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National Separation: Canada in Context—A Legal Perspective

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I. INTRODUCTION

We have in our country the patriotism of Ontarians, the patriotism of Quebecers and the patriotism of Westerners, but there is no Canadian patriotism, and there will not be a Canadian nation as long as we do not have a Canadian patriotism.¹

Canada's prolonged internal conflict between Quebec and the rest of Canada has reached new heights. The Federal Government's attempt to embrace Quebec and have Quebec ratify the Canada Act of 1982

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1. The late Henri Bourassa, journalist and politician, as described by Pierre Elliott Trudeau, *Say Goodbye to the Dream, in Meech Lake and Canada: Perspectives From The West 65* (Roger Gibbins ed., 1982).

has failed miserably, laying a foundation for unprecedented conflict with potentially grave consequences. Instead of bringing harmony among the Canadian people and legitimacy to the Canadian Constitution, the failed attempt has divided the country. In the past, resolutions have been found in temporary compromise. A resolution of this type will probably not satisfy the current expectations of the Canadian people. Therefore, either an all encompassing resolution or a valid approximation of one is required if the entrenched and divergent interests are to be reconciled. Internal crisis will reach an unprecedented level should this not be achieved.² Separation of a province from Canada, or for that matter sovereignty-association, would have profound effects upon Canadian nationals, their legal status, treaties that Canada is party to, and, most importantly, the Canadian economy. It is for these reasons that the proper review of the following material is important to the future of Canada.³

Globally, separation of countries has become a popular and sweeping trend in the 1990s. Neither the concept nor the actual act of separation itself is a recent development. What is novel is the acceptance of separation in unprecedented levels of form and propensity. The decline of the Soviet Union has seen the fragmentation process accelerated in the U.S.S.R.'s former sphere of influence. An example of this is Czechoslovakia, which has stepped out of Soviet shadows. Furthermore, Czechoslovakia's two dominant ethnic groups, the Czechs and Slovaks, have negotiated a peaceful partition of the country.⁴ The former Yugoslavia finds itself torn apart by a bloody and inhuman civil war promulgated by its divergent ethnic groups, primarily the Serbs, Bosnians, and Croats.⁵ The former Soviet Union itself separated on the basis of the prior Soviet Socialist Republics and may be in the process of dividing further based on ethnic, linguistic and religious lines (e.g., Armenians—who desire a place in the region of the former Southwestern S.S.R.'s).⁶ Canada may

2. After the failure of the Charlottetown Agreement, in October of 1992, Prime Minister Mulroney called for a moratorium on constitutional reform until the Canadian economy rebounded from the recession and lack of confidence in the Canadian dollar. Patricia Chisolm, *Weathering the Storm in Canada*, Maclean's, Sept. 28, 1992, at 40.

3. It may be argued that strict legal compliance is of little importance and that constitutional law is more political than legal. However, the constitutional law of Canada is the basis of the structure of Canada and therefore it cannot be ignored. This is especially true since the Constitution Act, 1982 has gained more prominence and been embraced by most Canadians.

4. *Czechoslovakia's Split Approved*, Wall St. J., Nov. 27, 1992, at 6; *Czechoslovak Parliament Votes Division of the Nation on Jan. 1.*, N.Y. Times, Nov. 26, 1992, at A5.

5. Michael S. Serrill, *Underfire*, Time, Jan. 18, 1993, at 32-34; Bruce W. Nelan, *Serbia's Spite*, Time, Jan. 25, 1993, at 48-49.

6. The former Soviet Socialist Republic of Lithuania is an example of a successful separation in Eastern Europe. Lithuania had first gained independence from Imperial

be the first Western country to follow this trend. This comment addresses the question of whether the constituent parts of Canada and its native peoples have any constitutional or international "right" to separate.

Understanding the crisis in Canada requires that we first examine what led to the current crisis and what Canadian constitutional law provides in reference to separation. Due to the similarities they share with Canada, a comparison to the United States and Australia is made to examine how they have dealt with separation on constitutional grounds and whether Canada can learn by their examples. International Law is then discussed in relation to a province, a territory, or natives separating from Canada with the purpose of determining whether separation is justifiable under International Law and whether it provides a framework for separation in Canada.

II. BACKGROUND—CANADA: MOVING TOWARDS SEPARATION

Canadian separatism has traditionally been based in Quebec, although it has recently found proponents in Western Canada and the First Nations.⁷ Separatism has been fueled in recent years by a renewal in the Parti-Quebecois;⁸ the formation of the Bloc Quebecois,⁹ the Re-

Russia on February 16, 1918. For the next twenty years Lithuania was a secure nation and, with its Baltic neighbors, Latvia and Estonia, a member of The League of Nations. On June 15, 1940, Moscow claimed Lithuania violated Mutual Assistance treaties and proceeded to militarily occupy the country, depose the government, and intern its leaders in the Soviet Union. The Soviets occupied Lithuania until 1991.

Article 72 of the 1979 Soviet Constitution was enacted for the purpose of implementing the self-determination provisions of the Helsinki Declaration. In theory, Article 72 granted the right of secession to every Soviet Socialist Republic (S.S.R.). In March, 1990, Moscow enacted a new law that laid the procedure by which a S.S.R. may secede. The new secession provisions required that two-thirds of the all the S.S.R.s vote in favor of secession in a popular referendum that allowed no campaigning. If the bid for secession were to fail, then by law it could not be attempted for another ten years. If the bid for secession was successful, then a five year period would be required by law to negotiate a separate agreement with the seceding S.S.R. On February 9, 1991, the Lithuanians held a plebiscite in which ninety percent of Lithuanians demanded independence.

After the failed August 1991 coup against Gorbachev, the Soviet state machine broke down; on September 6, 1991, the Soviet Union formally recognized Lithuania. Col. James P. Terry, *Lithuanian Independence and International Law: A Retrospective Examination*, 40 Naval L. Rev. 133, 138-40 (1992).

7. "First Nations" is a term used in Canada to describe the Canadian descendants of the original inhabitants of the North American continent. Inuit and Metis are included as First Nations. Patrick Macklem, *First Nations Self-Government and the Borders of the Canadian Legal Imagination*, 36 McGill L.J. 382 n.1 (1991).

8. The Parti Quebecois (P.Q.) is a provincial political party in the province of Quebec. In 1968, the separatist groups Movement Souveraineti-Association, and the Rassemblement Pour L'Independence joined together and formed the P.Q. The P.Q. was the reigning party in Quebec from 1976 to 1985 and today still remains a potent force in

form Party,¹⁰ and the Confederation of Regions¹¹ parties; the failure of the Meech Lake Accord;¹² the failure of the Charlottetown Agreement;¹³ and the increased desire and militancy by Canadian natives for self-government.¹⁴ Canada's particular mode of politics—balancing a region's

Quebec politics. The main platform of the P.Q. is to strive to protect Quebec as a distinct society from the rest of Canada. At one time the P.Q. believed this could only be achieved by secession/separation. Since the 1980 Quebec referendum and the Quebec public's reluctance to give the P.Q. authority to separate, the P.Q. has revised its goal and now seeks "sovereignty-association." Rene Levesque, *My Quebec* 22 (1979); R. Kenneth Carty & W. Peter Ward, *Entering The Eighties* 142-143 (1980); John Saywell, *The Rise of the Parti-Quebecois 1967-1976* (1977). The current P.Q. leader, Jacques Parizeau, stated that if his party ousts the liberals in the next provincial election (expected in 1994), his party would hold a sovereignty referendum within nine months of its election. National Notes, *Sovereignty Timetable*, *Maclean's*, Jan. 4, 1993, at 47.

9. The Bloc Quebecois is a federal political party that is based in and receives almost all its support from Quebec. This party was formed by Federal Members of Parliament (M.P.) after the failure of the 1987 attempt to amend the constitution (The Meech Lake Accord). After the Meech Lake Accord's failure, Bouchard, a Conservative (one of the three large Canadian political parties) M.P. from Quebec and a member of Prime Minister Mulroney's cabinet, resigned from his cabinet post and from membership in the Conservative Party. Bouchard became a hero in Quebec and subsequently became the leader of the Bloc Quebecois. In a *Maclean's*/CTV poll, the people of Quebec chose Bouchard as their favorite federal politician. Bouchard garnered 36% of the votes while the next three politicians, Brian Mulroney (the Prime Minister and leader of the Federal Conservative Party), Jean Chretien (leader of the Federal Liberal Party), and Bill Clinton, garnered 9%, 8%, and 7% respectively. Anthony Wilson-Smith, *Time to Listen*, *Maclean's*, Jan. 4, 1993, at 18; Nancy Ward, *A Lion's Roar in Quebec: A Champion of Nationalist Passion*, *Maclean's*, July 22, 1991, at 19; Anthony Wilson-Smith, *A New Voice for Quebec: Dissident MPs Seek Sovereignty*, *Maclean's*, Oct. 15, 1990, at 22; *Bloc Quebecois to Disband if Quebec Vote Lost*, *52 Facts on File* 84 (Feb. 6, 1992).

