THE CREE INTERVENTION IN THE CANADIAN SUPREME COURT REFERENCE ON QUEBEC SECESSION: A SUBJECTIVE ASSESSMENT*

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I. THE JAMES BAY CREES

The James Bay Cree people describe themselves as an organized society, distinct nation and Aboriginal people. They include the nine Cree First Nation communities in Northern Québec: the Chisasibi, Eastmain, Mistissini, Nemaska, Ouje-Bougoumou, Waskaganish, Waswanipi, Wemindji and Whapmagoostui.[1]

Juridically, they are an Aboriginal people of Canada within the meaning of Section 35 of the *Constitution Act of 1982*.[2] The National Assembly of Québec formally recognized the James Bay Cree people as a distinct nation having its own identity in a resolution entitled *Motion for the Recognition of Aboriginal Rights in Québec* on March 20, 1985.[3] However it should be noted that the Motion was phrased somewhat ambiguously as a recognition of "the existence of the . . . Cree . . . Nation . . . in Québec which should be able to develop as a 'distinct nation' with its own identity and exercise [its] rights within Québec."[4]

From a practical as well as legal point of view, the rights and interests of the James Bay Cree people with respect to their traditional territory—including lands, waters, and resources—extend beyond the boundaries of Québec and include offshore islands and waters in James Bay

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* A substantial portion of this paper is based on material found in the original Factum of the Intervener Grand Council of the Crees (Eeyou Estchee) in the Supreme Court of Canada and supporting documents [*hereinafter* the Cree Factum]. The Factum itself owes much to Paul Joffe, member of the Quebec Bar and Ontario Bars. Paul Joffe and Andrew Orkin of the Ontario Bar also appeared as counsel for the Grand Council. The comments are my own and do not purport to reflect the views of either the Grand Council or my fellow counsel.

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1. *See* CAN. CONST. § 35 (Constitution Act, 1982); Cree Factum, p.1. All references are to the original Factum. Subsequently, two additional Factums of Reply were filed on behalf of the Grand Council.

2. *See* CAN. CONST., *supra* note 1. Section 35(2) declares: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." *See id.*

3. *See* Motion for the Recognition of Aboriginal Rights in Québec of March 20, 1985. Section 25 of the *Constitution Act, 1982* specifies that the Canadian Charter of Rights and Freedoms in the Constitution "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada." CAN. CONST. pt. I, Canadian Charter of Rights and Freedoms, § 25 (Constitution Act, 1982).

4. *Id.*

and Hudson's Bay. For thousands of years, the Crees have occupied, governed, used, protected, and managed their traditional territory and continue to do so in a spirit of sharing. One must bear in mind, then, that the interests of the Cree Nation are not confined to the territory of Québec but also extend to adjacent areas. This traditional territory of the Cree people covers approximately 400,000 square kilometers, most, if not all of which was not part of the province of Québec at the time of Confederation in 1867[5]. In 1898 and 1912 the government of Canada annexed what is presently the northern two-thirds of the province to Québec, adding the traditional territory of the James Bay Crees.[6] Moreover, these vast territorial annexations took place without the knowledge or consent of the Cree People.[7] As a result, Québec did not enter the Confederation in possession of the Cree territories.

II. THE FEDERAL REFERENCE ON QUÉBEC SECESSION

The separatist Québec government tabled a draft bill on December 6, 1994 in the National Assembly entitled *An Act Respecting the Sovereignty of Québec*.[8] The bill outlined the process whereby it planned to make the province of Québec a "sovereign country" after approval by its voters in a referendum and a period of negotiations with Canada. On June 12, 1995 the leaders of two Québec political parties—the governing Parti Québécois and the Action Démocratique—as well as the leader of the Bloc Québécois, signed an agreement outlining their common project for the sovereignty of Québec. According to this agreement,

> [f]ollowing a yes victory in the referendum, the National Assembly, on the one hand, will be empowered to proclaim the sovereignty of Québec, and the government, on the other hand, will be bound to propose to Canada a treaty on a new economic and political

