POTENTIAL IMPACT OF QUEBEC SOVEREIGNTY: THE PERSPECTIVE OF ABORIGINAL PEOPLES

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Before I begin, I must, as a member of the Maliseet Nation, welcome you and remind you that the University, the City of Fredericton and indeed all the lands found along the Wolastook (Saint John River) are the traditional territories and homeland of my people the Wolastoq, more commonly referred to as the Maliseet or Saint John River Indians.

The majority of Maliseet lands have not been ceded to the colonial, provincial or federal governments; they have not been acquired through purchase or gift; nor are they the spoils of war. They are lands unto which aboriginal title applies and it is my perspective that they are the hunting grounds reserved to my people by the numerous treaties entered into between the Crown and the Maliseet Nation in the 18th Century. They are lands protected by the various Royal instructions and proclamations of the mid-1700s, most notably the Royal Proclamation of 1763. Today these lands, like my people, are divided by the imposition of federal reserves, the provincial boundaries of New Brunswick and Québec, and the international boundary between Canada and the United States (Maine). For the Mi'kmaq Nation, their traditional territories have been divided by the boundary impositions of Nova Scotia, New Brunswick, Prince Edward Island, Québec and Newfoundland. For the cousins of the Maliseet Nation, the Passamaquoddies, their traditional lands are divided by the international boundary between New Brunswick and Maine. Even though the Supreme Court of Canada recognized them in *R.* v. *Marshall*[1] as signatories to the 1760-1761 Treaties, the Canadian government refuses to recognize the treaty rights of the Passamaquoddies in the southwestern portion of New Brunswick, pretending that they are an American Indian Tribe with no aboriginal or treaty interests in Canada.

The lands of the Maliseet are lands my people used and occupied for millenia and are the traditional homelands of my Nation. They encompass more than the 3,345.6 hectares designated as reserve lands in New Brunswick, the 173.4 hectares

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[1] [1999] 3 S.C.R. 456.

in Québec and the single reservation located in Littleton, Maine, created as a result of the 1980 *Maine Land Claims Agreement*[2] by which the Maliseet Band of Houlton received $900.000.00 to acquire up to 5,000 acres of land.

A discussion of the potential impact of Québec sovereignty on Aboriginal People presents several questions. What have these boundaries meant to Aboriginal Peoples? What would be the impact of a future change in boundaries? What would Québec sovereignty mean to Aboriginal Peoples of the Maritimes region? How have the politics of the French/English divide affected Aboriginal Peoples? These are all important questions for Aboriginal Peoples, not only from the Maritimes but indeed all across the country, whether we live on our traditional lands or reside on reserves. Federally held reserve lands have recently been referred to as "the modern manifestations" of the First Nations that entered into pre-Confederation treaties with the Crown (1760-61). This new political dogma sounds like a disease and is indeed a pathological condition of the minds of those wishing to ignore the truth. It is much like the "superceded by law" concept of the early 1970s,[3] or the persistent attempt to downplay and demean pre-Confederation treaties as simple surrender documents or mere Peace and Friendship Agreements that did not protect or preserve any rights for the Mi'kmaq, Maliseet or Passamaquoddy Peoples. These and similar positions were used for over 100 years to avoid recognition of the treaty rights of my people and continue to be advanced by the federal and provincial governments in the courts.

Surely after numerous court victories over the last 30 years, most notably *Simon*[4] (1985), *Corbiere*[5] (1998) and *Marshall*[6] (1999), the time has come for the governments of this land to abandon attempts at avoiding the inevitable; that is, the recognition of the constitutionally protected rights of the heirs and natural descendants of the parties to pre-Confederation treaties. It is also time to abandon those policies which divide Aboriginal Nations on the basis of whether an individual is status or non-status under the federal *Indian Act*,[7] lives on or off-reserve, or can demonstrate a sufficient historical linkage to one of the local communities that

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[2] Pub. L. No. 96-420, 25 U.S.C.A. § 1721 *et seq.*

[3] DIAND, *Comprehensive Claims Policy* (Ottawa: Minister of Supply and Services Canada, 1973) at 3.

[4] *Simon* v. *The Queen*, [1985] 2 S.C.R. 387.

[5] *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

[6] *Supra* note 1.

[7] R.S.C. 1985, c. I-5.

signed a treaty in 1760-61. This latter policy is now used by government to limit treaty rights to the current reserve communities under the *Indian Act*.

