National Implications and Potential Effects in Québec

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Introduction

The Supreme Court of Canada judgment in *Delgamuukw* v. *British Columbia*[2] 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 in the different regions of Canada, based on varying 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." 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, the evolution of judicial analysis of their land-related rights is likely to continue. Second, certain key aspects, such as the status of Aboriginal peoples and their rights to self-determination and self-government, have yet to be adequately considered. These additional elements could eventually have a profound effect on the approach and analysis by courts in Canada. Third, new constitutional decisions can bring key insights that cannot be ignored. In particular, the judgment of the Supreme Court of Canada in the *Québec*

Notes will be found on pages 319–344.

Secession Reference[3] *could prove to have a far-reaching influence on various aspects of the Delgamuukw* decision. In particular, the interpretation in the *Delgamuukw* judgment of s. 35(1) of the *Constitution Act, 1982* should not be assessed in isolation. Other constitutional provisions may be critical in arriving at a more complete understanding of the meaning and implications of what the Court has ruled. As the Supreme Court of Canada has confirmed in other cases, the "Constitution is to be read as a unified whole."[4] Fourth, one can anticipate the growing influence of international human rights norms on the interpretation of Aboriginal peoples' rights. Canadian courts have yet to adequately consider these existing and emerging international standards.

In order to assess some of the potential impacts in Québec (or any other region), it is important to not only examine the Supreme Court's decision but also reflect on other developments that may influence constitutional interpretations in the future.

This article will focus on the following:

(1) summarize some key aspects of the judgment, as well as the limitations that the Court devised;

(2) highlight certain aspects of the recent decision of the Supreme Court in the *Secession Reference*, which are likely to affect constitutional interpretation in the future;

(3) examine the bases for Aboriginal peoples' right to self-government, including a human rights analysis;

(4) describe past and present government actions in Québec, so as to determine if they are consistent with the Court's requirements in *Delgamuukw*; and

(5) conclude with some observations and recommendations.

Important aspects of the *Delgamuukw* decision

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

(1) s. 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, duty to enter into and conduct those negotiations in good faith."[5] 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 those concerning land. Regardless of what differences might exist in the var-

ious regions of Canada, this duty should become increasingly significant in assessing the fairness of any negotiations concerning Aboriginal and treaty rights.

(2) in 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." [6] 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.[7]

(3) Aboriginal title "arises from the prior occupation of Canada by aboriginal peoples." [8] As the Court has previously indicated, Aboriginal rights are not dependent on any legislative or executive instrument for their existence.[9]

(4) Aboriginal title "is a collective right to land held by all members of an aboriginal nation." [10] This suggests that Aboriginal peoples, as distinct and organized societies, must have decision-making processes that are integral to the exercise of self-government.[11]

(5) Aboriginal title is a proprietary interest and can compete with other proprietary interests.[12]

(6) Aboriginal title encompasses the right to exclusive use and occupation of the land concerned,[13] including such uses as mineral rights.[14]

(7) 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." [15]

At the same time, the Supreme Court imposes two limitations on the uses of lands subject to Aboriginal title:

(1) a restriction on Aboriginal title is that "the lands pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands";[16] and

(2) "if 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." [17]

As Chief Justice Antonio 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." [18] 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 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).[19] [Emphasis added.]

These limitations to Aboriginal title appear to be unnecessarily paternalistic and inflexible.[20] They may inadvertently contribute to undermining 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 retaining their Aboriginal title or else foregoing certain activities or 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 of 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.[21]

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[22] of the Covenant."[23] This human rights consideration clearly invites governments and courts in Canada to seek a more constructive approach.

Undoubtedly, safeguards against possible destructive uses on Aboriginal peoples' lands should be assured. However, they should be incorporated, through effective checks and balances, in the decision-making of the peoples concerned—not through harmful practices of extinguishment.

In addition, the profound relationship of Aboriginal peoples with their lands and territories is a dynamic one. It 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 reflects the priorities and values of the Aboriginal people concerned. Therefore, it should not be rigidly defined in terms of any single activity that fulfils a vital purpose at any period of time. Further, to limit future uses to those compatible with such activity is taking away an element of decision-making that belongs within the people affected. This limitation would only serve to penalize[24] Aboriginal peoples and would be inconsistent with their right to self-determination.

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

Additional relevant principles in the *Québec Secession Reference*

The *Québec Secession Reference* was decided by the Supreme Court of Canada in 1996, subsequent to its ruling in *Delgamuukw*. It is common knowledge that the *Secession Reference* bears tremendous significance for any proposed secession from Canada. What may be less well known is that the judgment has potentially 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 this *Reference*.[25]

In the *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.' "[26, 27] In particular, there are underlying constitutional principles that "animate the whole of our Constitution."[28] These include federalism, democracy, constitutionalism and the rule of law, and respect for minorities.[29]

The judgment generally includes Aboriginal peoples under the constitutional principle of "protection of minorities."[30] This characterization is likely adopted because Aboriginal peoples are lesser in number[31] than the majority population in Canada or any of its provinces. While Aboriginal peoples generally can avail themselves of minority rights protections,[32] they constitute distinct "peoples" with the right to self-determination and other fundamental collective rights.[33] Evidence that the Court did not intend to imply that Aboriginal peoples are simply "minorities" is found in another recent decision. In *R.* v. *Van der Peet*,[34] Chief Justice Lamer underlined the original occupation of North America by Aboriginal peoples and then stated: "It 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."[35]

Further, in regard to the protection of the Aboriginal and treaty rights of Aboriginal peoples, the Court highlighted in the *Secession Reference* that "the 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."[36] 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.[37] 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 also 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 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.*[38] [Emphasis added.]

In conclusion, the principle of safeguarding of Aboriginal and treaty rights may be invoked as part of the constitutional principle of "protection of minorities" or, more appropriately, as a separate constitutional principle and value. Either way, it is clear that the principle has equal weight with other underlying constitutional principles. As the Court explained in the *Secession Reference*, "[t]hese 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."[39]

All of the underlying constitutional principles elaborated by the Court have the potential to bring new and important interpretations that benefit Aboriginal peoples. To what degree 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,[40] the principles of democracy and self-determination are especially relevant to Aboriginal peoples.

Aboriginal peoples' right to self-government—a key issue to resolve

In regard to the right to self-government, the Supreme Court concluded in *Delgamuukw* that there was insufficient evidence before it to make any judicial determination.[41] Consequently, the Court ruled that this issue should be determined when the case is sent back for a new trial.[42]

Chief Justice Lamer cautioned in passing that "rights to self-government, if they existed, cannot be framed in excessively general terms."[43] However, it makes little sense to attempt to determine contemporary rights of self-government based on the powers that were exercised by a particular people at an earlier period of history.[44] Such an approach would be inappropriate and unfair.[45] It would run counter to the notion of self-determination. As with any self-governing people, the nature and scope of powers exercised by an Aboriginal people in past situations would vary 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 how an Aboriginal people that is considered to be an "organized society"[46] for the purposes of s. 35(1) of the *Constitution Act, 1982* and possessing collective[47] Aboriginal and treaty rights could be determined to have few or no rights of self-government.[48] How else could Aboriginal peoples make collective decisions concerning their land tenure systems or any other matters affecting them and their traditional territory? How would such peoples determine collectively their economic, social, cultural and political development? How would they maintain societal order, in accordance with their own perspectives and values?

To date, there is no "clear and plain" intent[49] that Aboriginal peoples in Canada gave up their pre-existing rights to self-government. Such an outright alienation or destruction of fundamental rights may not even be possible.[50] Further, it is now recognized that it was 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 institutions and processes in favour of colonial-style municipal institutions.

> ... 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 newcomers. This did not occur all at once across the country, but gradually ...[51]

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.*[52] [Emphasis added.]

The right to self-determination, including self-government, is a crucial element to the ongoing survival[53] and development of Aboriginal peoples as distinct peoples. Adequate realization of this right is essential to the healing[54] and strengthening of Aboriginal societies, as well as 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.[55] However, it would be radical in the extreme for any government or court to determine that an Aboriginal people, as a "people," gave up their right to govern themselves and determine freely their economic, social and cultural development.[56]

In *Van der Peet*, Justice Claire L'Heureux-Dubé referred to reserve lands, Aboriginal title lands, and Aboriginal rights lands in raising the issue of Canadian sovereignty:

> The 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.[57]

However, what still has not been adequately addressed is the sovereignty of Aboriginal peoples within the Canadian constitutional context.[58] The Supreme Court of Canada has consistently concluded that Aboriginal peoples in Canada were recognized and treated as sovereign nations in early periods of history.[59] This sovereignty has never been ex-

pressly relinquished.[60] Yet, despite growing support for incorporation of Aboriginal sovereignty in the present constitutional framework,[61] this aspect has not been the subject of adequate examination and acknowledgment 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 be the result.[62]

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.[63] In developing a principled legal framework for the consideration of Aboriginal self-government, it is critical to also examine the underlying constitutional principle of democracy, as well as the right to self-determination. These basic aspects are of central importance to Aboriginal peoples and are therefore addressed below.

