and validity of the government's aspirations suffer as a result. A further consequence of Quebec's position is that there would be no common legal framework for discussion or reconciliation, even in a non-secession context, whenever the underlying constitutional principles highlighted in the *Session Reference* were in any way involved. Clearly, there is a need here for reconsideration. In addition to the

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The [Montreal] Gazette (31 March 1999) A4; M. Thibodeau, "Québec consent une exemption fiscale élargie aux Mohawks" *La Presse* (31 March 1999) A10.

In addition, Inuit and the Quebec government have agreed to establish a commission to study self-government for Nunavik. In this context, a Québec cabinet decree, dated October 6, 1999, no. 1138-99, includes the strict condition that any new government institution "must fall under the jurisdiction of Québec and respect the integrity of its territory and the effectivity of its government" [translated by author]. For additional concerns, see L. Leduc, "Des juristes mettent en doute l'entente entre Quebec et le Nunavik" *Le Devoir* (9 November 1999) A4.

[233] See *e.g.* L. Bouchard, "Premier Lucien Bouchard Reflects on the Ruling" in D. Schneiderman, ed., *supra* note 93 at 95: "[T]he Court demonstrated that Ottawa's arguments do not stand up to analysis, and it struck at the very heart of the traditional federalist discourse."

[234] "If Ottawa won't negotiate on sovereignty? 'Just watch us'" *National Post* (6 October 1999) A6 (edited transcript of National Post's October 5 interview with Joseph Facal, Québec's Intergovernmental Affairs Minister).

[235] *Quebec Secession Reference*, *supra* note 5 at para. 87 ("...a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession").

[236] *Supra* note 234. In this regard, Mr. Facal adds: "If you submit the clear expression of the collective will of a nation to the constitutional rule of law in Canada, you are in effect using the rule of law as a prison."

The federal government has responded to the renewed threat of a unilateral secession attempt by Quebec. On October 19, 1999, Federal Minister of Intergovernmental Affairs, Stéphane Dion, wrote a letter to Mr. Facal and concluded: "There are few things more dangerous in a democracy than a government that places itself outside the law" [official translation]. See also S. Dion, "Facal Refuted" *The [Montreal] Gazette* (20 October 1999) B3.

[237] See also *Charter of Paris for a New Europe*, *supra* note 133: "Democracy, with its representative and pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. No one will be above the law."

[238] See also J. Webber, "The Legality of a Unilateral Declaration of Independence under Canadian Law" (1997) 42 McGill L.J. 281 at 284: "Sovereignists' recent tendency to deny the relevance of law is disingenuous."

democratic principle and the imperative to respect human rights, all governments in Canada are bound by the interrelated principle of the rule of law.[239]

It is difficult to predict whether a more positive course will be adopted by the Quebec government in the future. Although some agreements will likely continue to be signed with Aboriginal peoples, Quebec's present strategies of unilateralism fail to meet any reasonable standard expected of a government. The Parti Québécois government may continue to tailor its policies concerning Aboriginal peoples so as to fit its sovereignist ambitions. However, the government cannot avoid or prevent the growing recognition in Canada and internationally of Aboriginal peoples' status as "peoples" with the right of self-determination. This increased recognition should have a most beneficial effect on the dynamic of Aboriginal-Crown relations. Therefore, perhaps before the next referendum on Quebec secession, the government may have little choice but to devise a more constructive approach.[240]

Conclusion

The judgment of the Supreme Court of Canada in *Delgamuukw* may be viewed as a positive and significant contribution to our understanding of Aboriginal title.[241] In some ways, the Court's decision provides a new benchmark. However, it should not be seen as a complete or final pronouncement on the subject. Substantial shifts in judicial perspectives will likely be required.

In particular, greater attention is needed in relation to the status and rights of Aboriginal peoples under Canadian constitutional and international law.[242] Principles underlying Canada's Constitution, such as "democracy" and the "protection of Aboriginal and treaty rights," should be accorded their full constitutional meaning and value in contemporary terms. The rights of present and future generations of Aboriginal peoples should not be unfairly limited by an excessive focus on historical Aboriginal activities.