10. The Reform Party of Canada was established in 1987. One year later it garnered 15% of the Alberta vote and 9% of the vote in the western provinces (Manitoba, Saskatchewan, Alberta, and British Columbia). The party's constitution states it was "born out of the discontents and frustrated aspirations of Western Canadians." Since its birth, the Reform Party has also found some support in Ontario and eastern Canada. Gordon Robertson, *A House Divided* 7-8 (1989); Brian Bergman, *Harvest of Resentment*, *Maclean's*, Oct. 29, 1990, at 37.

11. The Confederation of Regions Party began in a discontented western Canada as well. However, it is yet to garner substantial support. Paul Kaihla, *Anger at the Core*, *Maclean's*, Oct. 7, 1991, at 16-18.

12. The Meech Lake Accord was a proposed agreement among the provinces and the federal government to amend the constitution so that Quebec would ratify the constitution. See *infra* text at note 43.

13. This proposed agreement to amend the constitution followed the failure of the Meech Lake Accord. See *infra* text at note 46.

14. *Power Share Deal Struck*, *Winnipeg Free Press* (Canada), Aug. 22, 1992, at 10; Barry Came, *A Time for Healing: Emotions Still Divide Oka and Kahnawake*, *Maclean's*, Nov. 12, 1990, at 26; *An Angry Deadlock: There is a No-Surrender Mood at Oka*, *Maclean's*, Sept. 24, 1990, at 15; *Rough Justice*, *Maclean's*, Aug. 6, 1990, at 18.

or province's interests against those of all other Canadians in order to gain votes—has also fueled the fire.¹⁵

Although separatism in Quebec emerged in the middle of this century, although some believe its seeds lay on the Plains of Abraham. It was here that the British forces of General Wolfe defeated the French forces under General Montcalm, which in turn led to British rule in Quebec.¹⁶ From 1927 until 1982, Quebec blocked the patriation¹⁷ of the Canadian Constitution.¹⁸ Quebec's blocking actions were based upon the belief of its people that their distinct society was being eroded by the dominant English culture of North America and that the patriation of the constitution, without protection, would accelerate the erosion of that distinct society.¹⁹ It was not until 1982 that Prime Minister Trudeau and his Liberal government patriated the Canadian Constitution, with the assent of all the provinces except Quebec.²⁰ The Canadian Supreme Court held that the federal government was not constitutionally required to obtain the assent of the Canadian provinces to patriate the constitution. However, the Court held that convention does require the federal government to acquire a "substantial degree" of provincial support.²¹

The modern history of Quebec separatism began under the Lesage government.²² At the federal-provincial conference of July 1960, the First

15. Alain G. Gagnon & James P. Dickerton, *Canadian Politics* 285-390 (1990).

16. During the Seven Years War, the English Army and Navy took Quebec in September, 1759. Four years later, "New France" was transferred to the French under the Treaty of Paris. John Fitzmaurice, *Quebec and Canada* 4-5 (1985).

17. Patriation means "bringing back to the home country." In the case of Canada it also means the termination of the United Kingdom's authority over Canada and Canada's resulting autonomy. Peter W. Hogg, *Constitutional Law of Canada* 44-49 (2d ed. 1985). Peter W. Hogg, Q.C., L.L.B., L.L.M., Ph.D., is a professor of Law at Osgoode Hall Law School, York University. Professor Hogg's text is the leading text on Canadian Constitutional Law. Furthermore, Professor Hogg is frequently quoted with approval by the Supreme Court of Canada.

18. Pierre Trudeau, *Trudeau Speaks Out*, *Maclean's*, Sept. 28, 1992, at 23-26.

19. Katherine E. Swinton & Carol J. Rogerson, *Competing Constitutional Visions* Part I, 3-93 (1988).

20. Patrick Monahan, *Meech Lake: The Inside Story* 14-37 (1991).

21. Trudeau, *supra* note 18, at 22-26. *Re Resolution to Amend the Constitution* (Patriation Reference) 1 S.C.R. 753 (1981) [hereinafter *Re Resolution To Amend*]. This case is thoroughly discussed by Peter W. Hogg, *Comments on Legislation and Judicial Decisions*, 60 *Can. Bar Rev.* 307 (1982). Conventions are rules of the constitution not enforced by the courts, but used to prescribe the way in which legal powers shall be exercised. Hogg, *supra* note 17, at 12-20.

22. The Liberal Government of Lesage was elected in 1960, and set in motion the "Quiet Revolution." The "Quiet Revolution" refers to the years of 1960-1966, a period of dramatic modernization and economic growth in Quebec. Canadian Politics: An Introduction to the Discipline 348-49 (Alain Gagnon and James Bickerton eds., 1990); Georges Mathews, *Quiet Revolution* 2-9 (1990).

Ministers discussed a constitutional agreement but failed to produce any results.²³ Later, in 1964, under the pressure of Quebec Nationalists, Premier Lesage repudiated the Fulton-Favreau Agreement.²⁴ This agreement was a further attempt to patriate the constitution. After the failure of the Fulton-Favreau Agreement, "opting out" provisions became the new demands of the Quebec government.²⁵ These opting out provisions would allow Quebec to not participate in federal programs, but to receive federal funds to run their own programs.²⁶ In 1966, Daniel Johnston became the new premier of Quebec and changed Quebec's demands to "equality or independence."²⁷

In 1970, the Prime Minister and Premiers agreed to the Victoria Charter formula which provided for a constitutional amending process.²⁸ This agreement, as did the Fulton-Favreau Agreement, provided Quebec with a veto. The agreement required the ratification of all the provinces. All of the provinces did or were about to provide their ratification when Quebec decided not to ratify the agreement.²⁹

In 1970, the current era of Quebec separatism began. Since then Quebec has only had two Premiers: Robert Bourassa and Rene Levesque.³⁰ In the autumn of 1970 the short lived radical movement, called the Front for the Liberation of Quebec (F.L.Q.), kidnapped British Trade Commissioner James Cross, kidnapped and assassinated Quebec Labor Minister Pierre Laporte, and caused panic in the streets of Montreal in their search for "freedom."³¹ In response, Prime Minister Trudeau, with the support of the House of Commons, invoked the War

23. Trudeau, *supra* note 18, at 22-26.

24. The Fulton-Favreau Agreement (1964) set forth a formula that required the unanimous consent of the Federal Parliament and all provincial Parliaments for all significant constitutional amendments. Quebec was the only province that did not find the agreement acceptable, and therefore the agreement was not implemented. Eugene Forsey, *Freedom and Order* 235-237 (1972); Hogg, *supra* note 17, at 54-55.

25. The opting out clause was included in Section 38(3) of the Constitution Act, 1982. A province is permitted to opt out of a constitutional amendment that "derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province." Hogg, *supra* note 17, at 59-62.

26. Section 40 of the Constitution Act, 1982, provides for "reasonable compensation" to a province who has opted out of an amendment that transfers "provincial legislative powers relating to education or other cultural matters" from the provincial to the federal government. Hogg, *supra* note 17, at 61.

27. Levesque, *supra* note 8, at 16-17.

28. Hogg, *supra* note 17, at 54-56.

29. *Id.* at 55 n.19.

30. It should be noted that Mr. Levesque has died and that Mr. Bourassa is ill with cancer. Furthermore, on February 25, 1993, Mr. Mulroney announced his resignation as Prime Minister. This potential vacuum of powerful leaders leaves Canada's future less certain. Barry Came, *You Never Know*, *Maclean's*, Jan. 25, 1993, at 12; Brenda Dalglish, *Future Vision 1993*, *Maclean's*, Jan. 4, 1993, at 56; Peter C. Newman, *Bourassa's Illness Touches All of Us*, *Maclean's*, Jan. 25, 1993, at 32.