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5. *See, e.g*, An Act Respecting the North-western, Northern and North-eastern Boundaries of the Province of Quebec, 61 Victoria c. 3, Revised Statutes of Canada 2d ed. (1985); An Act to Extend the Boundaries of the Province of Quebec, 2 George V., Revised Statutes of Canada 2d ed. (1985); An Act Respecting the Delimitation of the North-western, Northern and North-eastern Boundaries of the Province of Quebec, 61 Victoria c. 6; An Act Respecting the Extension of the Province of Quebec by the Annexation of Ungava, S.Q. 1912, c.7; Chef Max "One-Onti" Gros Louis et al. v. La Société de Développement de la Baie James et al, [1974] R.P. 39 p.58,63; GRAND COUNCIL OF THE CREES, SOVEREIGN INJUSTICE: FORCIBLE INCLUSION OF THE JAMES BAY CREES AND CREE TERRITORY INTO A SOVEREIGN QUÉBEC 212-17 (1995)[hereinafter SOVEREIGN INJUSTICE]. SOVEREIGN INJUSTICE, a seminal study, was written for the Grand Council by Paul Joffe.

6. *See* SOVEREIGN INJUSTICE, *supra* note 5.

7. *See id.*

8. For a chronology of events leading up to the Reference, see *Québec: The Rules of Separation: How Did we Get Here?* <http://www.tv.cbc.ca/newsinreview/oct98/quebec/how.htm> [hereinafter *Rules of Separation*].

> Partnership, as to, among other things, consolidate the existing economic space.[9]

The agreement concluded, "[i]f the negotiations prove to be fruitless, the National Assembly will be empowered to declare the sovereignty of Québec without further delay."[10] In essence, this was a plan for secession by unilateral declaration of independence (commonly known as UDI).

Guy Bertrand, a well-known and controversial Québec city lawyer and former separatist, filed an individual action for a Declaratory Judgment and Permanent Injunction in the Superior Court of Québec in August 1995. The action challenged the constitutionality of the draft bill and, more specifically, the Québec government's proposed process for "accession to sovereignty."

The Premier of Québec introduced *An Act Respecting the Future of Québec* in the National Assembly on September 7, 1995, purporting to authorize the Assembly to proclaim the sovereignty of Québec after failure of a formal offer of economic and political partnership with Canada.[11] This bill, in essence, was an updated and modified version of the draft bill tabled on December 6, 1994.

Justice Lesage of the Superior Court of Québec rendered his judgment in the *Bertrand* case in September 1995, declaring that Québec's proposed course of action to proceed with a unilateral declaration of independence was illegal because it violated the Constitution of Canada.[12] This did not prevent the Québec government from continuing with its plans. Québec held a referendum on October 30, 1995 on whether Québécois agreed "that Québec should become sovereign, after having made a formal offer to Canada for a new Economic and Political Partnership" within the scope of Bill 1.[13] Sovereignty was rejected by a microscopic one percent (50.58% to 49.42%).[14]

Guy Bertrand filed a Revised Action for Declaratory Judgment and Permanent Injunction in January 1996, re-amending his initial action of August 1995. In response, in April 1996, the Attorney General of Québec filed a Declinatory Motion and Motion to Dismiss, claiming that the Constitution was irrelevant to the issue. Specifically, the motion stated that access to sovereignty was a political decision recognized by international law and that the courts of Canada had no jurisdiction over Québec's sovereignty process.

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9. *Id.*
10. *Id.*
11. *See id.*
12. *See* Bertrand v. P.C. du Québec, No. 200-05-002117-955, Sept. 8, 1995.
13. *See Rules of Separation*, *supra* note 8.
14. *See id.*

At this stage the Government of Canada decided to intervene in the case and in May 1996, Allan Rock, the Minister of Justice and Attorney General of Canada, announced that he had ordered counsel to appear and plead on his behalf in the hearing on Québec's motion to dismiss the *Bertrand* action. Justice Robert Pidgeon of the Superior Court of Québec rendered a judgment in August 1996, rejecting the Attorney General's motion to dismiss. The court held that Bertrand had raised a number of constitutional issues that deserved to be dealt with by the court on their merits. The court summarized these questions, paraphrased as follows: Is the right to self-determination synonymous with a right to secession? Can Québec secede from Canada unilaterally? Does international law validate Québec's process of accession to sovereignty? Does international law take precedence over domestic law? The court determined that these questions deserved to be heard and that the case could go ahead.