Democracy and self-determination in the Canadian constitutional context

In recent times, both the Royal Commission on Aboriginal Peoples and the government of Canada have concluded that section 35(1) of the *Constitution Act, 1982* includes the inherent right of Aboriginal peoples to self-government. 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 government 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.[64] [Emphasis added.]

If principles of democracy and self-determination were also considered, it would be difficult to reach any other conclusion. In the *Secession Reference,*[65] the Supreme Court of Canada underlined throughout the judgment that "democracy" is one of the underlying constitutional principles governing interpretation of the Constitution. 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." [66] These specific factors are directly relevant to the Aboriginal self-government debate.[67] The Court also added in general

terms that "democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government."[68] This link between democracy and self-determination is recognized not only under Canadian constitutional law, but also at international law. As T. Franck explains:

> ... *self-determination is the oldest aspect of the democratic entitlement* ... Self-determination postulates the right of a people in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement.[69]

Since self-determination is intimately tied to the democratic principle, one might query as to whether the right to self-determination is a part of the internal law of Canada. In the *Secession Reference*, the judgment states that "the 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."[70]

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.[71] The term may also overlap with other principles.[72] 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,[73] lead to the conclusion that the Court was describing the right to self-determination as nothing less than customary international law.[74]

Canadian case law 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.[75] This is true, as long as there is no conflict with statutory law or well-established rules of the common law.[76] In this way, the right to self-determination can be said to be a part of the internal law of Canada.[77] This has far-reaching positive implications that go beyond the Québec secession context, for any Aboriginal people who demonstrates it is a "people"[78] under international law.

Historically, non-Aboriginal governments in Canada have failed to recognize and respect the right of Aboriginal peoples to self-determination. However, in October 1996, the government of Canada formally declared in United Nations fora in Geneva that Canada is "legally and morally committed to the observance and protection of this right [of self-determination]" under international law in relation to indigenous and non-indigenous peoples.[79] This public declaration

by Canada may be binding under international law, in accordance with the principle of good faith.[80]

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

> ... the 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.*[81] [Emphasis added.]

Just as the *Canadian Charter of Rights and Freedoms* can provide avenues for the enforcement of customary international law within Canada,[82] so can the recognition and affirmation of Aboriginal and treaty rights in s. 35 of the *Constitution Act, 1982* do the same. This is especially true in relation to the exercise within Canada of the right of Aboriginal peoples to self-determination, as a customary law principle. As K. Roach provides: "In devising remedies, courts should be sensitive to the purposes of aboriginal rights, including the role of treaty-making and self-determination, while recognizing that they have a duty to enforce aboriginal rights." [83]

In the *Secession Reference*, the Supreme Court of Canada stated that "the 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." [84] Aboriginal peoples address to a vast degree 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 avenues for recognition and enforcement of their right to self-determination.[85] As R. 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 ..." [86]

In responding to the specific questions[87] posed in the *Secession Reference*, the Supreme Court did not deem it necessary to elaborate on whether Aboriginal peoples in Québec constitute distinct "peoples" with the right to self-determination. At the same time, the Court gave a glimpse of its views. First, it indicated that the characteristics of a "people" include a common language and culture.[88] Second, in

responding directly to the question concerning the international law right to self-determination, 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 Québec with particular regard to the northern lands occupied largely by aboriginal peoples." [89] 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, Chief Justice Lamer effectively recognized how 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." [90]

The importance to Aboriginal peoples of the right to self-determination, including the right to self-government, is hardly surprising. As H. Gros Espiell explains: "... human rights can only exist truly and fully when self-determination also exists. Such is the fundamental importance of self-determination as a *human right* and as a *prerequisite for the enjoyment of all the other rights and freedoms*." [91] [Emphasis added.]

Moreover, countries such as Canada have a positive duty to recognize and respect the right to self-determination. In this regard, both international human rights covenants specifically provide that "State Parties to the present Covenant ... shall promote the realization of a right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations." [92]

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.[93] 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.[94]

Currently, it is essential that the constitutional right of Aboriginal peoples to self-government be recognized.[95] This conclusion becomes all the more compelling when the human right to self-determination and the democratic principle are applied without discrimination[96] to Aboriginal peoples. In *Delgamuukw,* the Supreme Court has characterized the stewardship responsibility of Aboriginal peoples over their

lands in terms of both present and future generations.[97] The fulfilment of this responsibility would hardly be feasible, in the absence of adequate self-government powers.

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, they claim that any such pre-existing Aboriginal right has been extinguished. These positions are exceedingly difficult to sustain, particularly if they are considered in a human rights context.

As an examination of contemporary international instruments would suggest,[98] basic indigenous rights are human rights.[99] Those international instruments that explicitly address the fundamental rights of indigenous peoples, such as the draft *U.N. Declaration on the Rights of Indigenous Peoples*, complement existing human rights standards in the *International Bill of Rights*.[100] They do so, by providing the social, economic, cultural, political and historical context relating to indigenous peoples.[101] In particular, the right to self-government constitutes a vital political aspect of the right to self-determination, which itself is a human right.[102] The Supreme Court of Canada has confirmed in the *Secession Reference* that the right to self-determination "has developed largely as a human right." [103] In the future, it would 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.[104]

It is important to note that human rights have been declared repeatedly by the international community to be inalienable.[105] Clearly, they are not intended to be extinguished or otherwise destroyed.[106] Human rights instruments generally include provisions for some limitation or derogation,[107] but not the destruction of fundamental rights.[108]

Both of the International Covenants make clear that nothing in the Covenants can be construed as permitting the "destruction" of human rights.[109] Further, any "limitations" to the rights in the *International Covenant on Economic, Social and Cultural Rights* must be "compatible with the nature of the rights concerned." [110] In the *International Covenant on Civil and Political Rights*, 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." [111] However, any such derogations must be exercised without discrimination and are contemplated

to be temporary. As A. Kiss explains, "limitations, like derogations, are exceptional, to be construed and applied strictly, and not so as to swallow or vitiate the right itself." [112]

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 them exercise of their right of self-determination. This point has recently been underlined by the U.N. Human Rights Committee in its concluding recommendations to Canada.[113] Further, the Committee adds:

> 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 (art. 1, para.2).[114]

Not only has the Human Rights Committee applied the right to self-determination to Aboriginal peoples in Canada, but also it has highlighted the inextricable link between Aboriginal self-government and the adequacy of Aboriginal lands and resources. Moreover, in 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." [115] 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.

As outlined above, there is no specific authority to extinguish or otherwise destroy human rights. Rather, in regard to Aboriginal and treaty rights, the Canadian Constitution expressly requires the recognition and affirmation of these fundamental rights.[116] Also, the Crown's fiduciary responsibility in relation to Aboriginal peoples 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." [117]

Recently, the U.N. Committee on Economic, Social and Cultural Rights has highlighted the human rights of Aboriginal peoples, criti-

cized 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 as follows:

> The 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.[118]

Based on all of the above, it can be concluded that Canada's obligations to respect human rights require that Aboriginal rights be explicit recognized and respected in government policy and practice. It is unjustifiable for federal and provincial governments to insist upon 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 has been extinguished or is 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,[119] includes the "living tree" doctrine. 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." [120] This doctrine has been consistently reiterated by the Supreme Court of Canada. It is clearly applicable to the principles underlying Canada's Constitution, including democracy and the protection of Aboriginal and treaty rights.

As the Supreme Court stipulated in the *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* ..." [121] Moreover, in *A.-G. Canada* v. *Mossop*, the Court has indicated that this doctrine "is particularly well-suited to human rights legislation" [122] and that human rights considerations "must be examined in the context of

contemporary values."[123] Further, the Court in *Hunter* v. *Southam Inc.* has explained how Canada's Constitution must be forward-looking—always capable of growth and development even in ways that may originally have 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 considerations in mind.[124]

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 peoples, in order to determine their contemporary rights and powers.[125] While it remains important to adopt a contextual approach,[126] it is imperative to give increased weight to human rights and the underlying constitutional principles highlighted recently 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.

Considering *Delgamuukw* in the Québec context

In considering the principles and rulings in *Delgamuukw* in the Québec context, a few observations can be made. First, many policies and actions of the Québec government in relation to Aboriginal peoples were implemented a number of years before the Supreme Court's decision. Therefore, Québec may be reluctant to revisit past actions, regardless of their 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, s a means of government control, continues to breed distrust among Aboriginal peoples.

Third, government policies and strategies in Québec are determined to a large degree by its political agenda towards independence. Regardless of human rights considerations, Aboriginal peoples' status and rights are recognized solely in a manner that may not affect Québec's secessionist aspirations.

As in other regions of Canada, positive government initiatives do occur from time to time in Québec in relation to Aboriginal peoples. Yet, when one considers the wide range of urgent measures recom-

mended by the Royal Commission on Aboriginal Peoples,[127] government efforts in Québec (like other regions of Canada) must be considered as lacking in many important respects.[128]

Any "advances" still tend to take place in a legal and political framework that reinforces ultimate domination and control by the Québec government and National Assembly. This continuing government trend to unilaterally impose an overall framework and conditions for negotiations is self-serving and colonial in nature. It violates the duty of governments to conduct negotiations in good faith.[129] Rather than encourage recognition of and respect for Aboriginal and treaty rights, contemporary government policies in Québec seek their eventual demise or disappearance. Examples of such acts are evidenced by the following.