31. Fitzmaurice, *supra* note 16, at 37-38, 57-58, and 188-89.

Measures Act, which suspended civil rights and brought the Canadian military into Quebec to quell the F.L.Q.³² After a massive operation, many key F.L.Q. members were captured and arrested, and the group's activities ceased. In 1971, Premier Bourassa demanded "cultural-sovereignty."³³ In 1976, Premier Levesque demanded that the rest of Canada grant Quebec "sovereignty-association" or else Quebec would secede.³⁴ In pursuit of these goals Premier Levesque held a referendum in 1980 asking the Quebec people³⁵ for consent to negotiate a separation with Canada.³⁶ After the referendum's defeat,³⁷ Premier Levesque attempted to achieve Quebec's goals by attempting to induce a shift of federal power to the provinces. In 1981, Premier Levesque allied himself with seven other provinces to demand a "notwithstanding" clause, allowing provinces to opt out of federal programs with compensation.³⁸ Seven months later, Premier Levesque conditioned Quebec's assent to patriation of the constitution by requiring a constitutional veto for Quebec, recognition of Quebec as a "distinct society," and limitations to the Charter of Rights and Freedoms.³⁹ On April 17, 1982, however, Canada patriated the constitution without Quebec's assent and without its conditions.⁴⁰

After the patriation of the constitution in 1982, many Canadians and Canadian politicians desired that Quebec ratify the constitution.⁴¹ Once elected to office in 1984, Prime Minister Mulroney adopted this

32. *Id.* at 37-38 and 189; Hogg, *supra* note 17, at 285-86.

33. Trudeau, *supra* note 18, at 24-26.

34. Hogg defines sovereignty-association as secession (hence "sovereignty"), but also having an economic relationship between the ex-province and Canada (hence "association"). Hogg, *supra* note 17, at 101-02. Based upon the demands of the Quebec government and the public perception of "sovereignty-association," it would appear that the term is used to describe a state of existence. In this state of existence Quebec would have full sovereignty, and yet maintain its current economic and military ties (without any changes to them) with the rest of Canada; see also Fitzmaurice, *supra* note 16, at 42-50.

35. Quebecois is another term for inhabitants of Quebec. Harrap's *New Collegiate French and English Dictionary* 605 (1982).

36. Fitzmaurice, *supra* note 16, at 42-50.

37. The Quebec referendum had an 85% voter turnout in which 59.56% voted "no" and 40.44% voted "yes" to give the Quebec government authority to negotiate a separation with Canada. Mordecai Richler, *Oh Canada! Oh Quebec!: A Requiem for a Divided Country* 124-25 (1992).

38. This was only part of the agreement known as the "Vancouver Formula." Hogg, *supra* note 17, at 55. The notwithstanding clause (also known as the override power) is located in the Constitution Act, 1982, Section 33. A province may override Section 2 or Sections 7-15 of the constitution. These sections are part of the Charter of Rights. Hogg, *supra* note 17, at 15, 259-60 and 690-92.

39. Fitzmaurice, *supra* note 16, at 295-326.

40. Monahan, *supra* note 20, at 14-37; Gerald Gall, *The Canadian Legal System* 64 (3d ed. 1990).

41. Monahan, *supra* note 20, at 22.

cause. In 1985, Bourassa returned to power and demanded that the constitution's preamble be amended to include recognition of Quebec as a "distinct society." Otherwise he would not participate in constitutional talks which were intended to have Quebec ratify the constitution and end hostilities among the Canadian Governments.⁴² The Meech Lake Accord was the product of these talks, which spanned two years.⁴³ However, when presented to the Canadian public, the Meech Lake Accord was not popular. Indeed, the Meech Lake Accord became less popular over time, even though the Federal Government engaged in an expensive and extensive campaign to promote the Accord.⁴⁴ But despite its unpopularity, the Accord only required Manitoba's assent to progress to its enactment.⁴⁵ Manitoba did not assent, New Brunswick withdrew its ratification, and the Meech Lake Accord consequently failed.

In an effort to salvage Canada, Prime Minister Mulroney successfully brought the provinces back to the bargaining table. This time, the negotiations included natives and representatives from the Yukon and Northwest Territories. The Charlottetown Agreement was the product of these expanded negotiations.⁴⁶ It provided for native self-government,⁴⁷ a change to the constitutional amending process,⁴⁸ and, more importantly, recognition of Quebec as a "distinct society."⁴⁹ On October 26, 1992,

42. Swinton & Rogerson, *supra* note 19, at 3-93.

43. Peter W. Hogg, *Meech Lake Constitutional Accord Annotated* 3-4 (1988); Bryan Schwartz, *Fathoming Meech Lake* 1-3 (1987).

44. Monahan, *supra* note 20, at 200.

45. Manitoba had a minority Conservative Government. (A minority government in a parliamentary system of government such as Canada's exists when a political party holds less than a majority of seats and two or more other parties hold the remaining seats.) The Manitoba Liberal and the New Democratic Parties held up the Accord because they were concerned about the effect of the "distinct society" clause on the rights of women, non-francophones, and natives in Quebec. Nevertheless, the Manitoba Liberal and New Democratic parties begrudgingly were about to approve the Meech Lake Accord when one native member of the legislature, Elijah Harper, filibustered past the deadline for ratification. Harper was a New Democratic Party Member of the Manitoba Legislature. The actions he took to block the passage of the Meech Lake Accord has made him a hero to Canadian natives and somewhat of a national hero. Richler, *supra* note 37, at 218; C.E.S. Franks, *The Parliament of Canada* 48-50 (1987). The Defeat of the Meech Lake Accord cannot be mentioned without referring to Premier Clyde Wells of Newfoundland. Wells' vocal campaigning against the Accord and his disputes with pro-Meech Lake supporters placed him at the forefront of the debate. Philip Resnick, *Toward a Canada-Quebec Union*, at 6-9 and 32 (1991).

46. Charlottetown Agreement, § IV, A. [hereinafter Charlottetown Agreement]; Government of Canada, *Consensus Report on the Constitution: Charlottetown Agreement* (Aug. 28, 1992) [hereinafter Consensus Report].

47. Charlottetown Agreement, § II, A.

48. *Id.* § V.

49. *Id.* § I, A(2)(1)(c) and I, A(2)(2).

all of the Canadian Provinces voted on the Agreement.⁵⁰ Quebec, British Columbia, Alberta, Saskatchewan, Manitoba, and New Brunswick voted against its adoption. Newfoundland, Nova Scotia, Prince Edward Island, and Ontario (by the narrowest of margins) voted for its adoption.⁵¹ Thus, the ambitious Charlottetown Agreement, like so many attempted agreements before it, fell to defeat.

Once again separatism breathes new life. Most assuredly the defeat of the Charlottetown Agreement will give rise to a stronger movement for separation in Quebec, the western provinces, and among the First Nations. It is now, while old wounds fester, that we examine separation's legal viability.⁵²

III. THE "RIGHT" TO SEPARATE: COMPARATIVE CONSTITUTIONAL LAW

A. *The Canadian Constitution*

The obvious starting point in determining whether a province, territory, or native group can separate in Canada is Canadian Constitutional Law. Which Constitutional Law? Should it be the Constitutional Law as set forth by the Constitution Act, 1982, and the subsequent jurisprudence derived therefrom, even though Quebec did not ratify this Act? Alternatively, should the law prior to the Constitution Act, 1982,

50. Consensus Report, *supra* note 46.

51. The following displays how Canadians in the provinces and territories voted (yes is for the adoption of the Charlottetown agreement): Newfoundland 62.9% yes, 36.5% no; Nova Scotia 48.5% yes, 31.1% no; Prince Edward Island 73.6% yes, 25.9% no; New Brunswick 61.3% yes, 38% no; Quebec 42.4% yes, 55.4% no; Ontario 49.8% yes, 49.6% no; Manitoba 37.9% yes, 61.7% no; Saskatchewan 44.5% yes, 55.1% no; Alberta 39.6% yes, 60.2% no; British Columbia 31.9% yes, 67.8% no; Northwest Territories 60.2% yes, 39% no; Yukon 43.4% yes, 56.1% no; Nationally 44.8% yes, 54.2% no. Anthony Wilson-Smith, *What Happens Next?*, *Maclean's*, Nov. 2, 1992, at 13.