The Attorney General of Québec announced in September 1996 that after the failure of its Motion to Dismiss, the Québec government would no longer participate in the case. Rather than allowing this momentous case to wind its way through the courts as a private suit, the federal government of Canada announced later that month that it would take over the case and submit it directly to the Supreme Court of Canada by way of direct reference of certain questions relating to the unilateral secession of Québec identified in the judgment of Justice Pidgeon.

Reference by governments for an authoritative (but not binding) opinion from appellate courts is a well established Canadian practice, both at the federal and provincial levels.[15] Section 53 of the *Supreme Court Act* allows the federal government to refer to the Supreme Court "for hearing and consideration . . . important questions of law or fact concerning," among other things,

> (a) the interpretation of the *Constitution Acts*, (b) the constitutionality or interpretation of any federal or provincial legislation or (c) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective of governments thereof, whether or not the particular power in question has been or is proposed to be exercised.[16]

This is unlike the United States, where the Supreme Court and most state appellate courts do not render advisory opinions.

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15. *See Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53.
16. *Id.*

It was under section 53 of the *Supreme Court Act* that, on September 30, 1996, the Canadian government adopted Order-in-Council, P.C. 1996-1497 through which it put three specific questions to the Supreme Court.[17] The three questions referred to the Supreme Court were the following:

> 1. Under the Constitution of Canada, can the National Assembly, legislature or government of Québec effect the secession of Québec from Canada unilaterally?
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> 2. Does international law give the National Assembly, legislature or government of Québec the right to effect the secession of Québec 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 Québec the right to effect the secession of Québec from Canada unilaterally?
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> 3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Québec to effect the secession of Québec from Canada unilaterally, which would take precedence in Canada?[18]

In its preamble, the Order-in-Council invoked the following considerations:

> Whereas the Government of Québec has expressed its view that the National Assembly or government of that province has the right to cause Québec to secede from Canada unilaterally;
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> Whereas the Government of Québec has expressed its view that this right to cause Québec to secede unilaterally may be acquired in a referendum;
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> Whereas many Québecers and other Canadians are uncertain about the constitutional and international situation in the event of a unilateral declaration of independence by the government of Québec;
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> Whereas principles of self-determination, popular will, democratic rights and fundamental freedoms, and the rule of law, have been

17. *See Rules of Separation*, *supra* note 8.
18. *Id.*

raised in many contexts in relation of the secession of Québec from Canada.[19]

The Grand Council of the Crees, Eeyou Estche, is a corporation constituted under the laws of Canada to represent Cree interests. It was a party to, and a signatory of, the epoch-making 1975 *James Bay and Northern Québec Agreement* ("JBNQA").[20] The Grand Council sought and obtained leave to intervene under Rule 18 of the Supreme Court Rules[21] as did the Makivik Corporation, which represented the Inuit of Northern Québec and various other interveners including several acting on behalf of other Aboriginal nations and interests. The Grand Council saw the case as an opportunity to publicize its concerns, educate judicial and public opinion, and generally advance the cause of the Cree people.

In light of Québec's boycott of the Reference, in the summer of 1997 the Supreme Court invoked its powers under section 53(7) of the *Supreme Court Act*[22] to appoint a prominent Québec City lawyer, André Joli-Coeur, as *amicus curiae*. He was directed to challenge the views of the federal government and other parties and implicitly put forth the position Québec might have voiced had it participated in the Reference.

III. THE CREE POSITION

While not taking a position on Québec's right to self-determination as such, the Crees urged the Supreme Court to answer no to the first and second questions because of consequences for them under Québec's UDI. The Crees maintained that they were not prepared to accept unilateral secession because they did not want to be traded like chattel from one state to another—they considered themselves a people entitled to self-determination as recognized by Canadian and international law. Stated differently, they did not want to be constitutionally deported from Canada to another state. UDI by Québec would take the Crees out of Canada against their will and violate their right as a people to self-determination. In essence, it would be tantamount to

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19. *Id.*

20. *James Bay and Northern Québec Native Claims Settlement Act*, S.C. 1976-1977, 25-26 Eliz. II, c. 32 and *an Act Approving the Agreement Concerning James Bay and Northern Québec*, S.Q., 1976, c. 46.