As a former elected leader of the off-reserve Aboriginal community of New Brunswick, I have been directly or indirectly involved with the "Québec Question" for the past 25 years. From 1974-1990 I was President of the New Brunswick Aboriginal Peoples Council and from 1990 until now I have served as an advisor/negotiator to a number of National and provincial aboriginal leaders and organizations. During this period of time, I have had the unique opportunity of participating in the many constitutional discussions and processes. These include the pre-patriation discussions of the late 1970s, the early 1980s constitutional demonstrations, the post-patriation First Ministers' Conferences on Aboriginal matters which took place from 1983 to 1987, the Meech Lake Accord (1987), the Charlottetown Accord (1993) and the Royal Commission on Aboriginal People (1996). As a result, I have gained an appreciation of the fact that the question of Québec sovereignty is inextricably inter-woven with questions surrounding Aboriginal Peoples, aboriginal title, aboriginal rights, treaty rights, aboriginal self-governance and, indeed, the very place of Aboriginal Peoples in Canada and Québec. From my experiences, I have learnt that any discussion about Québec and its place in Canadian society leads to discussion of the rights of Aboriginal Peoples.

For Aboriginal Peoples, whether resident in Québec or in the rest of Canada, the issue of Québec sovereignty has been most contentious, not because we oppose the recognition of its uniqueness and special status but because the Québec issue has hijacked every aboriginal constitutional process to date, or has been used to avoid dealing with Aboriginal People and our issues. It is my perspective that the English-French wars of the 17th and 18th centuries continue to be waged today and, as history has shown, the colonial powers are more than willing to use Aboriginal Peoples to thwart one another, only to abandon us once we have done their bidding. This was the pattern used during the colonial period, not only in this country but indeed in all of the North American continent, and was again apparent in the recent decision of the Supreme Court of Canada in *Reference re Secession of Québec*.[8] The Supreme Court avoided rendering any opinion on the positions presented by Aboriginal interveners who sought clarification as to whether the Aboriginal Peoples of Québec have the right to remain in Canada should Québec decide to secede. One should be mindful that the Aboriginal Peoples of northern Québec, the Inuit and Crees of James Bay, have consistently expressed the opinion, both domestically and

[8] [1998] 2 S.C.R. 217.

internationally, that they wish to remain in Canada should Québec separate. In the 1995 Referendum on Québec sovereignty, the Crees of James Bay voted 95% in favour of remaining part of Canada and the Inuit of Ungava similarly expressed their clear supported the federalist "No" side. For Québec sovereignists, Aboriginal support for the Canadian federation undermines their notion of territorial integrity and is such a contentious issue that former Premier Jacques Parizeau attempted to dismiss it by playing the numbers game when he said, "Please, there are. . . perhaps 30,000 of them. They do not constitute the public good."

Mr. Parizeau and others in the sovereignty movement need to be reminded that the numbers are irrelevant at International Law and that the province's argument of territorial integrity to support its claim to the territory of northern Québec is highly questionable in light of musings made by the Supreme Court in its 1998 opinion in *Reference re Secession of Québec*. In elaborating on the four principles of the Constitution – Federalism, Democracy, Constitutionalism and the Rule of Law, and Respect for Minorities – the Supreme Court said

> . . . the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The "promise" of s. 35, as it was termed in *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of their rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.[9]

As well in responding to Question 2, "Does International Law give the National Assembly, legislature or government of Québec the right to effect the secession of Québec from Canada unilaterally?", the Supreme Court said

> We would not wish to leave this aspect of our answer to Question 2 without acknowledging the importance of the submissions made to us respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession, as well as the appropriate means of defining the boundaries of a seceding Québec with particular regard to the northern lands occupied largely by aboriginal peoples. However, the concern of aboriginal peoples is precipitated by the asserted right of Québec to unilateral secession. In light of our finding that there is no such right applicable to the population of Québec, either under the Constitution of Canada or

[9] *Ibid.* at para. 82.

> at international law, but that on the contrary a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account . . ..[10]

These two statements clearly substantiate my belief that, in the event of any future secession discussions or negotiations following a successful sovereignty referendum, the rest of Canada would attempt to use, as they have in the past, Aboriginal Peoples as fodder in nasty and protracted negotiations on the terms of separation and on the territories that a new sovereign Québec would have under its control. It is also clear that, in the event of such future negotiations, Aboriginal Peoples and their traditional territories would be used by federalists, in Québec and in the rest of Canada, as a negotiation tool to attempt to thwart Québec's territorial demands.