Further, notions of surrender or extinguishment of Aboriginal title should be replaced by new alternatives. As recommended by the UN Human Rights Committee, approaches are needed that are compatible with Aboriginal peoples' right of self-

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[239] See also H.W. MacLauchlan, "Accounting for Democracy and the Rule of Law in the Québec Secession Reference" (1997) 76 Can. Bar Rev. 155 at 178: "Nation states, subscribing to basic human rights and democracy...are the building blocks of an international legal order. If mature, democratic countries like Canada can be dismembered by a simple majority vote of an internal unit...any concept of an international rule of law would be lost."

[240] See *e.g.* Seymour, *supra* note 186, where the author proposes a more constructive approach in Quebec government policy, consistent with the right to self-determination of Aboriginal peoples.

[241] See *e.g.* Mandell, *supra* note 21.

[242] As D. Schneiderman has written, "[T]he aspirations of Aboriginal peoples are not simply to be treated as vestiges of cultural differences, but those of nations disinherited by the unquestioned operation of the colonizer's constitutional law" ("Theorists of Difference and the Interpretation of Aboriginal and Treaty Rights" (1996) 14 Int'l J. Can. Studies 35 at 47).

determination. In addition, judicial interpretation of Aboriginal land title and rights should not be artificially separated from Aboriginal jurisdiction.[243] To date, Canadian courts have not yet addressed Aboriginal peoples' right of self-government in any comprehensive manner. Aboriginal peoples possess this inherent right to self-government, as an essential political component of their right to self-determination. This right should be appropriately recognized under s. 35(1) of the *Constitution Act, 1982*. These conclusions are even more compelling if the status of Aboriginal peoples and their collective human rights are accorded full and sensitive[244] consideration.

Clearly, the preferable route for resolving land, resource and self-government issues is, in most situations, through negotiations conducted in good faith.[245] However, carefully-formulated litigation and effective judicial recourses are at times a necessary part of the overall process.[246] As stated in the *Report of the Royal Commission on Aboriginal Peoples* "[t]he courts can be only one part of a larger political process of negotiation and reconciliation."[247] The *Report* adds that

> [b]ecause negotiation is preferable to litigation as a means of resolving disputes between the Crown and Aboriginal nations, "courts should design their remedies to facilitate negotiations between First Nations, governments and other affected interests".[248] Aboriginal peoples will secure substantive gains in negotiations only if courts order remedies that give Aboriginal parties more bargaining power than they have under Canadian law at present.[249]

The need for judicial remedies that enhance the negotiating positions of Aboriginal peoples has been repeatedly illustrated throughout Canada's history. Through construc-

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[243] See also F. Cassidy in Cassidy, ed., *supra* note 88, 130 at 133: "An appropriate [land claims] policy cannot be based on the idea of extinguishment of aboriginal rights or title. It cannot force a detachment of aboriginal self-government arrangements from matters that relate to lands and resources."

[244] See *Sparrow*, *supra* note 10 at 1112, Dickson C.J.C.: "[I]t is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake." See also *Van der Peet*, *supra* note 19 at para. 49.

[245] *Montana Band of Indians* v. *Canada*, [1991] 2 F.C. 30 at 39, 2 C.N.L.R. 88 (F.C.A.): "Negotiated settlements of aboriginal claims are a distinct possibility in today's reality."

[246] *MacMillan Bloedel* v. *Mullin*, [1985] 3 W.W.R. 577, 61 B.C.L.R. 145, [1985] 2 C.N.L.R. 58 at para. 120 (B.C.C.A.):

> I think it fair to say that, in the end, the public anticipates that the claims will be resolved by negotiation and by settlement. This judicial proceeding is but a small part of the whole of a process which will ultimately find its solution in a reasonable exchange between governments and the Indian nations. Viewed in that context, I do not think that the granting of an interlocutory injunction confined to Meares Island can be reasonably said to lead to confusion and uncertainty in the minds of the public.

