

QUÉBEC'S ACCESSION TO SOVEREIGNTY AND ITS IMPACT ON FIRST NATIONS

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The possibility of Québec ceding from Confederation is very real, as exemplified by the overwhelming support Québécois gave to the separatist movement in the recent federal election. As Aboriginal people and Canadians watch and wait for the final solution, anxiety grows within our communities. The uncertainty created by an unstable political environment promotes the deterioration of economies while public displays of intolerance increase. A measure of the acceptability of intolerance is found in the formation of new political parties that are insensitive to the unique needs of smaller societies within a larger society.

It is ironic that the people of Québec, whose ancestors dispossessed Aboriginal people of vast tracts of land and were defeated on the Plains of Abraham in Québec City in 1759 by the English, now argue they somehow acquired a right to self-government within a sovereign nation. It is also ironic that the arguments are legal ones, presented to international bodies far away from the Aboriginal people of Canada and accessible only to recognized nation states. Yet they parallel in many ways the arguments a First Nation would put forward.

Prior to announcing an Aboriginal position on the secession of Québec from Confederation, the First Nations in Québec seek to understand, in a legal sense, the nature of Québec's arguments. Québec's claims concerning its ability to accede to sovereignty are based upon the right to self-determination of people, guaranteed in the *Charter of the United Nations*¹ and the *Declaration of Friendly Relations*.² The *Declaration* sets out three methods of exercising this right to self-determination: the creation of a sovereign and independent state, the free association or integration with an independent state, or the freely determined acquisition of any other political status.³ It is recognized in contemporary international law that the right to self-determination is a right that belongs to all people and not only to colonial people for whose benefit the right was originally recognized.

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¹Art. 1(1), 1(2), 55 and 56.

²*Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA. Res 2625, Annex, 25 U.N. GAOR, Supp. 28 at 121, U.N. Doc A/5217 (1970), as cited in H.M. Kindred et al., eds, *International Law Chiefly as Interpreted and Applied in Canada*, Documentary Supp., 5th ed. (Toronto: Edmond Montgomery Publications Limited, 1993) at 25-31 [hereinafter *Declaration*].

³*Ibid.* at 29-30.

However, the *Declaration* limits the exercise of the right to self-determination by stipulating that it does not authorize "any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples"⁴ In other words, the right to self-determination does not automatically include the right to secede. According to Québec, its accession to independence is justified because the proclamation of the *Constitution Act, 1982*⁵ constituted a negation of Québec's right to self-determination in light of the province's opposition to it, the rejection of the *Meech Lake Accord*,⁶ and the five conditions consequently imposed by Québec for its acceptance of the proclamation of the *Constitution*.

This same reasoning applies to First Nations. The First Nations constitute people under international law, and as such they have the right to self-determination. Although the experts consulted by the Committee to Examine Matters Relating to the Accession of Québec to Sovereignty⁷ were of the opinion that the right to self-determination of Aboriginal people does not include the right to secede, neither is this secession prohibited. This is also the case for Québec, which does not have a greater right to secede under international law. The existence of a state is a question of fact. The experts consulted by the Committee were in agreement in recognizing that Aboriginal people could accede to independence and that the existence of a new state would depend on that state's effectiveness.

It is possible that First Nations in Québec may not opt for independence if Québec accedes to sovereignty. It is therefore necessary to examine the consequences of such a situation on First Nations.

With respect to the territorial boundaries of a Québec state, the principle of the stability of boundaries is firmly protected in international law. A new state may accede to sovereignty with the borders which delimited it before independence. This principle was applied for the first time during the accession to sovereignty of the Spanish Colonies. Today it is considered to be a principle of general application in public international law. However, if this principle can be invoked against the First Nations of Québec in order to counter any initiative

⁴*Ibid.* at 30.

⁵Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act*].

⁶The text of the *Meech Lake Accord* can be found in *Strengthening the Canadian Federation: The Constitution Amendment, 1987* (Ottawa: Government of Canada, 1987) at 10-19.