(1) Denial of Cree and Inuit Aboriginal rights during land claims negotiations.

Under the *Québec Boundaries Extension Act*s of 1912, the Québec government had a constitutional obligation to recognize the territorial rights of Aboriginal peoples in northern Québec, while negotiating an agreement with the peoples concerned.[130] Yet, during the whole period of land claims negotiations, the Québec government refused to recognize that the Crees and 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 of governments and Crown corporations has been recognized by the Supreme Court of Canada.[131] It was only after the James Bay and Northern Québec Agreement (JBNQA)[132] was signed by the parties in 1975 that the Québec government admitted that the Crees and Inuit had fundamental rights[133] and that it had constitutional obligations[134] under the *Québec Boundaries Extension Acts* of 1912.

(2) Unfair land selection criteria imposed.

The Cree and Inuit parties in the JBNQA negotiations were denied by Québec the right to select their own traditional lands for harvesting purposes,[135] if the lands selected had any known mineral potential.[136] As recounted by the Grand Council of the Crees:

> 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." [137] 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.[138]

(3) Purported extinguishment of Aboriginal rights.[139]

Although a number of Aboriginal peoples were not party to the James Bay and Northern Québec Agreement,[140] their rights in and to the territory in northern Québec were purportedly extinguished by federal legislation approving and declaring valid the Agreement.[141] This third party "extinguishment" was insisted upon by the Québec government.[142] It is of doubtful constitutionality[143] and has been repeatedly denounced by the Commission des droits de la personne du Québec.[144] The effect of such actions by the government were described by the Opposition Party (Parti Québécois) at that time, as "extremely draconian."[145] Nevertheless, the government voted to defeat a motion to hear the views of Aboriginal third parties on the issue of extinguishment.[146] In this way, the Québec government acted in a manner that gravely violated 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 Québec has indicated to the Royal Commission on Aboriginal Peoples that extinguishment, as a necessary pre-condition to any negotiation of territorial rights, is "unacceptable."[147] Extinguishment of indigenous peoples' rights has also been described as "another relic of colonialism."[148] While the *Programme du Parti Québécois* has for many years indicated that agreements will be concluded without extinguishment of the rights of Aboriginal peoples,[149] the Parti Québécois government has never acted on this commitment and still insists on extinguishment.

(4) Imposition of the 1985 National Assembly Resolution on Aboriginal Rights.[150]

In March 1985, the National Assembly adopted a Resolution on Aboriginal peoples' fundamental status and rights despite the express objections of the peoples concerned.[151] The government unilaterally terminated negotiations on the wording of the Resolution, when Aboriginal leaders would not agree to Québec's proposed wording.[152] It would appear that a principal reason for imposing this Resolution on Aboriginal peoples was to purportedly demonstrate to the international community and Canadians how well the Québec government treats the first peoples in Québec.[153]

Notwithstanding the unilateral nature of the 1985 National Assembly Resolution, it has now been made the basis for Québec's 1998 policy on Aboriginal affairs.[154] Also, despite the rulings of the Supreme

Court of Canada,[155] the 1985 Resolution does not recognize that Aboriginal peoples have inherent or pre-existing rights. Their rights would be recognized only after an agreement has been reached on them with Québec. These government strategies show little respect for Aboriginal peoples and their fundamental rights.

(5) Terra nullius and indigenous peoples' rights

In June 1996, in *R.* v. *Côté*,[156] the Québec 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.[157] Consequently, the government alleged that s. 35 of the *Constitution Act, 1982* had no application in Québec in relation to the protection of Aboriginal rights.

To support its argument, the government urged the Supreme Court of Canada to apply the doctrine of *terra nullius*[158] *and attempted unsuccessfully to distinguish the Mabo* case[159] in Australia. This latter case had condemned the use of this doctrine against indigenous peoples as being racially discriminatory and colonial.[160] In response to this dispossession strategy, the Chiefs of the Assembly of First Nations of Québec and Labrador have unanimously condemned the discriminatory[161] positions taken in *Côté* by the Bouchard government.[162]

(6) Denial of Aboriginal peoples' status as distinct "peoples" [163]

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." [164] Moreover, for purposes of self-determination and Québec sovereignty, the "Québec people" is simply declared to include all of its citizens.[165] This suggests that there exists only a single people in Québec. This PQ position is erroneous and undemocratic. In particular, it invalidly strips Aboriginal peoples of their right to self-identification[166] in the self-determination context.

In regard to Aboriginal peoples in Québec, 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 Québec are likely to constitute "a people" for purposes of self-determination,[167] there is no Canadian or international law principle that would compel Aboriginal peoples against their will to identify as one people with Quebecers.[168]

(7) Denial of Aboriginal peoples' right to self-determination.

As long as Aboriginal peoples in Québec choose to self-identify as distinct peoples, it cannot be said that there is a single "Québec people" in

the province with the right to self-determination.[169] The Bouchard 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 to self-determination.[170] This position is as unjust[171] as it is futile. For purposes of self-determination, the term "peoples" includes "nations." This view is supported not only by international jurists,[172] but also by others in the context of Canadian domestic law.[173] 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.[174]

(8) Forcible inclusion of Aboriginal peoples in a sovereign Québec.

The Québec government is of the view that it can include Aboriginal peoples and their traditional territories in any future Québec "state," without the consent[175] of the peoples concerned.[176] Despite its lack of legitimacy or validity,[177] this extreme and destabilizing strategy has never been repudiated by the government.

In relation to existing treaties, such as the James Bay and Northern Québec Agreement (JBNQA), the Québec 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 Québec. However, 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.[178] In regard to JBNQA, such unilateral alteration would constitute a fundamental breach,[179] contrary to its express terms and conditions as well as its spirit and intent.[180]

(9) Undermining future treaty making by Aboriginal peoples in Québec.

Québec's 1998 policy on Aboriginal affairs proposes the "recognition of responsibilities according to a so-called contractual jurisdiction concept."[181] Under this concept, agreements signed in the future "would not be covered by constitutional protection" and solely the "provisions relating to land aspects of a comprehensive land claim agreement will receive constitutional protection."[182] Thus, the "contractual jurisdiction" approach would serve to severely limit the treaty-making capacity of Aboriginal peoples in Québec, both now and in the future.

The "contractual jurisdiction" approach may also seek to seriously restrict the application of s. 35 of the *Constitution Act, 1982*, which confers constitutional protection on treaty rights of First Nations. Presently, section 35 does not limit such protection to treaty rights relating to

land aspects. Also, Québec's new approach appears to contradict the 1985 National Assembly Resolution on Aboriginal Rights.[183] The strategy to move away from signing treaties with Aboriginal peoples appears to be a part of the official program of the Parti Québécois.[184]

(10) Self-serving principles in Québec's new Aboriginal policy.

In its 1998 policy on Aboriginal affairs, the Québec government imposes certain " fundamental reference points"[185] that entail significant constraints for First Nations. The reference points specified are: "territorial integrity," "sovereignty of the National Assembly," and "legislative and regulatory effectivity." Although the Crown is prohibited from "sharp dealing,"[186] no explanation is offered in Québec's policy as to what each of these terms would mean.

The policy paper repeatedly emphasizes the notion of "territorial integrity."[187] despite its inappropriateness in a domestic context.[188] "Territorial integrity," as used by the Québec government, could have extensive implications in international law. To date, the Québec government has invoked this principle to suggest that Aboriginal peoples and their territories would be forcibly included in an independent Québec.[189] Such matters go far beyond the stated objectives of Québec's 1998 policy.[190]

Similarly, for the Québec 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. In international law, "effectivity" usually means "effective control," which suggests that ultimate control must rest with the National Assembly.[191] Also, in the context of Québec unilateral secession, "effective control" is what Québec authorities would need to demonstrate in seeking international recognition as an independent state.[192]

In summary, the Québec government has shown little respect to date for the fundamental rights of Aboriginal peoples. One-sided principles have been imposed by the government to govern future negotiations. Any "progress" in Aboriginal peoples' issues still takes place within an overall unilateral framework that seriously undermines Aboriginal peoples' status and rights. In this context, the duty of Québec to enter into and conduct negotiations in good faith is not being respected. Although Québec's 1998 policy has been unanimously rejected by First Nations in the province,[193] the government has shown no signs of revising its document in conjunction with the peoples directly affected.

It is difficult to predict whether a more positive course will be adopted by the Québec government in the short term. Although some agreements will likely continue to be signed with Aboriginal peoples,

Québec'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 to self-determination. This increased recognition should have a most positive and profound effect on the dynamic of Aboriginal-Crown relations. Therefore, perhaps before the next referendum on Québec secession, the government may have little choice but to devise a more constructive approach.[194]

Conclusions

The judgment of the Supreme Court of Canada in *Delgamuukw* may be viewed in diverse ways as a positive and significant contribution to our understanding of Aboriginal title.[195] In some aspects, the Court's decision provides a new benchmark. However, it should not be seen as a complete or final pronouncement on this essential matter. 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. 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 excessive focus on Aboriginal activities in early periods of history.