In regard to the right to an effective legal remedy, see also *Universal Declaration of Human Rights*, *supra* note 32, art. 8; ICCPR, *supra* note 32, art. 2.

[247] *Report of the Royal Commission* vol. 2, *supra* note 3 at 562.

[248] Roach, *supra* note 110 at 15-3.

[249] *Report of the Royal Commission* vol. 2, *supra* note 3 at 564.

tive judicial guidance, unilateral or self-serving actions by non-Aboriginal governments against Aboriginal peoples would likely be discontinued. Instead, compliance with contemporary and emerging standards of negotiation may well be the result.

There is little doubt that the process of recognizing and reconciling Aboriginal peoples' status and rights will continue in the long term. This does not mean that agreements between Aboriginal peoples and non-Aboriginal governments (or third party developers) cannot or should not proceed. Mutually beneficial agreements can be arrived at, if genuine respect for the first peoples and their priorities and traditions of sharing are an integral part of the discussions.[250]

Without the essential qualities of recognition, sharing, and respect, no treaty or agreement will contribute to or ensure a climate of cooperation and reconciliation. *The James Bay and Northern Quebec Agreement*[251] is an example of the long-range problems that can occur when such basic elements are lacking. Since this treaty was signed in 1975, the James Bay Crees have been in court virtually every year over the past twenty years,[252] in order to defend their rights and ensure their just entitlements.[253] Clearly, the purported extinguishments or surrenders of Aboriginal rights provide no assurance whatsoever that the result of negotiations will contribute to a cooperative environment or to certainty in the future. The only certainty of an "extinguishment" strategy is that it generates mistrust.

What is crucial for any future negotiations concerning fundamental rights is the prior establishment of a principled framework. This framework must be consistent with Aboriginal peoples' values, genuine democracy and relevant international norms.[254] This should be accomplished collaboratively[255] by the parties or, as a last re-

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[250] For a recent example of ensuring respect for the rights and priorities of Aboriginal peoples, see J. Green, "Panel: INCO may mine Voisey's Bay only after land claims" *Nunatsiaq News* [Iqaluit] (16 April 1999) 13, where it is reported that a federal environmental assessment panel has determined that permission to develop a giant nickel mine in Labrador should proceed, but only after an agreement-in-principle on land claims is reached with the Inuit and Innu concerned. Should land claims discussions stall for unrelated reasons, then the panel recommended that at least an environmental co-management agreement should be negotiated as an interim measure.

[251] *JBNQA*, *supra* note 170.

[252] Inuit in northern Quebec have been involved in considerably less litigation concerning *JBNQA* than the James Bay Crees.

[253] For example, a recent Cree court action involves Ottawa, Quebec, and 27 forestry companies: see M.-C. Ducas, "Les Cris en appellent aux tribunaux" *Le Devoir* (16 July 1998) A1. For strong criticisms of forestry practices in Quebec, see J.-R. Sansfaçon, "Le massacre forestier" *Le Devoir* (31 March 1999) A8; A. Gruda, "Le massacre à la scie" *La Presse* (13 April 1999) B2; L. Bélanger, "Nos forêts du Nord pourraient bien n'être plus un jour qu'un vague souvenir" *La Presse* (1 April 1999) B3. For a forestry industry viewpoint, see J. Gauvin, "La foresterie québécoise a fait des pas de géant" *La Presse* (14 April 1999) B3.

[254] See "Aboriginal Rights and State Obligations", *supra* note 83 at 113-15, where international norms are invoked in interpreting s. 35(1) of the *Constitution Act, 1982*.

sort, by the courts.[256] In *Delgamuukw*, the Supreme Court signalled that the implementation of Aboriginal self-government would likely present some diverse and complex challenges.[257] However, the challenges of this latter phase must not unfairly compromise the initial step of establishing the relevant governing constitutional principles.