52. The analysis in the above section is not meant to denigrate by omission the natives and western Canadians who desire to separate. This section is to provide and explain the original and most dominant impetus for separation in Canada. In a *Maclean's*/CTV poll, 69% of Canadians viewed Canada as a relationship among ten equal provinces, while 31% viewed Canada as a pact between two founding groups, English and French. Only 56% of Quebecois viewed Canada as a relationship among ten equal provinces, while 73% of the rest of Canada viewed Canada as a relationship among ten equal provinces. Allen R. Gregg, *The New Canada*, *Maclean's*, Jan. 4, 1993. However weary Canadians are of the constitutional battles, 79% would not join the United States if given the opportunity. Interestingly, 20% of Canadians would be willing to join the United States if given the chance. This is an increase from 1989, when only 16% would be willing to join the United States. Ross Tarver, *Hope In Hard Times*, Jan. 4, 1993, at 16-17.

be applied? It is the constitutional law after the Constitution Act, 1982, that is the valid and applicable law.⁵³ The federal government with the consent of nine provinces, but not Quebec, requested that the United Kingdom amend the Constitution Act, 1867,⁵⁴ and patriate the Canadian Constitution.⁵⁵

Three provinces petitioned their Courts of Appeals to determine whether there was a legal or conventional requirement that the federal government first obtain the consent of the provinces to patriate the Canadian Constitution.⁵⁶ The provinces' request was then reviewed by the Supreme Court of Canada. The Supreme Court of Canada held in *Patriation Reference* (1981) that the federal government could by law act unilaterally to patriate the constitution.⁵⁷ However, the Supreme Court did find that convention⁵⁸ required the federal government to obtain a "substantial degree" of provincial support.⁵⁹ Therefore, the federal government sought and received such consent in December, 1981, when both Houses of the Canadian Parliament passed the petition which was subsequently enacted by the Parliament of the United Kingdom and became the Constitution Act, 1982.⁶⁰

Nevertheless, to gain a full understanding of the treatment of separation it is useful to review the prior constitutional law and its approach to separation. Furthermore, the provisions of the Constitution Act, 1867, are partially duplicated in the Constitution Act, 1982.

According to Matas, the constitutional law prior to 1982, Quebec could secede only if the Constitution Act, 1867 was amended.⁶¹ The necessary amendment could not be enacted by a province or by parliament; only the British Parliament could enact the amendment.⁶² The

53. The largest part of the Constitution of Canada is the Canada Act, 1982. It should be noted, however, that the Constitution of Canada includes: the Constitution Act, 1982; the Constitution Act, 1867 and its amendments, also known as the British North America Act, the orders in council and statutes admitting or creating new provinces or altering boundaries; the Statute of Westminster, 1931; and the Constitution Amendment Proclamation, 1984.

54. The British North America Act, 1867, an act of the British Parliament, was re-enacted as the Constitution Act of 1867. Gall, *supra* note 40, at 61-66.

55. Hogg, *supra* note 17, at 44-49.

56. Reference re Amendment of Constitution of Canada (Nos. 1, 2, and 3).

57. *Re Resolution to Amend*, 1 S.C.R. 753, 848.

58. Hogg, *supra* note 17, at 12-20.

59. *Re Resolution to Amend*, 1 S.C.R. at 848. The Canadian Supreme Court did not however determine what a "substantial degree" was.

60. Gall, *supra* note 40, at 63-65; E. McWhinney, Canada and the Constitution 1979-1982: Patriation of the Charter of Rights 125-26 (1982).

61. David Matas, *Can Quebec Separate?*, 21 McGill L.J. 387, 389 (1975); R.A. Mayer, *Legal Aspects Of Secession*, 3 Man. L.J. 61, 62-66 (1968).

62. The Constitution Act, 1867 could not be generally amended by the Canadian

procedure to be followed by the British Parliament would have required a joint address by the Canadian Senate and House of Commons, and the response of the British Parliament should be only to respect the wishes of the Federal Parliament.⁶³ No single provincial Parliament could request such a change, even if an independence referendum was held and a large majority of the population supported secession.⁶⁴ The above conclusion of Matas⁶⁵ on this issue is essentially the same as later espoused by the Supreme Court in *Patriation Reference*.⁶⁶ In essence, the pre-1982 analysis is similar to that of post-1982, except that prior to the patriation of the Canadian Constitution, the United Kingdom's Parliament had the ultimate and exclusive authority to amend the Canadian Constitution, this being a British Act of Parliament.

1. By a Province or Territory

One method of separation would be by constitutional amendment under the Constitution Act, 1982. Peter Hogg, one of Canada's premier authorities on Constitutional Law, indicates that a province, territory, or First Nation could constitutionally separate from Canada provided there was an amendment to the Constitution allowing separation.⁶⁷ Although there are now several ways to amend the constitution—each method of amending is intended for a specific purpose—section 38, the general amending procedure, is the most probable procedure to follow to provide for a separation.⁶⁸ This procedure requires Federal assent by both the House of Commons and the Senate as well as the assent of the legislative assemblies of two thirds of the provinces representing fifty percent of the population.⁶⁹ A province desiring to secede could not do so under Section 45 of the Constitution Act, 1982, because secession would not only amend the constitution of the province, but would also involve division of the national debt and national property. Section 45

government because it was an act of British Parliament. However, some minor amending power was given to the Canadian federal and provincial governments. The limited powers to amend were enumerated in Sections 91(1) and 92(1) for the Canadian federal and provincial governments respectively. Sections 91(1) and 92(1) have been replaced by Section 44 and 45, respectively, of the Constitution Act, 1982. There are now several amending procedures that apply to different subject matter and no longer is British assent required. The amending procedures are discussed *infra* at note 70.

63. Matas, *supra* note 61, at 392.

64. Constitution Act, 1867, Sections 91(1) and 92(1). This method had been attempted by Nova Scotia and failed, see *infra* text at note 77.

65. Matas, *supra* note 61, at 403.

66. *Re Resolution to Amend*, 1 S.C.R. 753 (1981).

67. Hogg, *supra* note 17, at 70-73, 101-06.

68. *Id.* at 102-03.

69. *Id.*

only allows a province to amend its provincial constitution and not the federal constitution. There are other methods of amending the constitution, but they are inapplicable here.⁷⁰ Therefore, a province seeking to secede cannot do so by a unilateral act.

Separation may be also valid under other procedures than those set forth in the Constitution Act, 1982. Provincial secession by unilateral act would, of course, be unauthorized by existing Constitutional Law.⁷¹ Nevertheless, a successfully maintained unilateral secession may establish a new legal order and be considered a successful revolution.⁷²

The Common Law has implied that a successful secession by a group or geographic unit from Canada may be universally recognized as a legitimate state with the power that accompanies this status. In *Madzimbamuto v. Lardner-Burke*,⁷³ the Privy Council "had to decide whether validity should be accorded to the acts of the legislature and government of Southern Rhodesia after the 'unilateral declaration of independence' from Britain."⁷⁴ The Privy Council used a two part test and determined that the acts lacked validity because it "could not be said 'with certainty' that the breakaway government was in effective control of the territory which it claimed the right to govern,"⁷⁵ and that the former sovereign, Britain, still claimed the right to govern. Applying the same analysis as *Madzimbamuto*, whether a Canadian province unilaterally declared in-

70. There are five constitutional amending procedures including the Section 38 method. First, Section 41 provides for unanimity of the Federal Parliament (both the House of Commons and the Senate) and all the parliaments of each province to amend the constitution when it relates to changing the structure of the Canadian government. However, it provides for narrow and specific subject areas. These include: the representation in the House of Commons, the powers of the Senate, selection method for senators, the number of senators per province, residency of senators, the Supreme Court of Canada, the extending of provinces into territories, and the establishment of new provinces. Second, Section 43 provides that when an amendment applies to some but not all of the provinces, the Federal Parliament and the parliaments of the affected provinces need to assent to the amendment. Third, Section 44 provides that the Federal Parliament alone need assent to amendments that are in relation to the Federal Executive, Senate, or House of Commons. Finally, Section 45 provides each provincial Parliament the power to amend the "constitution of the province." Only Sections 38 and 41 are the potential amending provisions. The other sections lack the scope. "The indirect impact of secession on matters enumerated in section 41 makes the unanimity procedure inapplicable." Therefore section 38, which is the general amending procedure and applies when none of the other four specific procedures is applicable, is the correct method for amending the Canadian Constitution to allow for separation. Procedure for Amending the Constitution of Canada, Part V, Constitution Act, 1982. Hogg, *supra* note 17, at 58-69, 102-03.