21. Section 18 of the Rules sets out the procedure for obtaining leave to intervene and the manner of effecting an intervention. *See* CAN. SUP. CT. R. 18..

22. Subsection 53(7) states: "The Court may, in its discretion, request any counsel to argue the case with respect to any interest that is affected and with respect to which counsel does not appear," the whole at the cost of the Federal Government. In January 1996, a Montreal newspaper reported the fees and disbursements paid to the *amicus curiae* out of federal funds cost more than $1.4 million Canadian. *See* THE GAZETTE (Montreal), Jan. 6, 1999, at A7.

placing them in a form of neo-colonial bondage. Further, under international law, the Crees stated that peoples have the right to refuse such dominion and seek their independence.[23]

The Crees do not go so far as to claim a right to external self-determination amounting to secession. They do, however, assert the right to remain in Canada if Québec secedes. There are practical considerations for the Cree position. For instance, one of the principal reasons that the threat of a unilateral secession by Québec is of such grave concern to the Crees, is the issue of the traditional territory of the James Bay Cree people. This territory extends beyond the boundaries of Québec and includes offshore islands and waters in James Bay and Hudson Bay. If Québec secedes, the Cree territory will be in both countries, creating a complex question of jurisdiction.

The opposition of the James Bay Cree people to being bound by the outcome of the 1995 referendum was made clear prior to the Québec referendum through a number of authoritative statements and actions.[24] Just prior to the October 30, 1995 referendum held by the Québec government, the James Bay Crees, the Inuit of Nunavik, and Innu (Montagnais) held their own referendums in five of their communities, on October 24, 25 and 26 respectively.[25] In these referendums, each of the Aboriginal peoples overwhelmingly rejected (by over 95%) being separated from Canada without their consent.[26]

IV. THE LEGAL UNDERPINNINGS OF THE CREE POSITION

The legal and constitutional underpinnings of the Cree position expressed to the Supreme Court can be summarized in the following manner.[27] First, apart from the explicit recognition of Aboriginal rights created by treaty in sections 25 and 35 of *The Constitution Act of 1982*,[28] there is now a constitutional convention in Canada that any proposed constitutional amendments which would alter the rights of Aboriginal peoples require their participation and consent.[29] Second, the *James Bay and Northern Quebec*

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23. *See* INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 1, 22 (1996).

24. *See* Cree Factum, *supra* note 1, at 13-14.

25. *See id.*

26. *See* C. Montpetit, *Inuits et Montagnais disent massivement Non*, LA PRESSE (Montreal), Oct. 29, 1996, at A2; A. Derfel, *Quebec Inuit strongly reject sovereignty in own vote*, THE GAZETTE (Montreal) Oct. 27, 1995, at A10.

27. *See* Cree Factum, *supra* note 1, and briefs filed by the Grand Council in the case. *See also* SOVEREIGN INJUSTICE, *supra* note 5.

28. *Constitution Act*, 1982, §§ 25, 35.

29. *See* Patrick J. Monahan, *The Law and Politics of Québec Secession*, 33 OSGOODE HALL L.J. 1, 16 n.46 (1995); NEIL FINKELSTEIN & GEORGE VEGH, THE SEPARATION OF QUÉBEC AND THE CONSTITUTION OF CANADA 25 (1992); SOVEREIGN INJUSTICE, *supra* note 5, at 84; PATRICK MONAHAN &

Agreement—the fundamental land claims agreement involving the Cree and Inuit peoples—stated that any alteration of Cree rights under this Agreement, or its change of context within the Canadian federation would require Cree consent. Therefore, in the case of unilateral secession by Québec, it may be constitutionally required that Cree and Inuit treaty rights under these agreements not be amended without Cree or Inuit consent.