A "principled" approach has recently been adopted by the Court in other situations where complex legal and political issues are interneshed. In the *Quebec Secession Reference*[258] and in *Corbière*,[259] the Court laid out a framework of legal principles

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[255] In sharp contrast to the Quebec government's approach, see *e.g.* British Columbia, Ministry of Aboriginal Affairs, *Report of the British Columbia Tasks Force*, 28 June 1991, online: British Columbia Ministry of Aboriginal Affairs Homepage <http://www.aaf.gov.bc.ca/aaf/pubs/bcctf/toc.htm> (last modified: 26 November 1996) at 15: "[L]eaders from First Nations across British Columbia appointed three members to the task force. ... Two members were appointed by the Government of Canada, and two by the Government of British Columbia. ... The task force ... agreed to address the terms of reference by a consensual process."

[256] In the event that self-government litigation proves to be a necessity, it would be especially beneficial for Aboriginal litigants to consider establishing certain fundamental principles as a first step. If carefully crafted, these principles could greatly assist all concerned parties to resolve their respective jurisdictions and interests through the negotiation process. In the absence of a principled framework, judicial consideration of self-government jurisdiction could prove to be a most imprudent risk.

For example, relevant principles might include recognition that: i) the right to self-government is a democratic entitlement of Aboriginal peoples; ii) Aboriginal peoples are "peoples" with the right to self-determination; iii) the right to self-determination is a part of the interual law of Canada; iv) the right to self-government is an important eomponent of Aboriginal self-determination within Canada; and v) the right to self-determination, including self-government, is incorporated in s. 35 of the *Constitution Act, 1982*.

[257] *Supra* note 1 at para. 171, Lamer C.J.C.: "The degree of complexity involved can be gleaned from the *Report of the Royal Commission on Aboriginal Peoples*, which devotes 277 pages to the issue. That report describes different models of self-government."

[258] See *supra* note 5, where the Court outlines a legal framework for secession negotiations that i) "emphasizes constitutional responsibilities as much as it does constitutional rights" (paras. 104, 151); ii) requires that such negotiations be "principled" (paras. 104, 149); iii) highlights the importance of underlying constitutional principles that govern the negotiations (paras. 49ff., 88, 90, 93-95); iv) includes a constitutional duty to negotiate (paras. 69, 88ff.); and v) underlines that participants in such negotiations must "reconcile the rights, obligations and legitimate aspirations of all Canadians" (para. 104).

[259] See *Corbière*, *supra* note 34, where the Court elaborates upon the principles that the federal Parliament must respect in engaging in a consultative and legislative process to eliminate discrimination against off-reserve members of Indian bands under s. 77(1) of the *Indian Act*. These principles include the following: i) the principle of democracy, as an underlying constitutional principle, means more than majority rule (*ibid.* at para. 116) and is "an important remedial consideration" (at para. 117); ii) the democratic principle "encourages remedies that allow the democratic process of consultation and dialogue to occur" (at para. 116); and iii) in order to comply with s. 15(1) of the Canadian *Charter*, any legislative amendments adopted by Parliament must recognize "non-residents' right to substantive equality in aecordance with the principle of respect for human dignity" (which does not mean in all instances that there would be identical voting rights for residents and non-residents) (at para. 95). As a result, the Supreme Court suspended the effect of its declaration for a period of 18 months, in order to "enable Parliament to consult with the affected groups, and to redesign the voting

while encouraging the interested parties to negotiate or discuss in good faith any future arrangements.