71. Hogg, *supra* note 17, at 104.

72. The American Revolution and the establishment of the United States as an independent state, with a new legal order, is one such example.

73. 1 A.C. 645, 3 All E.R. 561 (1968).

74. Hogg, *supra* note 17, at 104.

75. *Id.*

dependence, the courts would determine if they could predict with certainty that the secession would succeed. If the court determined that the secession would succeed then the court would determine whether Canada still claimed a right to govern the secessionist state. Canada's claim would depend upon the attitude of those in power in the federal government. The attitude would probably not be accommodating to the secessionist state if the separation was not by mutual assent of the federal and secessionist governments, with the support of the Canadian public.⁷⁶ For these reasons, a secession under the Common Law would most assuredly fail in Canada, but it is possible.

In fact, secession has already been attempted in Canada. Before the patriation of the Canadian Constitution in 1868, Nova Scotia petitioned the Imperial Parliament in 1867 for an amendment to the British North America Act, 1867 in order to secede from Canada.⁷⁷ The request for the amendment did not come from the federal government, and therefore the request was denied, despite the fact that two-thirds of the Nova Scotian voters signed a petition in favor of the secession.⁷⁸ Even though this occurred under the Constitution Act, 1867, it sets a negative precedent for any of the current provinces who have aspirations of secession.⁷⁹

2. By First Nations

Separation by Native Canadians may soon be accomplished by amendment to the Canadian Constitution. In fact, the 1992 Charlottetown Agreement was intended to amend the constitution and give Canadian aboriginal peoples the right to self-government. Unfortunately, the natives fell victim to "power politics" over the dispute between Quebec and the rest of Canada. All of the proposed changes to the Canadian Constitution that were proposed in the Charlottetown Agreement were condensed into a one-issue package which the Canadian people

76. This by no means is to suggest that Canada would use military force. Canada may, however, see fit to use economic and political force. That is, Canada could refuse to have economic ties with Quebec even though this would economically impair Canada. Canada could also assert pressure on other countries to do the same. Another method would be to simply not recognize the new state.

77. See Gall, *supra* note 40, at 61-66.

78. Matas, *supra* note 61, at 402 (citing the House of Commons Debates).

79. Should Quebec secede, the prospects of a bloody conflict between Quebec and the rest of Canada seem remote. The only foreseeable conflict that might arise could be one between Quebec and the Natives within its territory (the Natives in Quebec could rightfully claim and request protection from the Federal Canadian Executive). The Mohawk armed uprising at Oka, Quebec, in the summer of 1989 bears witness of tension between Quebec and its Native inhabitants. It is interesting that Quebec recognizes its own sovereignty rights but not that of Natives. See *supra* note 14.

could either accept or reject as a whole. Each Canadian had one vote, and even though the results of the national vote were not formally binding, the Canadian legislatures abided by the results. By doing so they rejected the Charlottetown Agreement, including self-government rights for natives, as an amendment to the constitution.⁸⁰

It is arguable that self-government is intrinsically incompatible with the concept of true separation.⁸¹ Concededly, some degree of native self-government would not result in Canadian natives, as a whole or by group, becoming fully sovereign as we now view the modern sovereign state.⁸² It does, however, grant them more sovereign powers than they currently possess.⁸³ Self-government also allows Canadian natives to live and relate to Canada in a way that is closer to the original intent of the original treaties between the two parties.⁸⁴

B. Analogy To the American and Australian Constitutions

The purpose of comparing Canada's Constitution to those of the United States and Australia is to determine how countries with similar

80. Charlottetown Agreement, *supra* note 46. See also Your Guide to Canada's Proposed Constitutional Changes (Canadian government report—Supplement to Charlottetown Agreement). The vote was a non-binding referendum, but the surrounding circumstances and the portrayal of the agreement resulted in expectations that the politicians would follow the will of the Canadian public. The federal government was more than aware that the amendments to appease Quebec were not well received in Western Canada and even in Quebec, where some of Bourassa's (the Premier of Quebec) top aides said that he had "sold out" Quebec. Tu Thanh Ha, *Wilhem Tape Gave Juicy Side of Talks and We Loved It*, Montreal Gazette, Oct. 2, 1992, at A1 and A2. The vote was predicted to be close. Why then did Prime Minister Mulroney not make native self-government a separate issue to be voted upon? It is the opinion of this author that the Prime Minister acted in this manner to gain the support of the Canadian voter, who approved self-government for natives but rejected the proposals that were to appease Quebec. Mr. Mulroney's attempt failed.

81. For instance, the natives would still be dependent on the federal government for funding and military protection. James Frideres, *Native People in Canada* 294-312 (2d ed. 1983).

82. As an example, the natives would concededly not be able to make certain types of treaties, if any at all. It is unimaginable that the First Nations could make a mutual defense treaty with Iraq. Meeting the obligations of such a treaty is clearly impossible. Therefore, under the Montevideo Convention on Rights and Duties of States (December 26, 1933) and section 201 of the Restatement (Third) of Foreign Relations Law (1986), the First Nation fails to meet the statehood criteria of capacity to conduct foreign relations. See also *infra* note 123.

83. This is evidenced in the proposals put forth in the Charlottetown Agreement. See *supra* note 46. However, is self-government solely restricted to the proposals set forth in the Charlottetown Agreement? It is yet to be agreed upon exactly what self-government is and therefore it is still somewhat of a nebulous concept.

84. Natives and Europeans had respect for each other and sought treaties to promote peaceful co-existence. Olive P. Dickason, *Canada's First Nations* 275 (1992).

values, history, and cultures have addressed the potential separation of one of its peoples and/or political subdivisions.

1. The United States Constitution

The United States and Canada are very similar in their respective cultural, economic, and geographic structures. Sharing a similar legal tradition, the two countries each have a written constitution. Those constitutions establish a federal state⁸⁵ in each country. This parallel structure allows for the drawing of valid comparisons.

Neither the United States Constitution nor the Constitution Act, 1982 has any express clause providing that the union is indissoluble and perpetual.⁸⁶ It was only after the American Civil War that the United States Supreme Court definitively stated the Union was "perpetual," "indissoluble," and "indestructible."⁸⁷

The United States' experience with secession led to one of the bloodiest civil wars of history. Unlike Nova Scotia and Western Australia, the Confederate States did not seek permission to separate. Each State, based upon the concept of the states' residual sovereignty to withdraw from the Union, unilaterally seceded and together formed a Confederacy.⁸⁸

The constitutional justification for the States' withdrawal were the theoretical concepts of nullification and secession, which had been espoused and elaborated upon by John C. Calhoun and Robert Hayne in their addresses and debates with Daniel Webster. These concepts gained acceptance, and on December 20, 1860, a convention of the people of South Carolina adopted an ordinance of secession. This was followed by a declaration of independence which declared that the union was dissolved.⁸⁹ The actions of South Carolina were based upon the assumption that the U.S. Constitution was a compact among the states. This notion arose from Jefferson's drafting of the Kentucky and Virginia resolutions, both of which contended that the Union was merely a compact among the States, that the States had the right to resist any

85. A federal state has a constitutional system of government when the law-making powers are divided between a central legislative body and legislatures in states or territorial units making up a federation. The allocation of power is derived from the constitution and cannot be unilaterally changed by one set of legislators. The Blackwell Encyclopedia of Political Thought, *Federalism*, 151 (David Miller ed., 1987).

86. The Australians do have such a clause in the Australian Constitution's Preamble. See *infra* text accompanying notes 98-102.

87. *Texas v. White*, 74 U.S. 700, 724-725 (1869).

88. *Id.* at 725.

89. John S. Bowman, *The Civil War Almanac* 41 (1982).

breach of the compact, and also that the States could declare a federal law as null if it was enacted in excess of the federal powers.⁹⁰

The States of Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas followed South Carolina's lead. In Montgomery, Alabama, a Congress of seceding states adopted a constitution similar to that of the United States and formed a provisional government.⁹¹ In April of 1861, the provisional government directed the confederate militia to attack Fort Sumter, which was held by the United States within Confederate territory.⁹² This was the first act of the American Civil War. Virginia, Tennessee, North Carolina, and Arkansas then seceded and joined the Confederacy. In August 1866, after five years of war, the Union triumphed, the war ended, and the States were united once more. However, the war ended without a formal amendment that declared the union of states indissoluble.