⁷The Committee to Examine Matters Relating to the Accession of Québec to Sovereignty [hereinafter Committee] was established by the Québec provincial government.

to dismember territory, it can be invoked by Canada, or by First Nations in Canada, as against the sovereignist aspirations of Québec.

In any event, should Québec accede to sovereignty with its present provincial boundaries, the existence and the status of the territories and reserves of the First Nations cannot be affected. Contemporary international law is in rapid evolution with respect to the recognition of rights of indigenous people to their traditional territories and to recuperate lands of which they were dispossessed without their consent.

Another issue of concern to the First Nations in Québec is the effect of sovereignty on the fiduciary obligations of the Crown. According to the Committee, these obligations would disappear simply because they flow from the interpretation of the Canadian *Constitution*.

However, as the Supreme Court of Canada confirmed in *Guerin v. The Queen*,⁸ the fiduciary obligation of the Crown "has its roots in the aboriginal title of Canada's Indians as discussed in *Calder v. Attorney General of B.C. ...*"⁹ Following this reasoning, the Supreme Court of Canada in *R. v. Sparrow*¹⁰ states that: "The relationship between the government and aboriginal is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship..."¹¹ Furthermore, it has been established by the courts that a mere change in sovereignty is not to be presumed to disturb the rights of private owners.

Since Aboriginal title is a right which has an independent legal existence, the cessation of the application of the Canadian *Constitution* in a sovereign Québec would not have the effect of erasing the fiduciary obligation. By virtue of s. 91 of the *Constitution Act*, which confers to the federal Parliament jurisdiction over, "Indians and the lands reserved for Indians", the fiduciary obligation rests principally, but not exclusively, on the federal government. A sovereign Québec would have the same fiduciary obligation to Aboriginal people by virtue of certain legal instruments to which it is a party, such as the James Bay and Northern Québec Agreement.

An issue of particular importance to the Micmac, Malisect and Abenaki First Nations in Québec is the preservation of treaties and their protection in a sovereign Québec. Presently, the treaties between First Nations and the Crown

⁸[1984] 2 S.C.R. 335.

⁹*Ibid.* at 349.

¹⁰[1990] 1 S.C.R. 1075.

¹¹*Ibid.* at 1108.

benefit from constitutional protection under s. 35 of the *Constitution Act*. An accession to sovereignty by Québec would not affect these treaties for the following reasons.

In the case of sovereignty of a state, international law recognizes the doctrine of respect for acquired rights held by private persons in the former state. International law also recognizes that the successor state cannot be bound by decisions which it has not taken; this would be contrary to the fundamental principle of international law, consensualism. To this end, in its National Assembly resolution of March 20, 1985, Québec affirmed that, "it will protect, in its fundamental laws, the rights included in the agreements concluded with the Aboriginal nations of Québec." Thus, the preservation of constitutional protection for treaty rights in agreements concluded with First Nations is a right to which Québec has freely consented.

On the subject of treaties to which both Canada and Québec are parties, such as the James Bay and Northern Québec Agreement, the Committee has affirmed that the National Assembly could decide to put the agreements back into force under Québec law. It must be emphasized that Québec cannot unilaterally decide to maintain these agreements without the consent of the Aboriginal parties, who could choose to compel the maintenance of the role of the federal government. On the other hand, Québec cannot unilaterally decide to rescind the agreements in force. Here again, the doctrine of acquired rights must be applied, even more so because Québec, in becoming a party to these agreements, has obligations which flow from them.

Another aspect of this issue is the obligations and responsibilities of Canada and Québec under international law. The obligations of a sovereign Québec towards First Nations would be those which it has already assumed under agreements with First Nations, as well as those which are currently assumed by the federal Parliament and which would pass to Québec. These include the fiduciary obligation owed to First Nations, the preservation of treaties and the constitutional protection of rights in treaties concluded with First Nations, respect for Aboriginal rights, and respect for the rights and liberties of persons living in the territory, including the right to self determination of First Nations. It should be emphasized that if Québec breached this last-mentioned obligation, First Nations would find themselves in the same position, vis-à-vis Québec, as that which Québec claims to be in with respect to Canada, and which it invokes in order to justify its secessionist aspirations.