Every chapter of the *James Bay and Northern Quebec Agreement* is subject to a general consent provision, or otherwise specifies a requirement for the consent of the interested Native party (either Cree or Inuit) to any amendment or modification.[30] The Grand Council urged the Supreme Court to hold that the Agreement is a treaty, "an agreement whose nature is sacred,"[31] which obligates both Canada and Québec to continue under an indefinite federal arrangement favoring the James Bay Cree and Inuit peoples in Québec. The Crees argued that this was mandated by the Constitution.

The Cree people also argued that they signed the Agreement within a federal constitutional framework and that they derived particular safeguards from having obligations met by the two levels of government. For them, the Agreement's triangular scheme, a dynamic embodiment of the federal principle, was still a *sine qua non* for their consent to the James Bay Agreement.

They further argued that a unilateral declaration of independence would shatter Cree rights under the Agreement, and might even lead to the demise of the Agreement itself. The Crees did not accept that Québec could merely take over federal responsibilities. Instead, they argued that they entered into a beneficial three-way relationship and wanted to preserve it. At the least, they wanted the ability to align themselves with their choice of either Canada or Québec in the event that one departed. In the context of unilateral secession, Québec could not unilaterally alter the *James Bay and Northern Quebec Agreement* from a tri-partite federal arrangement under the Constitution of Canada to a bilateral agreement subject to a new and uncertain Constitution of a secessionist Québec. If this change occurred, Cree and Inuit rights under the Agreement would take on different and uncertain interpretations that were never negotiated or agreed upon by the parties.

A third legal point upon which the Crees relied is the fiduciary obligations owed to Aboriginal peoples. While both the federal and Québec

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MICHAEL BRYANT, COMING TO TERMS WITH PLAN B: THEN PRINCIPLES GOVERNING SECESSION 54, n.70 (June 1996).

30. *See James Bay and Northern Quebec Agreement*, Nov. 11, 1975, The Grand Council of the Crees-Canada, §§ 2.15 (general consent provision); 3.7; 5.6; 6.6; 7.5; 8.19; 9.0.4; 10.0.19; 11A.0.9; 11B.0.18; 12.0.2; 13.0.3; 14.0.29; 15.0.27; 16.0.38; 17.0.88; 18.0.38; 19.4; 20.0.27; 21.0.20; 22.7.10; 23.7.10; 24.15.1; 26.0.10; 27.0.10; 28.18.1; 29.0.44; *see also Constitution Act, 1982*, §§ 35(1), 35(3).

31. R. v. Badger, [1996] 1 S.C.R. 771, 793.

governments owe fiduciary responsibilities to the James Bay Crees and other Aboriginal peoples, the primary fiduciary duty lies with the federal government.[32] This stems from the historical relationship Aboriginal peoples have had and continue to have with the British Crown.[33] That protection would be lost in the event of a Québec secession.

Section 35(1) of the *Constitution Act of 1982* declares: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[34] Various constitutional instruments in Canada, such as the *Royal Proclamation of 1763* and the *Imperial Rupert's Land and North-Western Territory Order*, reinforce the constitutional imperative that the government and Parliament of Canada act in a manner consistent with their fiduciary responsibilities.[35] This "special responsibility" of the Parliament and government of Canada was again affirmed in the Preamble of the *James Bay and Northern Québec Native Claims Settlement Act*.[36]

It also stands to reason that the Canadian Government and Parliament could not unilaterally transfer their fiduciary obligations to Québec absent Cree consent. The Crees were concerned that eventually Canada and Québec could make a deal without their knowledge or participation. Ironically, counsel for the Minister of Justice of the Northwest Territories expressed in the course of the Ottawa hearings his suspicions that the Québec Crees could themselves attempt to negotiate with Ottawa and Québec to acquire some islands in Hudson's Bay to the detriment of the Northwest Territories.