Aboriginal territories, lands, resources and self-determination are all issues that must be addressed on an urgent basis. Yet, there are still those who put budgetary considerations ahead of human rights and long-standing concerns for equality and justice. In this regard, serious reflection should be given to the words of Madame Justice Rosalie Silberman Abella of the Ontario Court of Appeal: "We have no business figuring out the cost of justice until we can figure out the cost of injustice."[260]

With this in mind, we must demonstrate the collective will to realize the critical precept underlined by Chief Justice Lamer in *Van der Peet* and reiterated in *Delgamuukw*: that "the only fair and just reconciliation is ... one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally,[261] place weight on each."[262] It is

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provisions of the *Indian Act* in a nuanced way that respects equality rights ... should it so choose" (*ibid.* at para. 121).

[260] Cited in J. Keene, "Claiming the Protection of the Court: Charter Litigation Arising from Government 'Restraint'" (1998) 9 N.J.C.L. 97 at 115. These words of M^me^ Justice Abella have been endorsed by Supreme Court of Canada Judge Claire L'Heureux-Dubé: see "Making Equality Work" (Notes for an Address to the Department of Justice, 10 December 1996).

[261] In regard to Aboriginal peoples, it is important to highlight here the concepts of "eqnality" that recently have been affirmed by the Supreme Court of Canada: i) True reconciliation, in accordance with s. 35(1) of the *Constitution Act, 1982*, requires that equal weight be accorded to Aboriginal and common law perspectives (see text accompanying this note); and ii) the principle of "protection of Aboriginal and treaty rights," either in its own right or as part of the principle of "protection of minorities," has equal weight with other underlying constitutional principles (see text accompanying note 46).

These constitutional precepts of "equality" have yet to be adequately incorporated in judicial analyses pertaining to Aboriginal peoples and their basic status and rights. For example, Aboriginal peoples are firmly opposed to the surrender or extinguishment of their Aboriginal title and rights. Yet courts continue to ignore this central Aboriginal perspective. Also, aside from considerations relating to fiduciary duties and human rights, such surrender or extinguishment is wholly inconsistent with the constitutional principle of "protection of Aboriginal and treaty rights." No other people in Canada has its fundamental rights purportedly destroyed, in order to safeguard the people or rights concerned.

In regard to the equality guarantees under s. 15(1) of the *Canadian Charter of Rights and Freedoms*, see *Corbière*, *supra* note 34 at para. 54, L'Heureux-Dubé J.: "[T]he contextual approach to s. 15 requires that the equality analysis of provisions relating to Aboriginal people must always proceed with consideration of and respect for Aboriginal heritage and distinctiveness, recognition of Aboriginal and treaty rights, and with emphasis on the importance for Aboriginal Canadians of their values and history."

[262] *Van der Peet*, *supra* note 19 at para. 50. This view is reiterated by Lamer C.J.C. in *Delgamuukw*, *supra* note 1 at para. 81 and in the majority opinion by Binnie J. in *Marshall*, *supra* note 225 at para. 19. To date, however, it would be difficult to conclude that the "Aboriginal perspective" has received equal consideration by Canadian courts when determining the nature and scope of Aboriginal rights. See *e.g.* A. Zalewski, "From *Sparrow* to *Van der Peet*: The Evolution of a Definition of Aboriginal Rights" (1997) 55 U.T. Fac. L. Rev. 435; and "Aboriginal Rights in Canada", *supra* note 21 at 292-93.

imperative that this perspective of intersocietal law include full respect for the collective and individual human rights of Aboriginal peoples. The inclusion of such a human rights dynamic may well prove to be a most positive catalyst—an essential step towards completing the "work in progress" found in *Delgamuukw*.

In *Marshall, ibid.* at para. 56, the majority opinion accorded the Aboriginal perspective fair consideration in deciding that the Mi'kmaq people had constitutionally protected treaty rights "to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified." Regrettably, this has led to violent reactions from non-Aboriginal fishers in New Brunswick: see M. Tenszen, "Lobster Pot Boils Over" *The [Montreal] Gazette* (4 October 1999) A8; and T. Ha, "Mi'kmaqs Brace for Further Clashes" *The Globe and Mail* (5 October 1999) at A4.