Further, notions of surrender or extinguishment of Aboriginal title should be replaced by new alternatives. As recommended by the U.N. Human Rights Committee, approaches are needed that are compatible with Aboriginal peoples' right to self-determination. In addition, judicial interpretation of Aboriginal land title and rights should not be artificially separated from Aboriginal jurisdiction. To date, Canadian courts have not yet addressed in any comprehensive way the right of Aboriginal peoples to self-government.

Aboriginal peoples possess an 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[196] consideration.

Clearly, the preferable route for resolving land, resource and self-government issues is, in most situations, through negotiations conducted in good faith.[197] However, carefully formulated litigation and ef-

fective judicial recourses are at times a necessary part of the overall process.[198] As stated in the *Report of the Royal Commission on Aboriginal Peoples*: "The courts can be only one part of a larger political process of negotiation and reconciliation ..." [199] And the Report adds:

> Because 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." [200] 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.[201]

The need for judicial remedies that enhance the negotiating positions of Aboriginal peoples has been illustrated repeatedly throughout Canada's history. Through constructive judicial guidance, unilateral or self-serving actions by non-Aboriginal governments against Aboriginal peoples would more likely be discarded. Instead, compliance with contemporary and emerging standards may well be the result.

There is little doubt that the process of recognizing and reconciling Aboriginal peoples' status and rights will continue into 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.[202]

Without these 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 Québec Agreement[203] 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 for the past twenty-odd years,[204] in order to defend their rights and ensure their just entitlements.[205] Clearly, purported extinguishments or surrenders of Aboriginal rights provide no assurance whatsoever that the result 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 would seem crucial for any future negotiations concerning fundamental rights is the prior establishment of a principled framework.[206] This framework must be consistent with Aboriginal peoples' values, genuine democracy and relevant international norms.[207] This should be accomplished collaboratively by the parties or, as a last resort, by the courts.[208]

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 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."[209]

Only then will we have the collective will to realize a critical precept underlined by Chief Justice Lamer in *Van der Peet* and reiterated in *Delgamuukw*. That is, 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,[210] place weight on each."[211] It is 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 component towards completing the "work in progress" that we find in *Delgamuukw*.

Notes

1 Member of the Québec and Ontario bars.

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

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

4 *Reference re Remuneration of Judges*, [1997] 3 S.C.R. 3 at 83, para. 107, per Lamer C.J.C.; *Reference re Secession of Québec, supra*, note 3, 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."

5 *Delgamuukw v. British Columbia*, note 2, *supra*, para. 186. Similarly, see *Nunavik Inuit v. Canada (Minister of Canadian Heritage)*, [1998] 4 C.N.L.R. 68 (F.C.T.D.), at 99, and at 101-102: "Where a national park is established, the impact will occur on 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.), where 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 Corporation*, [1999] 3 C.N.L.R., 8 at para. 26.

6 *Delgamuukw v. British Columbia, supra*, note 2, para. 87.

7 *Id*.

8 *Id*., paras. 114 & 126.

9 *Guerin v. The Queen*, [1984] 6 W.W.R. 481 at 497, 13 D.L.R. (4th) 321 at 335, per Dickson J.; *Calder v. A.G. British Columbia*, [1973] S.C.R. 313 at 390, per Hall J.; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 30 (Lamer C.J.C.); *Delgamuukw v. British Columbia, supra*, note 2, para. 134.

10 Delgamuukw v. British Columbia, supra, note 2, para. 115.

11 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). See also B. Slattery, "The Definition and Proof of Aboriginal Title" in Pacific Business & Law Institute, ed., *The Supreme Court of Canada decision in Delgamuukw*, conference materials (Vancouver, B.C.: 1998), 3.1 at 3.6: "... since 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..."; and L. Mandell, "The Delgamuukw Decision" in Pacific Business & Law Institute, ed., *The Supreme Court of Canada decision in Delgamuukw*, supra, 10.1 at 10.7-10.8.

12 *Delgamuukw v. British Columbia, supra*, note 2, para. 113.

13 *Id*., para. 117.

14 *Id*., para. 122.

15 *Id*., paras. 117 & 124. At para. 123 of the judgment, Lamer C.J.C. lists some of the critical literature supporting this point.

16 *Id.*, para. 125.
17 *Id.*, para. 131.
18 *Id.*, para. 126.
19 *Id.*, para. 128.
20 See, for example, R. 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 principle of equality).
21 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.
22 *International Covenant on Civil and Political Rights* (1966), G.A. Res 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316, Can. T.S. 1976 No. 47 (1966). Adopted by the U.N. General Assembly on December 16, 1966 and entered into force March 23, 1976, art. 1, para 1: "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."
23 See "Concluding observations of the Human Rights Committee" in United Nations Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant*, 7 April 1999, CCPR/C/79/ Add. 105, para. 8.
24 In *Delgamuukw v. British Columbia, supra*, note 2, 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.
25 Since the decision in the *Québec Secession Reference* was rendered by the Supreme Court in August 1998, the underlying constitutional principles highlighted by the Court have been argued in other cases in a non-secession contex't. See, for example, *Samson et al. v. Attorney General of Canada et al.*, (1998) 155 F.T.R. 137, 165 D.L.R. (4th) 342 at para. 7 (principle of democracy unsuccessfully invoked in seeking to restrain Senate appointment by Governor General of Canada); and *Hogan et al. v. Attorney General of Newfoundland et al.*, Supreme Court, Newfoundland, 1997 St. J. No. 2526, decision of Riche J. filed January 14, 1999, QuickLaw version [1999] N.J. No. 5 (principles of protection of minority rights and rule of law unsuccessfully invoked in claiming invalidity of constitutional amendment concerning denominational rights).
26 *Reference re Remuneration of Judges of the Provincial Court of P.E.I., supra*, note 4, para. 92.

27 *Reference re Secession of Québec, supra,* note 3, para. 32.

28 *Id.*, para. 148. See also *Reference re Resolution to Amend the Constitution,* [1981] 1 S.C.R. 753, at 874, 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."

29 *Reference re Secession of Québec, supra,* note 3, para. 32. See also R. Howse and A. Malkin, *Canadians are a Sovereign People: How the Supreme Court Should Approach the Reference on Québec Secession,* (1997) 76 Can. Bar Rev. 186, at 210: "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.*" [Emphasis added.]

30 *Reference re Secession of Québec, supra,* note 3, para. 82.

31 See also I. Schulte-Tenckhoff, *Reassessing the Paradigm of Domestication: The Problematic of Indigenous Treaties,* (1998) 4 Rev. of Const'l Studies 239, at 284: "... 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*." [Emphasis added.]

32 The U.N. Human Rights Committee considers complaints of indigenous peoples, among others, in relation to art. 27 of the *International Covenant on Civil and Political Rights* (minority rights provision). See, for example, *Ominayak v. Canada,* U.N. Doc. CCPR/C/38/D/167/1984 (Human Rights Committee decision, March 28, 1990) ("historical inequities ... and 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,* U.N. GAOR, 36th Sess., Supp. No. 40, at 166, U.N. Doc. A/36/40 (1981); and in (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 *International Covenant on Civil and Political Rights*).

33 S. J. Anaya, *Indigenous Peoples in International Law* (Oxford/New York: Oxford University Press, 1996), at 100: "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 intersect substantially in related concerns of nondiscrimination and cultural integrity." [Emphasis added.]

See also J. Duursma, *Fragmentation and the International Relations of Micro-States [:] Self-Determination and Statehood* (Cambridge: Cambridge University Press, 1996), at 38: "One of the main differences between a

minority and a people is the fact that in the definition of minorities no 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 longer 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*, U.N. Doc. E/CN.4/Sub.2/404/Rev.1 (1981) at 41, para. 279.

34 *R. v. Van der Peet, supra*, note 9.

35 *Id.*, at para. 30.

36 *Reference re Secession of Québec, supra*, note 3, para. 82 [emphasis added].

37 This point is made in C.-A. Sheppard, "The Cree Intervention in the Canadian Supreme Court Reference on Québec Secession: A Subjective Assessment," (1999) 23 vermont L. Rev. 845 at 856: "It may not be too optimistic to consider that there has now 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*." [Emphasis added.]

38 P. Russell, "The Supreme Court Ruling, A Lesson in Democracy," *Cité Libre*, English ed., vol. 26, no. 4, October-November, 1998, 29, at 30.

39 *Reference re Secession of Québec, supra*, note 3, para. 49. See also para. 91.

40 See sub-head "Democracy and self-determination in the Canadian constitutional context," *infra*.

41 *Delgamuukw v. British Columbia, supra*, note 2, paras. 170 per Lamer C.J.C. and 205 per La Forest J.

42 *Id.*, at para. 171.

43 *Id.*, at para. 170. See, generally, *R. v. Pamajewon*, [1996] 2 S.C.R. 821 (S.C.C.); B. 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).