In essence, the Grand Council argued that the juridical recognition or constitutional acknowledgment of the Crees as a people, even a nation, had vast legal implications. Further, the Grand Council argued that this stems from the logic of what could be described as the Cree syllogism:

1. Aboriginal peoples, including the Crees, are the *only peoples* whose rights as such are acknowledged and enshrined specifically in the Canadian Constitution;

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32. *See* Monahan, *supra* note 29, at 16 n.46

33. *See* Brian Slattery & David Schulze with Carol Hilling, *Understanding Aboriginal Rights*, (1987) 66 CAN. B. REV. 727, 755; Peter W. Hutchins, et al., *When Do Fiduciary Obligations to Aboriginal People Arise?*, 59 SASK. L. REV. 97, 118 (1995); J. Woehrling, *Les aspects juridiques d'une éventuelle sécession du Québec* (1995) 74 CAN. B. REV. 293, 328.

34. CAN. CONST. § 35(1) (*Constitution Act*, 1982).

35. *See generally* Royal Proclamation of 1763 (discussing the fiduciary responsibilities of the government and parliament of Canada owed to the people and inhabitants of Canada); *see also* Rupert's Land and North-Western Territory Order (discussing the obligation the Parliament of Canada owes to legislate for the future welfare and good government for its people).

36. *See* S.C. 1976, 77, c.32.

2. Under international law, only peoples—thus the Crees—can claim a right to self-determination;[37]
3. While the right of self-determination is not equivalent to right to secession or independence, it could become so in circumstances of oppression or colonial tyranny;
4. Unilateral independence by Québec would remove the Crees against their will from one state to another—a neo-colonial *coup de force*—which would trigger for the Crees a right to secede from the new state or, before that happens, entitle the Crees to call upon Canada to discharge its fiduciary obligations by protecting the Crees, prevent their removal or assist them in denying the new state effective control over the Crees and their territory.[38]

V. THE SUPREME COURT DECISION

Part of the federal government's strategy before the Supreme Court of Canada was to try and confine the debate to the three questions mentioned in the Reference in an effort to avoid discussing Aboriginal concerns brought by the Grand Council and other interveners. Ottawa wanted the discussion limited to the constitutionality of a unilateral secession by Québec. The two provinces that bothered to attend the argument—Manitoba and Saskatchewan—and the two territories present—the Northwest Territories and the Yukon—for reasons of their own did not address Aboriginal concerns. As a result, the Aboriginal interveners were on their own.

Surprisingly, the *amicus curiae*, appointed to represent the views that Québec had refrained from advancing, acknowledged in Court that the Crees were a people with the same rights to self-determination as French-speaking Québecois. However, the Crees and other Aboriginal interveners sought a full exploration and determination by the Court of their constitutional and international rights. The Supreme Court, while falling far short of Ottawa's

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37. *See generally* U.N. CHARTER arts. 1,15; International Covenant on Civil and Political Rights art. 1 (1966); *International Covenant on Economic, Social and Cultural Rights*, art. 1 (1966); *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, reprinted in* 9 I.L.M. 1292 (1970) (see heading "principle of equal rights and self-determination of peoples"); *Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N.G.A. Resolution 1514 (XV), 15 U.N. GAOR, Supp. (no.16) 66, U.N. Doc. A/4684, adopted on December 14, 1960, para. 2; *Final Act of the Conference on Security and Co-operation in Europe* (Helsinki Final Act), signed by 35 states (including Canada and the United States) on August 1, 1975, *reprinted in* 14 I.L.M. 1295, Principle VIII (1975); Vienna Declaration and Programme of Action, June 25, 1993, *reprinted in* 32 I.L.M. 1661, p.22, para.2 (1993); S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 90 n.19 (1996).

38. *See* Cree Factum, *supra* note 1.

suggestions that it not address Aboriginal issues, remained cautious and somewhat cryptic in dealing with them. Judicial restraint was applied with a vengeance.

The hearing took place from February 16 to 19, 1998, and the Court rendered its unanimous judgment on August 20, 1998.[39] In essence, it held that Québec had no right to secede unilaterally from Canada, either under Canadian Constitutional law or under international law.[40] While the Court rejected UDI, it recognized that secession of Québec could be achieved by constitutional amendment.[41] This would require a "clear expression" of the popular will on a "clear" referendum question "free of ambiguity" both in terms of the question asked and the support it received.[42] The result of such a referendum would have no legal effect as such but it would impose "an obligation on all parties to come to the negotiating table."[43] The parties would then be required to negotiate in good faith.[44]