These principles of a "perpetual," "indissoluble," and "indestructible" union were instead set forth in *Texas v. White*.⁹³ The primary issue in that case was whether the state of Texas could legitimately pass an ordinance of secession by legislative act. By virtue of the Texas ordinance,⁹⁴ Texas had attempted to cease being a state of the Union, and therefore its citizens would cease to be citizens of the United States. The court responded to this attempt by stating:

The union of the States never was a purely artificial and arbitrary relation. . . . It received definite form and character and sanction by the Articles of Confederation. By these the Union was solemnly declared to be "perpetual." And when these Articles were found to be inadequate to the exigencies of the country the Constitution was ordained to form a more perfect union. It is difficult to convey the idea of indissoluble unity more clearly than by these words.⁹⁵

It is in this language that the Constitution of the United States

90. *Id.* at 13; Thomas Jefferson 125-26 (Merrill D. Peterson ed., 1986); Caleb P. Patterson, *The Constitutional Principles of Thomas Jefferson* 55-56 and 149-55 (1953).

91. Bowman, *supra* note 89, at 42-46.

92. *Id.* at 50-51.

93. *Texas v. White*, 74 U.S. 700, 724-25 (1869). The U.S. Supreme Court found that Texas did not cease to be a State nor her citizens to be citizens of the Union. It is noted by the Australians, Quick and Garran, that the victorious union did not propose an amendment to expressly state the perpetuity and indissolubility of the union. To do so, say the Australians, "after it had been so settled by the sword," would be tantamount to admitting doubt existed. John Quick & Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* 294 (1976).

94. The Texas ordinance was adopted on February 1, 1861. *White*, 74 U.S. at 704.

95. *Id.* at 724-725.

denies the right to secession and ensures an indestructible union of states. However, the Supreme Court went on to state that: "[T]he perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence or of the right of self-government by the States. . . . [T]he Constitution in all its provisions looks to an indestructible union composed of indestructible States."⁹⁶ Thus, the states were independent to a degree, and they too were free from a threat of secession by a sub-component.

In *Texas v. White*,⁹⁷ the United States Supreme Court held that the union of the states was "perpetual" and "indissoluble." Therefore the Court reasoned that the confederate states could not and did not secede. Thus, the theories of secession and nullity, based upon Jefferson's assumption that the United States Constitution was a compact among states, failed. The Supreme Court's decision did not occur until after a bloody civil war. Canada, as the United States, does not have an express clause in its constitution asserting that the state is perpetual and indissoluble. Hopefully, the Canadian Supreme Court has the opportunity to declare that Canada is "perpetual" and "indissoluble" before Canada is confronted with a group that attempts to separate.

2. *The Australian Constitution*

The Australian Constitution (July 9, 1900) specifically precludes separation in its preamble. The preamble affirms that the people of Australia have agreed "to unite in one indissoluble Federal Commonwealth."⁹⁸ It is the opinion of the Australian jurists John Quick and Robert Garran that the omission of such a clause in the United States Constitution led to doctrines of nullification, secession, and ultimately the American Civil War.⁹⁹ This is what the Australian constitutional framers hoped to avoid.

The Australians also realized that the Canadians did not have a clause declaring perpetuity or indissolubility in the Constitution Act, 1867. However, the Australians apparently understood that what was

96. *Id.* at 725.

97. *Id.*

98. The Preamble to the Australian Constitution states in part: "Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established." *The Commonwealth of Australia Constitution Act*, 63 and 64 VICT., Chapter 12 (July 9, 1900) (emphasis added). *Id.*

99. Quick & Garran, *supra* note 93, at 292; see also R.D. Lumb and K.W. Ryan, *The Constitution of the Commonwealth of Australia Annotated* (3d ed. 1981); Peter J. Hanks, *Australian Constitutional Law* (4th ed. 1985).

good for Canada was not necessarily good for Australia. The Australians had the benefit of the experience and analysis of the American Civil War, while Canada did not. Furthermore, the Canadian colonial experience lasted 300 years and was a cultural mosaic, while Australia was settled simultaneously and was largely homogeneous. Finally, Canadian political organization was regionally based while Australian parties worked on a national level. For these reasons, the Australians believed that there should be a reminder of the intent of the "framers" to create a lasting and indissoluble state.

Despite the precautions taken by the Australian constitutional framers, Australia, like Canada and the United States, has already experienced an attempted separation. In 1935 the state of Western Australia tried to separate from the Australian Commonwealth.¹⁰⁰ Until reform in 1986, Australia continued and made necessary a practice of petitioning the United Kingdom to approve and to effect Australian law reform.¹⁰¹ Thus, Western Australia petitioned a joint committee of the House of Lords and the House of Commons of the United Kingdom.¹⁰² Even though approximately two-thirds of the Western Australians voted to separate,¹⁰³ the request was denied on the same basis given regarding the earlier attempt by Nova Scotia—the request did not come from the federal government.¹⁰⁴ Thus, the Australian experience indicates that separation without the consent of the federal government will not succeed.

In order to separate under Canadian constitutional law, there must be an amendment to the Constitution Act, 1982, as provided for in section 38, allowing such a separation. The Confederate American states, Western Australia, and Nova Scotia are examples of how federal governments have resisted such separations and do not provide any support for separatist groups in Canada. The common law principles put forth in *Madzimbamuto*¹⁰⁵ may offer a shred of hope for separatists. This

100. Matas, *supra* note 61, at 392; Mayer, *supra* note 61, at 63-64.

101. Australia was bound to petition the United Kingdom by the Colonial Laws Validity Act, 1865. Hogg, *supra* note 17, at 94-95; Hanks, *supra* note 99, at 11-13.

102. Report to consider the petition of the State of Western Australia (House of Commons (U.K.), Parliamentary Papers, vol. 6 (1934-35)).

103. Matas, *supra* note 61, at 402; Mayer, *supra* note 61, at 63. The number of people that voted for secession in Western Australia is significant in that the prerequisite support of two-thirds of the people was not sufficient to procedurally override the established constitutional process. Thus Quebec's 1980 referendum and any future referendum is simply an indicator of support for separation. Under the West Indies Act, 1967, C.4 (U.K.) a West Indian state associated with the U.K. could terminate the association with a two-thirds vote of the legislature of one of these states. Then a referendum would be required with a two-thirds vote in support of termination. If the referendum approves termination, then royal assent is given. Matas, *supra* note 61, at 388.

104. Matas, *supra* note 61, at 392; Mayer, *supra* note 61, at 63-64.

105. *Madzimbamuto v. Lardner-Burke*, [1968] 1 A.C. 645.

hope is ill-founded, however, because a separating group would probably never meet the requirement of receiving assent from the former sovereign, Canada. The only exception to this may be the natives, who seek self-government and not a thorough separation from Canada. Finally, a separating group may become a valid state if they successfully establish a new order with a new legal standard.¹⁰⁶ It is this last mode of separation that is best addressed by international law.¹⁰⁷

IV. THE "RIGHT" TO SEPARATE UNDER INTERNATIONAL LAW

International law may provide both a right to separate and a justification for such a separation, whereas Canadian constitutional law provides no such opportunities. Customary international law and treaty law are equally useful in setting forth guidelines which separating parties in Canada could follow. Prior to inquiring whether international law can be applied to the issue, it is important to understand how it is implemented in concert with Canadian constitutional law.

A. *The Role of International Law in the Canadian Scheme*

The Federal Government of Canada exercises exclusive treaty-making powers. The Canadian Parliament need not be involved in the process. International relations have always been a prerogative of the Crown, the executive branch. Treaties that require ratification and are considered important are usually presented to both the House of Commons and the Senate for approval. One quarter of the treaties that Canada ratified between 1946 and 1966 were submitted to Parliament. Once ratified, the treaty is binding in international law but it is not effective internally in Canada until it is implemented.¹⁰⁸ Implementation of a treaty requires enactment of a statute in order to give the treaty domestic effect.¹⁰⁹ Customary international law, however, may be effected as part of the Common Law. Customary international law or a treaty that is not implemented may be persuasive to a Canadian court but is not binding.