It must be remembered that a new state requires the recognition of the international community, and that the latter accords a great deal of importance to the capacity of the new state to respect the fundamental rights of persons living in the territory which is claimed. In Québec, where there are conflicting claims

for self-determination by a number of people, one would expect the international community to require guarantees that the right to self-determination of the Québec people would not be exercised to the detriment of the right to self-determination of First Nations in their territories.

As for Canada, as long as the current situation prevails, that is, as long as Québec remains a Canadian province subject to Canadian constitutional law, the status of First Nations in Québec and in Canada would remain unchanged. The obligations owed by Canada would continue in force. The eventuality of Québec's accession to sovereignty would not put an end to the obligations of the federal government. Before the accession of Québec to sovereignty, the federal government must ensure that the right of First Nations to self-determination is respected. First, Canada must make sure that the desires of First Nations in Québec with respect to their political status are met. This necessarily includes the right of First Nations to choose from belonging to a sovereign Québec, belonging to Canada or taking up the right to sovereignty. Second, if First Nations in Québec choose to associate with Canada, or Québec, the exercise of their right to self-determination includes the right to determine their status within the state, either on the basis of existing rules or on the basis of new accords concluded with authorized representatives.

The right to self-determination is a right of people which cannot be exercised without respecting the will of the people. However, in certain states which proceed according to the will of the majority, the opinion of the majority does not necessarily reflect the will of the population as a whole. Since the 17th century international law has recognized that the inhabitants of a territory which is ceded, annexed, or becomes a new state, have the right to preserve their nationality of origin instead of acquiring the nationality of the successor state. During the 17th century, this right of option was generally subject to Draconian conditions, such as leaving the territory of the successor state after having disposed of one's immovable property, or simply leaving such property behind, as was the fate of the Acadians in the 1700s. However, the conditions for the exercise of this right have been modified over the years. Today, there is nothing which requires emigration in order to exercise the option.

In the event that First Nations do not elect to accede to sovereignty, this right of option would permit First Nations to choose a nationality which would be most advantageous to them and would offer the greatest guarantee of rights. First Nations could choose to conserve their own nationality along with Canadian or Québec nationality, or add to their own nationality both Canadian and Québec nationality.

The Listuguj Mi'gmaq reiterate that Québec has no greater right to sovereignty than Aboriginal people. Their aspiration to establish a separate and independent state is dependent upon the concurrence of First Nations residing in

the territory that Québec is claiming as its own. The Cree Nation that occupies territory in northern Québec is demanding that the Royal Commission on Aboriginal Peoples examine this issue. The Terms of Reference for the Royal Commission direct it to examine and submit recommendations to Parliament on issues affecting Aboriginal people.¹² The accession of Québec would certainly affect Aboriginal people residing in Québec in a very dramatic way. The Listuguj Mi'gmaq echo the demand of the Cree Nation. We do not believe that any political or financial impediment should hinder the Commission's capacity to investigate this matter.

The Grand Council of the Mi'gmaq Nation have made presentations to the United Nations seeking the support and recognition of other nations states for the protection of the human rights of indigenous people, including treaty rights. The assertion and protection of Aboriginal and treaty rights will be central to all further dealings with any government. As set out in the treaties, the Mi'gmaq Nation wants peace, stability and unity throughout the land, but will not sacrifice what is rightfully its own.

Should Québec or Canada take legislative action to facilitate the creation of an independent Québec state without the concurrence of First Nations, the Mi'gmaq Nation will be asked to form a collective resistance to such action. The Listuguj Mi'gmaq reserve the right to undertake any reasonable measure to protect its affiliation with the Mi'gmaq Nation, its traditional lands, and the integrity of its treaties with the nation state of Canada.

¹²Terms of Reference of the Royal Commission on Aboriginal Peoples, P.C. 1991-1597.