The Court further held that the Canadian Constitution "embraces unwritten, as well as written rules" and that these "supporting principles" include constitutional conventions.[45] The Court identified, for purposes of answering the Reference questions and without stating that the list was exhaustive, "four fundamental and organizing principles of the Constitution:" federalism, democracy, constitutionalism and rule of law, and respect for minorities.[46] The Court emphasized that, "[t]he proclamation of the *Constitution Act, 1982* . . . re-affirmed Canada's commitment to the protection of its minority, Aboriginal, equality, legal and language rights . . . ."[47]

However, the distinction the Court made between "minority rights" and "Aboriginal rights" or between "minorities" and "Aboriginal peoples" was not always clear.[48] At times, the judgment used language that was vague, such as: "cultural and group identities,"[49] "respect for cultural and group identity,"[50] "vulnerable minority groups"[51] or "minority interests."[52] The Court discussed the fourth underlying constitutional principle, protection of minorities, in

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39. *See* Reference re Secession of Quebec, [1998] 161 D.L.R. (4th) 385.
40. *See id.* at 430-31, 449.
41. *See id.* at 422-23..
42. *Id.* at 424.
43. *Id.* at 425.
44. *See id.* at 424-25, 431, 446.
45. *Id.* at 403.
46. *Id.*
47. *Id.* at 408.
48. *Id.* at 410, 415, 420, 422.
49. *Id.* at 415.
50. *Id.*
51. *Id.* at 419.
52. *Id.* at 420.

paragraphs 79 to 82.[53] It referred to the "specific constitutional provisions protecting minority language, religious and education rights" and cited a number of its own decisions on the subject.[54] However, none of these rights relate to Aboriginal peoples. The clearest statement pointing to a distinction between traditional minority rights and Aboriginal rights appeared in paragraph 82:

> Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982,* included in S. 35 explicit protection for existing Aboriginal and treaty rights, and in S. 25, a non-derogation clause in favour of the rights of Aboriginal peoples. The "promise" of S. 35, as it was termed in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at p. 1083, 70 D.L.R. (4th) 385, recognized not only the ancient occupation of land by Aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, *whether looked at in their own right or as part of the larger concern with minorities*, reflects an important underlying constitutional value.[55]

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, which requires protection of Aboriginal and treaty rights.

The concluding sentence of paragraph 82 does open the door for consideration of Aboriginal and treaty rights as a separate underlying constitutional principle on par with federalism, democracy, constitutionalism and the rule of law, and respect for minorities.[56] Aboriginal rights should not be viewed merely as a subspecies of minority rights. Therefore, the protection of Aboriginal and treaty rights should be considered to "function in symbiosis" and not "be defined in isolation from the others" nor trump one another.[57]

While the Court did not openly embraced the protection of Aboriginal and treaty rights as a separate constitutional principle,[58] in describing the contents of eventual negotiations about Québec secession, it recognized that

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53. *See id.* at 420, 422.

54. *See id.* at 420.

55. *Id.* at 422 (emphasis added).

56. *See id.*

57. *Id.* at 410.

58. This is despite the Court's statement in paragraph 82, quoted above, that the protection of Aboriginal and treaty rights "reflects an important underlying constitutional value." *See id.* at 422.

by necessity such negotiations would have to encompass boundary issues and the protection of the rights of "the linguistic and cultural minorities, including Aboriginal peoples . . . ."[59] The Court further indicated that in the negotiations "aboriginal interests would be taken into account" but considered that it is "unnecessary to explore further the concerns of the Aboriginal peoples in this Reference."[60]

The Court was equally unclear on the participants in such eventual negotiations. After an unambiguous expression of the popular will to secede, there would arise "a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire."[61] The Court referred to "participants in Confederation" and to the "obligation on the other Provinces and the Federal Government [to enter] negotiations."[62] The Court dealt with the conduct of the other Provinces and the Federal Government.[63] However, in the last sentence of paragraph 92, it stated, "[n]egotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and *other participants*, as well as the rights of all Canadians both within and outside Quebec."[64] It is unclear what is meant by "other participants." The logical implication is that there will be participants other than Ottawa and the provinces in such negotiations. The remaining question is whether Aboriginal peoples will be included. The opinion does not make this clear.