Section 132 of the Constitution Act, 1867 which provides the authority for internal implementation of international law, reads: "The

106. It is not, however, wholly inconceivable that Canadian politicians will strike a new deal that may include the rewriting of the constitution. This would be a means of maintaining a sense of Canada as it is today.

107. Application to the United Nations or International Court of Justice may be the last resort for Canada to resolve its internal disputes. These international organizations and international decisions may become more prevalent if the world continues to shift power traditionally residing with the states to international or supranational organizations.

108. Hogg, *supra* note 17, at 241-46.

109. *Id.* at 243-44.

Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the empire and such foreign countries."¹¹⁰ The framers of this clause of the Constitution Act, 1867 obviously did not foresee Canada becoming an independent nation. Instead, they viewed Canada as part of the British Empire, and as such, would have its major treaties signed by the British Crown. The Imperial Conference of 1926 affirmed that Canada was autonomous in both domestic and international affairs. Therefore, Canada had full and exclusive authority to conduct its own international affairs.

In *Labour Conventions*,¹¹¹ the Privy Council interpreted section 132 as authorizing part of the British Empire (Canada) to implement British treaties, and found that power to implement treaties was set forth in Sections 91 and 92 of the Constitution Act, 1867.¹¹² "[I]n classifying a statute which was required to implement a Canadian Treaty, one was supposed to disregard the fact that the purpose of the statute was to implement a treaty and to look to the substantive matter of the statute."¹¹³ That is, if the matter was allocated by section 91 to the Federal Parliament, the Federal Parliament had the power to implement the statute. Conversely, if section 92 allocated the power to the Provincial Legislature, it had the power to implement the statute.¹¹⁴ The *Labour Conventions* case and its poor reasoning have been heavily criticized¹¹⁵ for being contrary to the spirit and possibly the literal language of section 132. Furthermore, it renders the government of Canada powerless to ensure performance of treaties it has signed.¹¹⁶ However, it should be noted that provincial autonomy would be threatened if the federal government could derogate from the powers allocated to the provinces in section 92 of the Constitution Act, 1867. Furthermore, Hogg has noted that the United States and Australia, countries where the federal governments retain treaty-making power, are still constrained by internal political considerations that result in their behaving similarly to Canada in international affairs.¹¹⁷

110. Can. Const. § 132 (1867).

111. A.G. Canada v. A.G. Ontario et al. (*Labour Conventions*) (1937) A.C. 326 [hereinafter A.G. Can. v. A.G. Ont.].

112. *Id.* at 462-65.

113. Hogg, *supra* note 17, at 251.

114. This is an example of the "water tight compartments" principle. However, since *Multiple Access v. McCutcheon*, 2 S.C.R. 161 (1982), this principle is no longer a proper guide for judicial attitudes towards Canadian Constitutional Law. Bruce Ryder, *The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations*, 36 McGill L.J. 309 (1991); Hogg, *supra* note 17, at 251, 341; Gall, *supra* note 40, at 99.

115. A.G. Can. v. A.G. Ont. (1937) A.C. 326.

116. Hogg, *supra* note 17, at 252-54.

117. *Id.* at 254.

The case of *Radio Reference*¹¹⁸ saw the Privy Council accept the argument that the Federal Parliament had power under the principles of peace, order, and good government¹¹⁹ to implement a Canadian treaty. If a law relates to a treaty, section 132 does not apply and if it is not enumerated in sections 91 or 92 then section 91 applies the residual power of the Federal Government of Canada to make laws for peace, order, and good government.¹²⁰ Peace, order, and good government is meant to fill the gaps in the Canadian scheme of distribution of powers.¹²¹ Although this reasoning on the implementation was rejected in the *Labour Conventions* case, Hogg recognizes that recent dicta of the Supreme Court of Canada suggest that the reasoning of the *Radio Reference* case may again become favored.¹²² Therefore, "peace, order, and good government" may prevail and, if the case does not become favored, we need to determine whether the treaty subject matter has been allocated to the Federal or provincial Parliaments.

B. *The International Law of Separation and Self-Determination*

How does international law determine whether a separating province has become an independent state? First it must meet the requirements as set out by the 1933 Montevideo Convention on Rights and Duties of States.¹²³ The Montevideo Convention and Restatement § 201 both require that a state have a defined territory, permanent population,

118. *Re Regulation and Control of Radio Communication in Canada (Radio Reference)* (1932) A.C. 304, at 312.

119. Gall, *supra* note 40, at 93, 96-98; Hogg, *supra* note 17, at 369-95.

120. Hogg, *supra* note 17, at 369.

121. *Id.* at 373.

122. *Id.*

123. Restatement (Third) of Foreign Relations Law § 201 (1986):

b. *Defined territory.* An entity does not necessarily cease to be a state even if all of its territory has been occupied by a foreign power, it has boundary disputes or if it has otherwise lost control of its territory temporarily.

c. *Permanent population.* To be a state an entity must have a population that is significant and permanent.

d. *Government.* A state need not have any particular form of government, but there must be some authority exercising governmental functions and able to represent the entity in international relations.

e. *Capacity to conduct international relations.* An entity is not a state unless it has competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical and financial capabilities to do so.

The Montevideo Convention on Rights and Duties of States (Dec. 26, 1933) sets forth the same criteria as above mentioned section 201. Barry E. Carter & Phillip R. Trimble, *International Law* 413 (1991).

government, and the capacity to conduct foreign relations. Recognition of a state is a controversial process, and several legal theories exist that describe a state's creation.¹²⁴ The constitutive theory of international law suggests an entity is not a state unless recognized by other states. One state is under no duty to recognize another state. Therefore, this theory must only be considered as one factor in determining statehood. The declaratory theory, also known as the evidentiary theory, is in opposition to the constitutive approach. This theory declares that statehood exists prior to recognition and that recognition is merely a formal acceptance of that statehood. Under either theory, recognition of a state acknowledges that as an entity, it has the privileges, rights, and duties of a state.¹²⁵ The American Restatement of Foreign Relations Law suggests international entities should be treated as states even if these entities are not formally recognized as states. Restatement section 202 states this principle does not apply if "statehood" results from a threat or use of armed force in violation of the United Nations Charter.¹²⁶

Self-determination has only recently become a prominent concept in international law. Significantly, although international law supports the right to self-determination it, like most states, is reluctant to support a secession.¹²⁷ This reluctance may reflect states' fear of legitimizing secession, which in turn could lead to legitimizing secession attempts in their own states.

Past questions of self-determination gave way to *machtropolitik*: either armed force was used to put down a rebellion or a strong and successful rebellion resulted in a new state or government.¹²⁸ However, *machtropolitik* may be losing ground to negotiated separations. Peaceful and not very peaceful separations of colonies since World War II, and more importantly the usually peaceful division and sub-division of the Soviet sphere, have set the stage for a new era of Nationalism and separation. It may be a fleeting trend, as the experiences of South Africa¹²⁹ or the former

Yugoslavia¹³⁰ would suggest, or a sign of things to come. Hopefully this new trend of peaceful separation has rooted itself and will continue as the preferred form of division of the modern state.

The following analysis of self-determination relates to a Canadian province, territory, and Native peoples in reference to international law and Canadian constitutional law.

1. Quebec (As a Province)

Quebec has traditionally been the province in Canada that has sought its own independence. Under international law, Quebec also has the best claim of any of the Canadian provinces for true self-determination. For these reasons, Quebec will be analyzed in the following discussion to determine whether a Canadian province has the right to self-determination under international law.

Self-determination was first presented in international law during the 1920s in the Aaland Islands Case. The people of these islands wished to separate from Finland and become a part of Sweden.¹³¹ Self-determination did not, however, receive serious consideration until after World War II. Over time the "legal" right of self-determination has developed to apply only to "peoples."¹³² The right of self-determination is expressed in Article 1(2) of the Charter of the United Nations. Canada, as a signatory to the Charter of the United Nations, is bound under international law to apply Article 1(2). This article states that the purpose of the United Nations is "to develop friendly relations among nations based on the principle of equal rights and self-determination of peoples."¹³³ Article 55 of said Charter reiterates this concept.¹³⁴ Canada is also bound to the 1966 International Covenant on Civil and Political

130. Richard F. Iglar, *The Constitutional Crisis in Yugoslavia and The International Law of Self-Determination: Slovenia's and Croatia's Right to Secede*, 15 BCICLR 213 (1993); Louise Lief & Tim Zimmerman, *Clinton and the World*, U.S. News and World Rep., Feb. 22, 1993, at 33; Robin Knight, *A Test the West is Failing*, U.S. News and World Rep., Jan. 18, 1993, at 56; Eloise Salholz, *Of Diplomats and Lame Ducks*, Newsweek, Nov. 16, 1992, at 46. These articles are just examples of many that saturated western media at the end of 1992 and early months of 1993.