44 *Cf. R. v. Pamajewon, supra*, note 43, 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 *R. v. Van der Peet, supra*, note 9, 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 v. British Columbia, supra*, note 2, 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" (para. 117). 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*.

45 Fundamental rights can take on new meanings over time. In the human rights context, see *A.-G. Canada v. Mossop*, [1993] 1 S.C.R. 554, at 621, per L'Heureux-Dubé J: "... concepts 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."

46 *Calder v. A.G. British Columbia*, [1973] S.C.R. 313, at 328: "... the fact 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 v. British Columbia*, note 2, *supra*, para. 189.

47 *Delgamuukw v. British Columbia*, note 2, *supra*, para. 115 per 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."

48 Legal literature in favour of recognition of Aboriginal rights to self-government includes: K. McNeil, *Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty, supra*, note 11; P. Hogg & M.E. Turpel, *Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues*, (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; 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; P. Macklem, *First Nations Self-Government and the Borders of the Canadian Legal Imagination*, (1991), 36 McGill L. R. 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.

49 "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 v. British Columbia*, note 2, *supra*, para. 180, per Lamer C.J.

50 See text accompanying note 105, infra. See also W. Moss, "Inuit Perspectives on Treaty Rights and Governance" in Royal Commission on Aborig-

inal 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 extinguishment."

51 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 1, at 139-140.

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

53 C. Brölmann & M. Zieck, "Indigenous Peoples" in C. Brölmann, R. Lefeber, M. Zieck, (eds.), *Peoples and Minorities in International Law* (Boston: Kluwer Academic Publishers, 1993) 187, at 219: "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."

54 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, supra,* note 51, vol. 3, at 5: "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 pp. 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." And at 13: "The health status of Aboriginal peoples in Canada is a measurable outcome of social, biological, economical, political, educational and environmental factors."

55 P. Hogg & M.E. Turpel, *Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues, supra,* note 48, at 211 (agreements on self-government do not create the right, but settle mutually acceptable rules to govern the relationship between three orders of government).

56 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, supra,* note 51, vol. 1, 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.

57 *R. v. Van der Peet, supra,* note 9, para. 117.

58 See, for example, P. Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, (1993) 45 Stanford L. Rev. 1311, at 1367: "*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." See also Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, supra*, note 51, vol. 5, at 162: "[Aboriginal, provincial and federal governments] share the sovereign powers of Canada as a whole, powers that represent a pooling of existing sovereignties."

See, generally, B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, (1991) 29 Osgoode Hall L.J. 681; 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, c. 4 ("Contending Sovereignties"); A. Bissonnette, *Le droit à l'autonomie gouvernementale des peuples autochtones: un phénix qui renaîtra de ses cendres*, (1993) 24 Revue générale de droit 5 at 22.

59 *R. v. Van der Peet, supra*, note 9, para. 37 (Lamer C.J.C.), para. 106 (L'Heureux-Dubé J.); *R. v. Côté*, [1996] 4 C.N.L.R. 26, para. 48 (Lamer C.J.C.); *R. v. Sioui*, [1990], 1 S.C.R. 1025, at 1052-1053.

See also A. Lajoie, et al., *Le statut juridique des peuples autochtones au Québec et le pluralisme* (Cowansville, Québec: Les Éditions 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).

60 See, for example, 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* (Montréal: Les Éditions du Boréal, 1997), at 266; R. Dupuis & K. McNeil, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec* (Ottawa: Minister of Supply and Services Canada, 1995), vol. 2, Domestic Dimensions, at 50.

61 See also P. Hogg & M.E. Turpel, *Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues, supra*, note 48; K. 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).

62 B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, (1991) 29 Osgoode Hall L.J. 681, at 690: "... 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." See also P. Russell, *High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence*, (1998) 61 Sask. L. Rev. 247, at 275-276 (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.

63 P. Russell, *Aboriginal Nationalism and Québec Nationalism: Reconciliation Through Fourth World Decolonization*, (1997) 8:4 Constitutional Forum 110

at 116: "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"; R. Whitaker, "Aboriginal Self-Determination and Self-Government: Sovereignty by Inclusion," *Canada Watch* 5 (June/July 1997, no. 5) 69, at 73: "Sovereignty, Aboriginal voices are telling us, is not an absolute, not a zero-sum of authority; it is something that can, and should, be shared."

See also Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, supra,* note 51, vol. 2(1), 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* (B.C./Montreal: Oolichan Books/Institute for Research on Public Policy, 1991) 171 at 173: "... we have already a divided sovereignty in Canada. If we can put in place a process that would allow for peaceful negotiations, we could 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."

64 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, supra,* note 51, vol. 5, at 1-2.

See also Minister of 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* (Ottawa: Public Works and Government Services, 1995); P. Hogg & M.E. Turpel, *Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues, supra,* note 48, at 211; P. Hogg, *Constitutional Law of Canada,* Loose-leaf Edition (Toronto: Carswell, 1997), vol. 1, at 27-46, n. 166; P. Monahan, *Constitutional Law* (Concord, Ontario: Irwin Law, 1997), at 36. Cf. P. Thibault, *Le rapport Dussault-Erasmus et le droit à l'autonomie gouvernementale des peuples autochtones,* (1998) 9 N.J.C.L. 159, at 221-222.

65 *Reference re Secession of Québec, supra,* note 3.

66 *Id*. para. 64. The Court cited *R. v. Oakes,* [1986] 1 S.C.R. 103, at 136 in this regard.

67 For a brief summary of other aspects of the judgment in the *Québec Secession Reference* that are relevant to Aboriginal peoples, see P. Joffe, "Québec's sovereignty project and aboriginal rights" in *Canada Watch,* January-February 1999, nos. 1-2, 6.

68 *Id.*, para. 64.

69 T. Franck, *The Emerging Right to Democratic Governance,* (1992) 86 Am. J. Int'l L. 46 at 52.

70 *Reference re Secession of Québec, supra,* note 3, para. 114.

71 See J.-M. Arbour, *Droit international public,* 3rd ed. (Cowansville, Québec: Éditions 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 Nguyen Quoc Dinh, P. Dallier & A. Pellet, *Droit international public,* 5th ed. (Paris: L.G.D.J., 1994), at 341.

See also A. Bayefsky, *International Human Rights Law [:] Use in Canadian Charter of Rights Litigation* (Toronto: Butterworths, 1992), 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 practice, and (2) a determination that states conceive themselves as acting under a legal obligation."

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

73 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, 1994), 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 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": see I. Brownlie, *Principles of Public International Law,* 5th ed. (Oxford: Clarendon Press, 1998) 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.

74 J. Duursma, *Fragmentation and the International Relations of Micro-States [:] Self-Determination and Statehood, supra,* note 33, 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."

See also S.J. Anaya, *Indigenous Rights Norms in Contemporary International Law,* (1991) 8 Arizona J. of Int'l & Comp. Law 1 at 29-30: "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)."

75 A. Bayefsky, *International Human Rights Law [:] Use in Canadian Charter of Rights Litigation, supra,* note 71, at 5-10.

76 *Id.*, at 5.

77 These positions were argued by the Intervener Grand Council of the Crees in the *Secession Reference*. See *Factum of the Intervener Grand Council of the Crees (Eeyou Estchee)*, para. 76; *Factum of the Intervener Grand Council of the Crees (Eeyou Estchee)—Reply to Factum of the Amicus Curiae,* para. 83. (Factums submitted in this *Reference* are available on QuickLaw, database SCQR.)

78 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 "peoples" 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 existence as a people) have been identified. See generally Secretariat of the Int'l Commission of Jurists, *East Pakistan Staff Study,* (1972) 8 Int'l Comm. of J. 23.

79 *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 U.N. Commission on Human Rights, February 4, 1997* (statement on art. 3, right to self-determination, on October 31, 1996).

80 *Nuclear Tests (Australia v. France)*, [1974] I.C.J. Rep. 253 at 268, 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." And at 267, 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."

This issue is discussed in P. Joffe, *International Practice, Québec Secession and Indigenous Peoples: The Imperative for Fairness, Non-discrimination and Respect for Human Rights,* (1997) 8.1 N.J.C.L. 97, at 99-101.

81 *Reply By the Attorney General of Canada to Questions Posed By the Supreme Court of Canada,* para. 8, available on QuickLaw, database SCQR.

82 G. La Forest, *The Expanding Role of the Supreme Court of Canada in International Law Issues,* (1996) 34 Can. Yearbook Int'l L. 89 at 97.

83 K. Roach, *Constitutional Remedies in Canada* (Aurora, Ontario: Canada Law Book, 1996), 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."

84 *Reference re Secession of Québec, supra,* note 3, para. 126.

