# Quebec's sovereignty project and aboriginal rights

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The interpretations and rulings of the Supreme Court of Canada in the *Quebec Secession Reference* should prove to be of far-reaching significance for aboriginal peoples. In particular, the aboriginal dimensions have extensive implications for Quebec's sovereignty project.

Although the judgment includes a few key pronouncements specifically relating to aboriginal peoples, the court indicated that it was not necessary to explore further in this reference their rights and concerns. The court took this position only because it had concluded that there is no right to unilateral secession by Quebec authorities under Canadian or international law (*Secession Reference*, paragraph 139). Since the judgment expressly highlights the importance of aboriginal peoples' rights and concerns, it would be erroneous to presume that the judgment can be properly analyzed solely in federal-provincial or non-aboriginal terms.

Before examining the aboriginal aspects of the reference, it is important to raise a preliminary, overarching concern. On the day after the Supreme Court rendered this historic judgment, Premier Lucien Bouchard emphasized in televised interviews that the rest of Canada would be constitutionally bound to negotiate with Quebec following a successful referendum. At the same time, he declared that the Quebec government would not be bound by the court's judgment. Such a view creates an unworkable double standard. A future Quebec referendum on secession could only acquire legitimacy, as set out in the judgment, if the Quebec government first accepts that it is bound, like all other political actors in Canada, by all aspects of the judgment. Otherwise, from the outset, there would be no common legal and constitutional framework for any secessionist project.

## SOME MAJOR NEW DEVELOPMENTS

With regard to Quebec's sovereignty project, I would like to list a number of points in the court's judgment that appear vital for aboriginal peoples. These points serve to balance legality and legitimacy. They also give rise to principles and norms that reflect the importance of dignity, equality, and mutual respect for all peoples in Canada. Many of the points summarized below go well beyond aboriginal peoples in their scope and significance, both for the present and the future.

1. **Unilateral secession.** As a result of the Supreme Court judgment, the threat of unilateral secession by Quebec is not totally eliminated. *De facto* secession (paragraphs 142 and 155) could still be attempted by Quebec in the future. However, the likelihood of unilateral action in the next few years has been considerably diminished in favour of aboriginal peoples, among others, in Canada.
2. **Increased importance of clarity.** In terms of clarifying the rules for any secession project, the court's judgment goes beyond requiring in the future a clear referendum question on secession and a clear majority vote. Unlike the situation that prevailed during the 1995 referendum on Quebec secession, there are now a number of judicial interpretations, criteria, and rules arising from the court's decision to use to measure the alleged validity or legitimacy of any party's position. Increased clarity and transparency should be the result.
3. **Legitimacies are all relative.** The court's judgment makes clear that legitimacy is a relative concept (paragraph 66). Following any successful referendum in the future, the legitimacy claims of Quebeckers must still be balanced by the legitimacies, rights, and interests validly asserted by others. Therefore, should the Quebec government seek to deny the legitimacy and rights of aboriginal peoples to determine their own future, then any claim of legitimacy by the Quebec government would itself be severely undermined.
4. **Principle of democracy applicable to all.** The democratic principle is not limited to Quebeckers clearly expressing their collective will through a referendum. The court's judgment stipulates that the rights, obligations, and legitimate aspirations of everyone in Canada must be reconciled (paragraph 104). Therefore, in the Quebec secession context, should aboriginal peoples express their own collective will through their own referendums or other democratic means, these legitimate and democratic voices must be accorded equal recognition, consideration, and respect without discrimination or other double standard.

## ABORIGINAL RIGHTS STRENGTHENED

Neither Canadian nor international law recognizes any doctrine of superiority of one people over another. As the preamble of the *International Convention on the Elimination of All Forms of Racial Discrimination* provides: "any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous."

5. **Aboriginal peoples not simply minorities.** The judgment generally includes aboriginal peoples under the constitutional principle of "protection

of minorities" (paragraph 82). This does not mean that the court intended to imply that aboriginal peoples are simply "minorities." In the 1996 case of *R. v. Van der Peet*, Chief Justice Lamer, on behalf of the majority, emphasized 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."

6. **Participants in future secession negotiations.** In terms of who has a role in the political aspects of any future secession process, the court refers generally to "political actors" (paragraphs 98, 100, 101, 110, and 153). In some instances, federal and provincial governments are mentioned (paragraph 86), but it cannot be concluded that they are the only "political actors" involved. "Participants," other than federal and provincial governments, are expressly contemplated by the court for any future secession negotiations (paragraph 92).

It is clear that, for secession and other constitutional purposes, aboriginal peoples are distinct "political actors" in Canada. Section 35.1 of the *Constitution Act, 1982* expressly provides for the direct involvement of representatives of aboriginal peoples in first ministers conferences, whenever amendments are contemplated to s. 35 and other constitutional provisions pertaining to them. Also, the established practice in Canada is to include the representatives of aboriginal peoples in constitutional negotiations as distinct "political actors."

7. **Number of "peoples" in Quebec.** The court chose not to answer the question of who constitutes "peoples" in Quebec for purposes of self-determination under international law. However, it indicated that the characteristics of a "people" include a common language and culture (paragraph 125). These criteria suggest that the court is not heading toward any definition of a single "people" in Quebec, based simply on provincial territorial considerations.