To me, it is clear that the 17th century policy of using Aboriginal Peoples to fight the French/English conflict is still alive and actively being pursued. Since the Supreme Court 1998 *Secession* ruling, interesting events have occurred in respect of the relationship between the Québec government and the Aboriginal Peoples resident in the province. The agreement signed earlier this year between the Crees of James Bay and the Québec government has potential long term implications not only for the Cree people of James Bay but indeed for the rest of Canada as a whole.[11] This new agreement has been termed historic by the Grand Council of the Crees of Québec and has been stated by them to be built upon "a New Vision of Nation to Nation relationship based on the common desire of ensuring a flourishing Québec Nation and a flourishing Cree Nation."[12] It is clear to me that the government of Québec has adopted a new and proactive policy for dealing with the Aboriginal Peoples of northern Québec, a policy which is as much part of their strategy for future attempts at secession as it is for dealing with the Crees. It is a strategy built on a relationship of recognition, cooperation and allying themselves with the First Nations of northern Québec. This new approach will have significant impact, not only for Aboriginal Peoples living in northern Québec, but for Aboriginal People residing in southern Québec and indeed in the rest of Canada. Should this new strategy produce positive results for the James Bay Cree, it undoubtedly will be seen

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

[11] *Agreement Concerning A New Relationship Between Le Gouvernement du Québec and the Crees of Québec*. The parties signed an agreement in principle on 23 October 2001 and a final agreement on 7 February 2002.

[12] Grand Chief T. Moses, "Comments at Signing of the Agreement in Principle, Québec City, October 23, 2001," online: The Grand Council of the Crees Website < http://www.gcc.ca/News/grand_chief_comments_agreement_in_principle.htm > (date accessed: 10 April 2002).

by other northern Québec First Nations (the Inuit, Montagnais, and Naskapis) as the way of the future and would lead these Aboriginal Nations to seek similar agreements with Québec, thereby making additional allies for its future attempts at secession.

For southern based First Nation groups in Québec (the Abenaki, Algonquin, Attikamek, Huron, Mi'kmaq, Maliseet and Mohawk), the benefits of this new policy are less clear because these First Nations' territories are occupied by millions of non-Aboriginal persons, and because these First Nations are small minorities living in a sea of francophones, anglophones and allophones. Additionally, the 150 plus years of *Indian Act* policy regimes have seriously undermined traditional notions of tribal affiliation and descent and replaced them with the assimilationist and limiting provisions of the *Indian Act*, provisions that are often endorsed and used by chiefs and band councils.

Additionally, it is of interest to consider the Liberal Party of Québec's *new* Aboriginal Policy. In the final report of its Special Committee on the Political and Constitutional Future of Québec Society, the Québec Liberal Party calls for a new relationship to be developed with the Aboriginal Nations of Québec. It proposes a number of recommendations ranging from acknowledging the fact that Aboriginal People form full fledged Nations to establishing formal mechanisms to facilitate the conclusion of global or specific political agreements between the parties concerned.[13] Of particular interest for off-reserve Aboriginal persons are recommendations to promote the full involvement of off-reserve persons in aboriginal matters and to submit a reference question to the courts pertaining to the scope of federal and provincial jurisdiction with regard to Métis and off-reserve status and non-status Indians. The jurisdictional question is seen as a major stumbling block preventing action on issues of importance to off-reserve Aboriginal Peoples because the provinces have maintained the position that responsibility is vested in the federal government and the federal government has stated that its responsibility is only applicable to reserves and those living on-reserve. These subjects have been raised on numerous occasions over the past three decades but without action to implement change. Off-reserve groups from Québec and the rest of Canada will call upon the Liberal Party, if elected, to proceed immediately with a court reference and will seek to intervene in yet another process that will pit the French and English solitudes against one another in an never-ending chess match over Aboriginal Peoples issues.

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[13] Québec, *A Project for Québec: Affirmations Autonomy and Leadership* (Montreal: Liberal Party of Québec, 2001) at 21-26 (Chair: B. Pelletier).

I now turn to the question of the potential impact of Québec sovereignty on Aboriginal Peoples, particularly as the traditional territories of Aboriginal Peoples cross the current geopolitical boundaries of Canada and those of several provinces and territories. What have these boundaries meant to Aboriginal Peoples? What impact would Québec sovereignty have on the Aboriginal Peoples of the Maritimes?

For the most part, Aboriginal Peoples hold true to the notion of traditional governance that is all inclusive and extends over our traditional lands and to our knowledge and teachings about our traditional territories. Québec sovereignty and new boundaries would have little impact since it makes no difference whether the suppressor of Aboriginal Peoples and our rights is the Canadian state or a sovereign independent Québec. Indeed, the reality is that neither Canada nor Québec (nor any other province) appears ready to abandon the centuries old policy and practice of dividing Aboriginal Peoples and our traditional territories into provincial or territorial administrative units. We see no departure from that policy in the treatment that our peoples receive today whether they live on-reserve or off, or whether they live in one of the several provinces that have been created over the past 200 plus years. For the Aboriginal Peoples of the Maritimes, a sovereign Québec will mean only that we have one more colonial government to deal with in our attempts to restore traditional governance and ensure access to our birth rights.