85 See also 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 ltée, 1998) 345, at 349.

86 R. McCorquodale, *Self-Determination: A Human Rights Approach,* (1994) 43 Int'l & Comp. L.Q. 857, at 864. See also draft *U.N. Declaration on the Rights of Indigenous Peoples,* in U.N. Doc. E/CN.4/1995/2; E/CN.4/Sub.2/1994/56, 28 October 1994, at 105-115, 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"; S. J. Anaya, *Indigenous Peoples in International Law, supra,* note 33, at 109 ("Self-government is the overarching political dimension of ongoing self-determination"); Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, supra,* note 51, vol. 2(1), at 175; A. Bucha-

nan, Federalism, Secession, and the Morality of Inclusion, (1995) 37 Arizona L. Rev. 53, at 54.

87 The three questions referred by the federal government to the Supreme Court of Canada were:
   (1) Under the Constitution of Canada, can the National Assembly, legislature or Government of Quebec effect the secession of Quebec from Canada unilaterally?
   (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?

88 *Reference re Secession of Québec, supra,* note 3, para. 125.

89 *Id.*, para. 139.

90 *Delgamuukw v. British Columbia, supra,* note 2, para. 85.

91 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, (New York: United Nations, 1980), U.N. Doc. E/CN.4/Sub.2/405/Rev.1 at 10, para. 59. In this U.N. study, Gros Espiell also took the view that the right to self-determination did not extend to peoples already organized in an independent state. 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 *Reference re Secession of Québec, supra,* note 3, para. 138, and recently by the government of Canada.

92 Article 1, para. 3 of both the *International Covenant on Civil and Political Rights, supra,* note 22, and the *International Covenant on Economic, Social and Cultural Rights*, (1966), G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16), 49, U.N. Doc. A/6319 (1966); Can. T.S. 1976 No. 46.

93 In *Delgamuukw v. British Columbia, supra,* note 2, 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 the 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.

94 See cases cited in note 9, *supra*.

95 Report of the Special Committee, *Indian Self-Government in Canada* (Ottawa: Queen's Printer, 1983) ("Penner Report"), 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*, article 3: "Indigenous 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."

In addition, see Canadian Human Rights Commission, *Annual Report 1993* (Ottawa: Minister of Supply and Services Canada, 1994) at 23: "... the inherent right of 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."

96 E.-I. Daes, *Equality of Peoples Under the Auspices of the United Nations Declaration on the Rights of Indigenous Peoples*, (1995) 7 St. Thomas L. Rev. 493.

97 *Delgamuukw v. British Columbia, supra*, note 2, para. 154.

98 See, generally, the draft *United Nations Declaration on the Rights of Indigenous Peoples*; and the *Indigenous and Tribal Peoples Convention*, 1989, I.L.O. Convention No. 169, I.L.O., 76th Sess., reprinted in (1989) 28 I.L.M. 1382 (not yet in force in Canada).

99 See I. Cotler, "Human Rights Advocacy and the NGO Agenda" in I. Cotler & F.P. Eliadis, (eds.), *International Human Rights Law [:] Theory and Practice* (Montreal: Canadian Human Rights Foundation, 1992) 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*."

100 The *International Bill of Rights* is said to include the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights*.

101 Similar arguments are made in regard to the role of regional human rights instruments in reinforcing universal human rights norms: see, for example, C. Anyangwe, *Obligations of State Parties to the African Charter on Human and Peoples' Rights*, (1998) 10 African J. Int'l & Comp. L. 625, at 625.

102 All of the major international human rights instruments include references to the right to self-determination. See, for example, *Charter of the United Nations*, Can. T.S. 1945 No. 76; [1976] Yrbk. U.N. 1043; 59 Stat. 1031, T.S. 993, arts. 1, 55; *International Covenant on Civil and Political Rights*, art. 1; *International Covenant on Economic, Social and Cultural Rights*, art. 1; United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted June 25, 1993, reprinted in (1993) 32 I.L.M. 1661, para. 2. See also S. J. Anaya, *Indigenous Peoples in International Law, supra*, note 33, at 90, n. 19 (references re self-determination is a human right); and U. Umozurike, *Self-Determination in International Law* (Hamden, Connecticut: Archon Books, 1972), at 46 et seq.

103 *Reference re Secession of Québec, supra*, note 3, para. 124.

104 See, for example, K. McNeil, *Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction*, (1998) 61 Sask. L. Rev. 431, where the author aptly questions the coherency of current judicial analyses that allow Aboriginal peoples' rights to be intruded upon by governments.

105 See, for example, the *Universal Declaration of Human Rights,* G.A. Res. 217 (III 1948), 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. See also *Charter of Paris for a New Europe, A New Era of Democracy, Peace and Unity,* November 21, 1990, reprinted in (1991) 30 I.L.M. 190: "*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." [Emphasis added.]

106 "Extinguishment" is defined as "the destruction or cancellation of a right": *Black's Law Dictionary,* 6th ed. (St. Paul: West Publishing Co., 1990), at 584.

107 See, for example, the *Canadian Charter of Rights and Freedoms,* art. 1 ("reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"); and art 33 (derogation permitted solely in certain cases).

108 See also draft *U.N. Declaration on the Rights of Indigenous Peoples,* art. 44: "Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire."

109 Art. 5, para. 1 of the Covenants: "*Nothing in the present Covenant may be interpreted as implying* for any State, group or person any right to engage in any 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." [Emphasis added.]

110 Art. 4: "... the 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." [Emphasis added.]

111 Art. 4.

112 A. Kiss, "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.

113 See text accompanying note 23, *supra.*

114 See "Concluding observations of the Human Rights Committee" in United Nations Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant,* 7 April 1999, CCPR/C/79/Add. 105, para. 8.

115 *Id.*, para. 7.

116 *Constitution Act,* 1982, s. 35(1).

117 D. McRae, *Report on the Complaints of the Innu of Labrador to the Canadian Human Rights Commission,* Ottawa, August 18, 1993, at 5.

118 United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant,* U.N. Doc. E/C.12/1/Add.31, 4 December 1998, para. 18.

119 P. Hogg, *Constitutional Law of Canada, supra,* note 64, 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."

120 *Edwards v. A.-G. Canada,* [1930] A.C. 124 (P.C.) at 136.

121 *Reference re Secession of Québec, supra,* note 3, para. 52.

122 *A.-G. Canada v. Mossop,* [1993] 1 S.C.R. 554, at 621.

123 In *Mossop,* the Court was examining enumerated grounds of discrimination.

124 *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155.

125 See also 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.

126 See also *Delgamuukw v. British Columbia, supra,* note 2, para. 201, per La Forest J. (approach adopted under s. 35(1) is a highly contextual one); and *Edmonton Journal v. A.-G. Alberta,* [1989] 2 S.C.R. 1326 (S.C.C.) at 1355-1356, per Wilson J. ("contextual approach" emanates from the interpretation clause in s. 1 of the *Canadian Charter of Rights and Freedoms*).

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 K. McRoberts & P. Monahan, (eds.), *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: Univ. of Toronto Press, 1993) at 348. In s. 35.1 (3) of the Draft Legal Text, it was provided that:

> The 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 P. Hogg & M.E. Turpel, *Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues, supra,* note 48, at 192 *et seq.*; A. Bissonnette, *Le droit à l'autonomie gouvernementale des peuples autochtones: un phénix qui renaîtra de ses cendres, supra,* note 58, at 7-9.

127 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, supra,* note 51, vol. 5, at 141 et seq. (summary of recommendations).

128 For example, a major shortcoming is the lack of an adequate land and resource base among Aboriginal peoples in Québec.

129 See note 5, *supra.*

130 Identical duties are provided in s. 2(c) of *An Act to extend the Boundaries of the Province of Quebec,* S.C. 1912, c.45 and in s.2(c) of the Schedule in *An Act respecting the extension of the Province of Quebec by the annexation of Ungava,*

S.Q. 1912, c. 7: "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 pertaining to the *Rupert's Land and North-Western Territory Order,* 1870 in *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada,* Schedule (A), R.S.C. 1985, App. II, No. 9, 8 at 8-9: "... *upon 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* ..." [December 1867 Address].

131 *R. v. Sparrow,* [1990] 1 S.C.R. 1075 at 1103-1104: "... the James Bay development by Québec 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 *Québec Boundaries Extension Act,* 1912, S.C. 1912, c. 45."

132 *James Bay and Northern Quebec Agreement and Complementary Agreements,* 1997 Edition (Québec: Les Publications du Québec, 1996).

133 Assemblée nationale, *Journal des Débats,* 4th Sess., 30th Legisl., vol. 17, No. 29, June 21, 1976, at 1597 (Québec Minister of Natural Resources, Jean Cournoyer). Apparently, these types of misrepresentations have characterized the treaty process since the early 1800s. See B. Clark, *Native Liberty, Crown Sovereignty [:] The Existing Aboriginal Right to Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990) at 202: "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.*" [Emphasis added.]

134 See the *ex post facto* statement of J. Ciaccia in the "Philosophy of the Agreement" in the James Bay and Northern Quebec Agreement, *supra,* note 132, at xx: "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.*" [Emphasis added.]

135 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.

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

137 *International Covenant on Civil and Political Rights,* article 47.

138 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 U.N. Commission on Human Rights, February 1992), at 100.