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With regard to aboriginal peoples in Quebec, their cultures and spirituality are not those of Quebeckers. Aboriginal peoples each have their own way of life. They each clearly choose to identify themselves as a distinct people. While French Canadians in Quebec are likely to constitute "a people" for purposes of self-determination, there is no Canadian or international law principle that would compel aboriginal peoples against their will to identify as one people with Quebeckers.

8. **Right to self-determination part of Canadian law.** 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" (paragraph 114).

## INTERNATIONAL LAW AND SELF-DETERMINATION

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. The term may also overlap with other principles. 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, lead to the conclusion that the court was describing the right to self-determination as nothing less than customary international law.

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. This is true, as long as there is no conflict with statutory law or well-established rules of the common law. In this way, the right to self-determination can be said to be a part of the internal law of Canada. This has far-reaching positive implications, which go beyond the Quebec secession context, for any aboriginal peoples who demonstrate they are "a people" under international law.

9. **Boundary issues must be addressed in negotiations.** The issue of Quebec's boundaries is not only underlined by the court in terms of Canada's "national existence" (paragraph 96), but also with regard to aboriginal peoples — especially their "northern lands" (paragraph 139). In conformance with the judgment, boundary issues must be addressed in any negotiations on Quebec secession.

Moreover, the court adds that "none of the rights or principles under discussion is absolute to the exclusion of others" (paragraph 93). Therefore, the Quebec government could not rely on constitutional guarantees for its present provincial boundaries to prevent division of the province in the event of secession. Since Canada and Quebec would both be divisible in secession negotiations, the Quebec government could not insist that the international law principle of *uti possidetis juris* must prevail to preserve the province's current boundaries.

10. **Constitutional amendment procedures not absolute.** The court states that underlying constitutional principles, such as democracy and

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sue. The court's characterization of a "clear majority" as "a qualitative evaluation" is not very helpful.

By the same token, despite the claims of some, the court's allusions to a Canadian tradition of "enhanced majorities" (paragraph 77) do not bear on the question of a referendum on Quebec sovereignty. The notion of "enhanced majorities" is presented as part of the Canadian understanding of democracy, but the evidence that is offered deals not with the procedures in vote-taking among citizens or the members of a legislature, but the number of provincial legislatures needed to ratify a constitutional amendment. In other words, it bears upon the principle of federalism rather than democracy. The fact remains that within any given jurisdiction simple majority always has been the main operative principle of democracy in Canada. It might be argued that a provincial referendum on secession is so consequential and unprecedented as to require a higher threshold than 50 percent plus one. Yet it is difficult to make this argument in terms of past Canadian practice. In short, it would require a different methodology than the court's.

Still, through the carefully constructed and balanced positions it did take, the court has transformed the terms of public debate over Quebec sovereignty, cutting through the posturing and pretence and focusing all sides on the central questions at hand. By restoring to its proper place the best of Canada's political tradition, the court provided a leadership that had been wanting among political and intellectual elites alike.

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protection of minorities, apply to more than secession negotiations (paragraphs 93-95). These principles "animate the whole of our Constitution" (paragraphs 148 and 32), including the "amendment process" (paragraph 92). This suggests that the express provisions to amend the constitution of Canada are qualified by unwritten principles and are not absolute.

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In an extreme situation such as secession, underlying constitutional principles could serve to limit the powers of federal and provincial legislatures. Should legislatures violate the principle of democracy in relation to aboriginal peoples, the courts could rule that the amendment procedures used to allow Quebec secession were "not in accordance with the authority contained in the Constitution of Canada" (*Constitution Act, 1982*, s. 52(3)).

As the above 10 points illustrate, the question of legitimacy of Quebec secession is inextricably tied to the respect accorded to the rights, legitimacies, and aspirations of aboriginal peoples, among others. Non-aboriginal governments and legislatures in Canada do not have the discretion to determine the future of aboriginal peoples. This is fortified by the fact that the Canadian system of government has been "transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy" (paragraph 72).

## NEW RULES OF THE GAME

The status and rights of aboriginal peoples are fundamental elements in Canada's constitution. Protection of these rights "reflects an important underlying constitutional value" (paragraph 82). Should a successful referendum in Quebec lead to secession negotiations in the future, the court's judgment has strengthened the position of aboriginal peoples in Quebec to make their own collective choices, participate directly in negotiations, and assert their basic rights. As the court stipulates in the *Secession Reference*, any future negotiations on Quebec secession must be "principled" (paragraphs 104, 106, and 149).

In particular, the right of aboriginal peoples to self-determination militates against their forcible inclusion in any future seceding Quebec. With regard to the James Bay and Northern Quebec Agreement, the right to self-determination of the Cree and Inuit reinforces the fact that any alteration of their constitutionally protected treaty rights requires their free and informed consent.

While clearly there are no guarantees, the Quebec government may ultimately be able to negotiate an independent Quebec state. However, consistent with principles of fairness, democracy, and respect for human rights, this would not necessarily include the vast northern and other traditional aboriginal territories currently in Quebec.

# Strategy and process

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der to make it attractive to all parts of the country, including Quebec.

Working on plan A is invariably going to be easier and more rewarding than facing the (likely) consequences of a failed secession negotiation, bogged down in its own complexity in the face of unrealistic expectations that it could be settled quickly.