Aboriginal peoples participated in the four First Ministers Conferences between 1983 and 1987 concerning their constitutional rights. They also were directly involved in the Charlottetown Constitutional Accord discussions in 1992. They would also be entitled to participate in post-referendum negotiations on Québec secession since such secession would necessarily impact the "aboriginal and treaty rights" protected under section 35(1) of the *Constitution Act, 1982*.[65]

In deciding whether international law applied, the Court rejected the unanticipated challenge of the *amicus curiae* to its right to pronounce on international law, and held that in the appropriate circumstances it is quite legitimate for the Court "to look at international law rather than domestic law."[66] In the latter part of its judgment, the Court examined Québec's claim that international law's recognition of self-determination entitled the province

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59. *Id.* at 427.
60. *Id.* at 442.
61. *Id.* at 424.
62. *Id.* at 425.
63. *See id.* at 426.
64. *Id.* (emphasis added)
65. *Constitution Act, 1982*, § 35(1).
66. Reference re Secession of Quebec, [1998] 161 D.L.R. (4th) 385, 399.

to UDI. While the discussion of self-determination was presented in the light of Québec's claim to a right of secession and dealt with general principles, it is applicable to the rights of Aboriginal peoples including the Crees. The Court began by stating, "[t]he right of a people to self-determination is now so widely recognized in international conventions that the principle . . . is considered a general principle of international law."[67] However, it then stated that "international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in . . . exceptional circumstances . . . a right of secession may arise."[68] The Court stated that the right to self-determination is granted to "peoples,"[69] but did not define what the term "peoples" includes.[70] It expressly stated that it is not necessary "to examine the position of the aboriginal population within Québec."[71] The Court then summarized international law by stating that the right of self-determination "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."[72] The right to *external* self-determination or secession "arises in only the most extreme of cases and, even then, under carefully defined circumstances."[73] Threats to the territorial integrity of states must be prevented.[74] The Court reviewed the narrow exceptions when a people are entitled to secede according to international law[75] and concluded:

> the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-

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67. *Id.* at 434-35.
68. *Id.* at 436.
69. *Id.* at 437.
70. *Id.*
71. *Id.* But the Court was equally hesitant to decide the question of whether there is also a Québec people: "it is not necessary to explore this legal characterization to resolve Question 2 appropriately. Similarly, it is not necessary for the Court to determine whether, should a Québec people exist within the definition of public international law, such a people encompasses the entirety of the provincial population or just a portion thereof." *Id.*
72. *Id.* at 437-38.
73. *Id.* at 438.
74. *See id.* at 438-39.
75. *See id.* at 440-41.

> determination because they have been denied the ability to exert internally their right to self-determination.[76]

While not squarely addressing the issues arising from the clearly stated refusal of the James Bay Crees and the Inuit to be compelled to follow Québec into secession from Canada, the Court made references to the potentially significant consequences of secession on Québec boundaries. In paragraph 96 the Court stated, "[n]obody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Québec."[77] The Court signalled that negotiations about Québec secession would have to include "the appropriate means of defining the boundaries of a seceding Québec with particular regard to the northern lands occupied largely by aboriginal peoples."[78]

CONCLUSION

There is no doubt that this remarkable judgment of the Supreme Court of Canada outlined a highly principled and democratic approach to resolving the problems arising from an eventual desire of a majority of Québécois to secede from Canada. It is a blueprint for moderation, good faith, respect for the rights of others and maintaining the rule of law. While the Court—out of prudence or judicial restraint—did not explore Aboriginal issues in any detail, the judgment nevertheless shows sufficient deference to Aboriginal rights and concerns to constitute a milestone.

The thoughtful, learned and effective interventions in the case by Aboriginal spokesmen and the extensive publicity given to Aboriginal issues in the media have greatly enhanced the credibility of the Aboriginal peoples and established their role as major participants in future constitutional discussions. In many ways, the interveners, although accorded only the legal status of incidental or supporting players in this drama, triumphed as leading actors with an attentive and widening audience.

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76. *Id.* at 442.
77. *Id.* at 428.
78. *Id.*