139 Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Supply and Services, 1995), at 17: "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 quebécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985), where it is demonstrated that there is no common understanding whatsoever among representatives of the federal government, Québec government and various Aboriginal peoples as to what any purported "extinguishment" of rights under JBNQA might mean.

140 James Bay and Northern Quebec Agreement, *supra*, note 132.

141 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, N.W.T. The JBNQA, s. 2.14 includes an undertaking by the Québec 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.

142 Commission des droits de la personne du Québec, *The Rights of Aboriginal Peoples [:] We must respect the rights of Native Peoples and deal with them accordingly* (Québec: January 1978) (Document 1), at 9-10: "*[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.* [new para.] *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." [Emphasis added.]

143 P. Joffe & M.E. Turpel, *Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives, supra,* note 58, vol. 1, 1995, at 315ff.

144 See, for example, Commission des droits de la personne du Québec, *The Rights of Aboriginal Peoples [:] We must respect the rights of Native Peoples and deal with them accordingly* (Québec: January 1978), 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: novembre 1993) at 15, 26.

145 Assemblée nationale, *Journal des Débats, Commissions parlementaires,* Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 6, 1975, No. 176, at B-6069 (J.-Y. Morin).

146 Assemblée nationale, *Journal des Débats, Commissions parlementaires,* Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 7, 1975, No. 177, at B-6075.

147 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* (Montréal: November 1993) at 14; see also, at 43, the Commission's recommendation to permanently cast aside any pre-conditions requiring the extinguishment of rights.

148 D. Sambo, *Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?,* (1993) 3 Transnat'l L. & Cont. Probs. 13 at 31. On the same page, the author adds: "No other people are pressured to 'extinguish' their rights to lands. This is racial discrimination. The practice of extinguishment must be eliminated." See also M. Seymour, *La Nation en question* (Montreal: Éditions de l'Hexagone, 1999), at 158 (old method of extinguishment of Aboriginal rights must be abandoned by Québec).

Studies that recommend alternatives to extinguishment include: Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Coexistence: An Alternative to Extinguishment* (Ottawa: Supply and Services, 1995); M. Jackson, *A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements,* Report submitted to the Royal Commission on Aboriginal Peoples, February 1994; P. Joffe & M.E. Turpel, *Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives, supra,* note 58, 3 vols.

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

150 See *Motion for the recognition of aboriginal rights in Québec,* adopted by the Québec National Assembly, March 20, 1985; *Motion portant reconnaissance des droits des autochtones,* adopted by Assemblée nationale du Québec, March 20, 1985.

151 See Assemblée nationale, *Journal des débats,* March 19, 1985, vol. 28,1 No. 38, 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. See also Grand Council of the Crees, *Sovereign Injustice [:] Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Québec* (Nemaska, Québec, 1995), at 96-97.

152 The Québec government removed all draft provisions negotiated with Aboriginal peoples that it did not favour, e.g. existence of the federal fiduciary responsibility in relation to Aboriginal peoples. Moreover, the Resolution

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).

153 See, for example, J. Parizeau, *Pour un Québec souverain* (Montréal: VLB Éditeur, 1997), at 319, where the 1985 Resolution is referred to as an example of how "sensitive" the Québec government is to "minorities living on Québec territory."

154 Secrétariat aux affaires autochtones, *Partnership, Development, Achievement* (Québec: Gouvernement du Québec, 1998), at 17, 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 guidelines and principles for the strategic choices and proposed framework for intervention."

155 See cases cited, *supra,* in note 9.

156 *R. v. Côté, supra,* note 59.

157 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 Québec government was seeking far-reaching judicial conclusions denying the fundamental rights of other indigenous peoples, who were not parties to the case. Such practice is a violation of the rules of natural justice (*audi alteram partem*).

158 "*Terra nullius*" means "lands belonging to no one." The government also urged the Supreme Court of Canada to interpret the *Royal Proclamation of 1763* (often referred to as the "Indian Bill of Rights"), so as to preclude the recognition of indigenous land rights rather than to confirm them.

159 *Mabo et al. v. State of Queensland,* (1992) 175 C.L.R. 1 (High Court of Australia).

160 As Brennan J. of the High Court of Australia provides in *Mabo,* at 42: "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.*" [Emphasis added.]

In rejecting Québec's argument in *Côté, supra,* note 59, para. 53, Chief Justice Lamer of the Supreme Court of Canada quoted the above words of Brennan J. and ruled as follows: "... the [Québec government's] proposed interpretation risks undermining the very purpose of s. 35(1) [of the Constitution Act, 1982] by *perpetuating the historical injustices suffered by aboriginal peoples at the hands of colonizers* who failed to respect the distinctive cultures of pre-existing aboriginal societies." [Emphasis added.]

161 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, supra,* note 51, vol. 1, 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."

See also S. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States,* (1996) 90 American J. Int'l L. 590, at 615: "*Terra nullius,* how-

ever, 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 is profoundly at odds with international human rights law and thus legally obsolete."

162 *Discriminatory and Colonial Positions Taken by the Government of Québec Before Supreme Court of Canada: Denial of the Existence of Aboriginal Rights in Québec*, Resolution No. 11/96, Secretariat of the Assembly of First Nations of Québec and Labrador, October 17, 1996.

163 E.-I. 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."

164 Parti Québécois, *La volonté de réussir: Programme et statuts du Parti Québécois, supra*, note 149, at 18. The sub-heading "Historical Minorities" is placed under the heading "Citizenship." Cf. B. Melkevik, Le droit à l'identité et normes internationales: Minorités et peuples autochtones" in *Le Défi identitaire*, Cahiers d'études constitutionnelles et politiques de Montpellier I, Montpellier, 1996, 44, at 75 (Aboriginal peoples are "peoples" with economic, cultural and political heritages).

165 Parti Québécois, *La volonté de réussir: Programme et statuts du Parti Québécois, supra*, note 149, at 1: "The Québec people, composed of all of its citizens, is free to decide itself its status and its future." [Unofficial translation.] *Cf.* Parti Québécois, *Programme du Parti Québécois [:] Des idées pour mon pays* (Montréal: Parti Québécois, 1994), at 1, where it merely states that the "Québec people" exists, without indicating who is included and whether there are other peoples in the province.

166 *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 R. McCorquodale, *Self-Determination: A Human Rights Approach, supra*, note 86, at 867. In F. Dumont, *Raisons communes* (Montréal: 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."

167 See, for example, J. Brossard, *L'accession à la souveraineté et le cas du Québec*, 2nd ed. (Montréal: Les presses de l'Université de Montréal, 1995) (Supplément de D. Turp), at 182, where it is suggested that the best position to take is that the French-Canadian nation as a whole should exercise the right to self-determination; L. Dion, *Le Duel constitutionnel Québec-Canada* (Montréal: Les Éditions du Boréal, 1995), at 350 (French Canadians form a nation); L. Gagnon, "Débat: les mots taboos," *La Presse*, September 13, 1994, at B3 (true base of the Québec independence movement is the French-Canadian nation centred in Québec); M. Venne, "Le facteur culturel," *Le Devoir*, editorial,

April 23, 1999, at 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,* May 3, 1999, at 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). Of course, nothing precludes French Canadians or others from self-identifying freely as Quebecers.

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

169 See also M. Seymour, *La Nation en question, supra,* note 148, at 155 (there are eleven Aboriginal peoples and the Québec people living in whole or in part within the province of Québec).

170 See, for example, Secrétariat aux affaires autochtones, *Partnership, Development, Achievement, supra,* note 154, where Québec'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 Gazette,* Montreal, May 25, 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."

171 R. Guglielmo, *"Three Nations Warring in the Bosom of a Single State" [:] An Exploration of Identity and Self-Determination in Québec,* (1997) 21 Fletcher Forum of World Affairs 197, at 198: "Denial 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."

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), 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." [Unofficial English translation.]

172 W. Ofuatey-Kodjoe, "Self-Determination" in O. Schacter & C. Joyner, eds., *United Nations Legal Order* (Cambridge: Cambridge Univ. Press, 1995) vol. 1, 349 at 354; H. Johnson, *Self-Determination Within the Community of Nations* (Leydon: 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 centred on the desire to be certain that a narrow application of the term 'nation' would not prevent the extension of self-determi-

nation to dependent peoples who might not qualify as nations." See also discussion of "nations" and "peoples" in J. Duursma, *Fragmentation and the International Relations of Micro-States [:] Self-Determination and Statehood, supra*, note 33, at 14.

173 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, supra*, note 51, vol. 2(1), at 178: "... the three Aboriginal peoples identified in section 35(2) encompass nations that also hold the right of self-determination." And at 182: "Aboriginal peoples are entitled to identify their own national units for purposes of exercising the right to 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 M. Seymour, *La Nation en question, supra*, note 148, at 16 ("peoples" and "nations" used almost synonymously).

Also, in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Marshall C.J. provides at 559: "The 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 the others.'* "

174 See *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195, (1966) 5 I.L.M. 352. Adopted by U.N. General Assembly on December 21, 1965, opened for signature on March 7, 1966, and entered into force on January 4, 1969, art. 1, para. 1: "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." [Emphasis added.]

175 This position of the Québec 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: Les Éditions Varia, 1998), at 93 (in regard to transferring Aboriginal peoples in the 1898 and 1912 territories to a new Québec state, their consent would be required); P. Hogg, *Principles Governing the Secession of Quebec*, (1997) 8.1 N.J.C.L. 19, at 44 (in view of their treaty rights, consent of the Crees and Inuit would be required regarding their northern territories). See generally M. Seymour, *La Nation en question, supra*, note 148, at 180-181 (Québec people cannot, in principle, have Québec accede to sovereignty without the consent of Aboriginal peoples); and at 184 (at moment when Québec 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 Québec, secession might still be achieved for a portion of what is now the province of Québec. 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 *Reference re Secession of Québec, supra*, note 3.

176 On the possible use of force by the Québec government, see Grand Council of the Crees, *Sovereign Injustice,* note 151, *supra,* at 156-164; R. Séguin, "Iron hand possible, Quebec minister says," *Globe and Mail,* January 30, 1997, at A4. See also Statement of the Minister of Intergovernmental Affairs, Jacques Brassard, in Assemblée nationale, *Journal des débats,* 2nd sess., 35th legisl., November 12, 1997. For a strong criticism of Brassard's approach and argument, see A. Dubuc, "Babar et la partition," *La Presse,* editorial, November 15, 1997, at B2.

177 See, for example, M. Seymour, *La Nation en question, supra,* note 148, at 186, where the author states that Québec must not try to impose by force a sovereign state on Aboriginal peoples without trying simultaneously to satisfy their claims.

178 Grand Council of the Crees, *Sovereign Injustice [:] Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Québec, supra,* note 151, at 277-280.

179 In regard to JBNQA, see P. Hogg, *Principles Governing the Secession of Quebec, supra,* note 175, at 44: "[The Agreement] 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 Québec ... Since Canada's obligations could no longer be fulfilled in an independent Québec, and would have to be assumed by the new state of Québec, a secession would constitute a breach of the Agreement. *The Agreement could be amended, of course, but only with the consent of the Aboriginal nations who are parties to it.*" [Emphasis added.] See also R. Howse and A. Malkin, *Canadians are a Sovereign People: How the Supreme Court Should Approach the Reference on Québec Secession,* (1997) 76 Can. Bar Rev. 186, at 210, n. 87: "Unilateral secession of Québec 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."

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

181 Secrétariat aux affaires autochtones, *Partnership, Development, Achievement, supra,* note 154, at 22.

182 Id.

183 The 1985 National Assembly Resolution stipulates: "That this Assembly: ... Consider these [land claims] agreements and all future agreements 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 Secrétariat aux affaires autochtones, *Partnership, Development, Achievement, supra,* note 154, at 17-18.

184 See Parti Québécois, *La volonté de réussir: Programme et statuts du Parti Québécois, supra,* note 149, at 22 (in making the transition to a sovereign Québec,

existing "treaties" with Aboriginal peoples will be respected until they are replaced by new "agreements").

185 Secrétariat aux affaires autochtones, *Partnership, Development, Achievement, supra,* note 154, at 12.

186 *Sparrow v. The Queen, supra,* note 131, at 1107, per Dickson C.J.: "... no appearance of 'sharp dealing' should be sanctioned," quoting *R. v. Taylor and Williams,* (1981) 34 O.R. (2d) 360, at 367. See also *R. v. George,* [1966] S.C.R. 267, at 279 (Cartwright J. dissenting); and *Gitanyow First Nation v. Canada, supra,* note 5, 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] 2 C.N.L.R. 77, at 92, para. 41 ("[n]o appearance of 'sharp dealing' will be sanctioned").

See also J.S. Henderson, *Interpreting Sui Generis Treaties,* (1997) 36 Alta. L. Rev. 46, at 80: "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."

187 Secrétariat aux affaires autochtones, *Partnership, Development, Achievement, supra,* note 154, at 11, 12, 19 and 21.

188 There is no articulated concept of "territorial integrity" of a province in Canadian law. As long as Québec remains a province, its boundaries are protected under Canada's Constitution: see *Constitution Act, 1871*, s. 3 and *Constitution Act, 1982*, s. 43. How the Québec 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 *Reference re Secession of Québec, supra*, note 3, paras. 130, 154. See also T. Musgrave, *Self-Determination and National Minorities* (Oxford: Clarendon Press, 1997), at 235: "The maintenance or alteration of internal boundaries of 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."

189 Even if Québec 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 U. Umozurike, *Self-Determination in International Law, supra,* note 102, at 234, where it is said that *"the ultimate purpose of territorial integrity is to safeguard the interests 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." [Emphasis added.]

190 While the policy document of Québec 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.

191 Evidence of such ultimate control by Québec has been incorporated into its 1998 policy. See, for example, Secrétariat aux affaires autochtones, *Partnership, Development, Achievement, supra,* note 154, at 22: "Should 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."

192 The international law principle of "effectivity" is discussed in *Reference re Secession of Québec, supra,* note 3, paras. 140-146.

193 E. Thompson, "First Nations reject new policy," *The Gazette,* Montreal, May 20, 1998, at A5; M. Cloutier, "Les Premières Nations rejettent les propositions de Chevrette," *Le Devoir,* May 20, 1998, at A1. This does not mean that no agreements of any nature are being signed by First Nations and Québec. In relation to the Mohawks of Kahnawake, see K. Deer, "Québec Cabinet Signs Agreements," *The Eastern Door,* Kahnawake, March 26, 1999, at 1; A. Jelowicki, "Mohawks' tax picture changes," *The Gazette,* Montreal, March 31, 1999, at A4; M. Thibodeau, "Québec consent une exemption fiscale élargie aux Mohawks," *La Presse,* March 31, 1999, at A10.

194 See, for example, M. Seymour, *La Nation en question, supra,* note 148, where the author proposes a more constructive approach in Québec government policy, consistent with the right to self-determination of Aboriginal peoples.

195 See, for example, L. Mandell, "The Delgamuukw Decision," *supra,* note 11.

196 See *Sparrow v. The Queen, supra,* note 131, at 1112, per Dickson C.J.: "it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."

197 *Montana Band of Indians v. Canada,* [1991] 2 F.C. 30, at 39, [1991] 2 C.N.L.R. 88, at 92: "Negotiated settlements of aboriginal claims are a distinct possibility in today's reality."

198 *MacMillan Bloedel v. Mullin,* [1985] 2 C.N.L.R. 58 (B.C.C.A.), at 77: "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 that will ultimately find its solution in a reasonable exchange between governments and the Indian nations. Viewed in this 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,* art. 8; *International Covenant on Civil and Political Rights,* art. 2, para. 6.

199 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, supra,* note 51, vol. 2(2), at 562.

200 K. Roach, *Constitutional Remedies in Canada, supra,* note 83, at 15-3.

201 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, supra,* note 51, vol. 2(2), at 564.

202 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, April 16, 1999, at 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.

203 James Bay and Northern Quebec Agreement, supra, note 132.

204 Inuit in northern Québec have been involved in considerably less litigation concerning JBNQA than the James Bay Crees.

205 For example, a recent Cree court action involves Ottawa, Québec, and 27 forestry companies: see M.-C. Ducas, "Les Cris en appellent aux tribunaux," *Le Devoir*, July 16, 1998, at A1; for strong criticisms of forestry practices in Québec, see also J.-R. Sansfaçon, "Le massacre forestier," *Le Devoir*, editorial, March 31, 1999, at A8; A. Gruda, "Le massacre à la scie," *La Presse*, editorial, April 13, 1999, at B2; L. Bélanger, "Nos fôrêts du Nord pourraient bien n'être plus un jour qu'un vague souvenir," *La Presse*, April 1, 1999, at B3. For a forestry industry viewpoint, see J. Gauvin, "La foresterie québécoise a fait des pas de géant," *La Presse*, April 15, 1999, at B3.

206 In addressing other complex issues of a legal and political nature, the Supreme Court of Canada has already largely adopted the notion of a principled framework. See *Reference re Secession of Québec, supra*, note 3, 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. 49 *et seq*., 88, 90, 93-95); iv) includes a "constitutional duty to negotiate" (paras. 69, 88 et seq.); and v) underlines that participants in such negotiations must "reconcile the rights, obligations and legitimate aspirations" of all those concerned (para. 104).

207 See P. Macklem, *Aboriginal Rights and State Obligations, supra,* note 61, at 113 et seq., where international norms are invoked in interpreting s. 35(1) of the *Constitution Act, 1982*.

208 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 internal law

of Canada; iv) the right to self-government is an important component 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*.

209 Cited in J. Keene, *Claiming the Protection of the Court: Charter Litigation Arising from Government "Restraint,"* (1998) 9 N.J.C.L. 97, at 114-115. These words of Madame 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, December 10, 1996.

210 In regard to Aboriginal peoples, it is important to highlight here the concepts of "equality" 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 39, *supra*).

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.

211 *R. v. Van der Peet, supra*, note 9, para. 50. This view is reiterated by Lamer C.J.C. in *Delgamuukw v. British Columbia, supra*, note 2, para. 81.

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