131. The inhabitants of the Aaland Islands were unsuccessful in their bid. Williams, *supra* note 124, at 13.

132. *Id.* at 14.

133. U.N. Charter, Ch. I: Purposes and Principles, art. 1 (2). See also Barry E. Carter & Philip R. Trimble, *International Law: Selected Documents* 24 (1991).

134. U.N. Charter, Ch. IX, art. 55: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote. . . ." See Carter & Trimble, *supra* note 133, at 14.

124. Sharon Williams, *International Legal Effects of Secession by Quebec* 4 (Final Report of the York University Constitutional Reform Project, Study No. 8, 1992).

125. *Id.* at 4-5.

126. Restatement (Third) of Foreign Relations Law 204, Reporters Note 2 (1986).

127. Williams, *supra* note 124, at 18-19, 22.

128. *Machtropolitik* is the German term for power politics. It is the conducting of politics entirely as if there was no other factor involved besides power, and groups are only considered to the extent they have power. Roger Scruton, *A Dictionary of Political Thought*, 280, 357 (1982).

129. Johan D. Van Der Vyver, *Constitutional Options For Post-Apartheid South Africa*, 40 Emory L.J. 745 (1991); Chris Erasmus, *On the Brink of Disaster*, Maclean's, July 13, 1992, at 24; John Bettersby, *Attack Marks Shift in South African Violence*, The Christian Sci. Monitor, Dec. 1, 1992, at 3; Joseph Contreras, *Slaughter in South Africa*, Newsweek, Sept. 21, 1992, at 57.

Rights and Cultural Rights which adopted the "right" to self-determination for all peoples.¹³⁵ As set out by these treaties and other sources of international law, self-determination allows these "peoples" to freely determine their political status.

U.N. Security Council Resolutions, General Assembly Resolutions, the Covenants, World Advisory Opinions, and Multicultural Treaties that espouse self-determination indicate that self-determination has become an international right.¹³⁶ This "right" however, has only been used in limited situations of colonial devolution. Sharon Williams noted that "it has not been forcefully argued when the struggle has begun after independence."¹³⁷ The 1970 Declaration of Principles supports this view:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above, and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or color.¹³⁸

Genevieve Burdeau, of the Belanger-Campeau Commission,¹³⁹ deems

135. International Covenant on Civil and Political Rights, U.N. GAOR, 21st Sess., Supp. No. 16, Part 1, art. 1, U.N. Doc. A/6316 (1966).

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

See also *id.* at 357-72.

136. Examples of these documents that espouse self-determination are: the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.S. Res. 2625 (XXV), 25 UN GAOR, Supp. No. 28, at 121; U.N.S.C. Res. 183 (1963); U.N.S.C. Res. 301 (1971); U.N.S.C. Res. 377 (1975); Declaration on Friendly Relations, G.A. Res. 2625, Annex, 25 U.N. GAOR Supp. (No. 17), at 66, U.N. Doc. A/5217 (1970); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.S. Res. 1514 (XV), 14 December 1960; Namibia Advisory Opinion, I.C.J. Rep. 1971, at 31; Western Sahara Advisory Opinion, I.C.J. Rep. 1975, at 12 and 31-33.

137. Williams, *supra* note 124, at 16.

138. *Id.*

139. After the failure of the Meech Lake Accord, the Belanger-Campeau Commission

two things necessary for provincial secession outside of a colonial situation that will assure compliance with international law.¹⁴⁰ Both popular will and the consent of the predecessor state are required under Burdeau's approach. These criteria lend themselves to colonial devolution but not to unilateral separation (e.g. secession) without consent by the predecessor state. The experience of Eastern Europe has seen the consent of the former Soviet Union and then Russia for its component parts to separate. Canada's consent would therefore appear to be required and possibly not forthcoming.

The other basis that Quebec as a province may assert in its claim to self-determination is that it is a "people" in the context of international law.¹⁴¹ The standard of "people" has both objective and subjective aspects. The subjective standard is whether a large majority of the subject group views itself as a "people" distinct from other peoples, both within the same sovereignty and with respect to other "peoples" in the world.¹⁴² The standard most certainly is aided if these people view themselves as sovereign. The objective standard is based upon whether there are common identifying characteristics within the group, such as geographic, ethnic, linguistic, religious, economic, or historical bonds.¹⁴³

Quebec meets part of the subjective standard. Quebecois view themselves as distinct from other Canadians.¹⁴⁴ Quebec's insistent desire to have recognition in the Canadian Constitution as a distinct society within Canada is evidence of this. However, the failed 1980 referendum on sovereignty and the concomitant desire for sovereignty-association are admissions by Quebec that as yet it does not view itself fully sovereign.

Quebecois also seem to meet the objective standards of "people" in the context of international law. The Quebecois live in the geographic area defined by the province of Quebec. Unfortunately, other French Canadians live in pockets across the maritime provinces, Ontario, and the Prairie Provinces. These, therefore, do not meet the geographic standard except on a community by community basis. It could be argued however, that these other French Canadians, or French Canadians as a whole, do meet these standards. In what was formerly the Soviet Union,

was created by the Quebec National Assembly (the provincial legislature) and the Allaire Committee was created by the Quebec Liberal Party to formulate a new position for Quebec. Monahan, *supra* note 20, at 261-62.

140. Williams, *supra* note 124, at 17.

141. Iglar, *supra* note 130, at 214.

142. Williams, *supra* note 124, at 14-15, 19.

143. *Id.*

144. This includes being distinct from French Canadians not from or residing in Quebec. Richard Handler, Nationalism and the Politics of Culture in Quebec 30-38 (1988).

pockets of Russians are dispersed throughout this territory. Surely no one would deny that they would qualify as a "people." However, only some French Canadians outside Quebec view themselves as Quebecois. Those who do were probably born in Quebec or at some time lived there. Therefore, the objective and subjective standards in concert necessarily determine that the vast majority of French Canadians living outside of the borders of Quebec are not Quebecois.

Quebecois belong to an ethnic French group. However, the French Canadian ethnic group has subcategories such as Metis, Franco-Ontarians, Franco-Manitobains, New Brunswick French, and possibly subdivisions within Quebec itself (e.g., metropolitan Montreal compared to the region of Gaspé).¹⁴⁵ The Quebecois have also intermingled with English, Natives, and other ethnic groups.¹⁴⁶ Therefore, ethnicity can only be argued on the broad standard of French, which is based more upon language and self identification in the Canadian context. Quebec's dominant French language is unquestionably a primary unifying factor.

The Quebecois' primary language is French, and its maintenance has been safeguarded by many governmental and non-governmental actions. The Quebec Government has even exercised the powers granted to it by the Canadian Constitution and instituted language laws to exclude commercial and educational use of all other languages.¹⁴⁷ Although support of religion is varying across Canada, Quebec remains predominantly Roman-Catholic.¹⁴⁸ The Quebec economy as a political unit unites all Quebecois in its prosperity or weakness.

Historically Quebec has been a separate entity from the rest of Canada. It began as a colony of France and then became a British colony after the British conquest. Quebec thereafter became part of the Canadian Confederation. Although Quebec was seen as separate community, it was never an independent state and therefore cannot be distinguished on these grounds. Quebec may however be distinguished as the primary residence of the coming together of two peoples, English and French.¹⁴⁹

145. Jean Leonard Elliott, *Two Nations Many Cultures*, 99-152 (1979); Dean R. Louder & Eric Waddell, *French America* 1-116 (1983); Edward M. Corbett, *Quebec Confronts Canada* 84-88 (1967).

146. Dickason, *supra* note 84, at 168-73; Frideres, *supra* note 81, at 271-92.

147. In 1977 the Parti Quebecois enacted Bill 101 in Quebec. This law was to prohibit the use of English on most commercial signs (among other things). There were challenges to this law which was later to be found unconstitutional. See *Devine v. A.G. Quebec*, 2 S.C.R. 790 (1988) and *Ford v. A.G. Quebec*, 2 S.C.R. 712 (1988). In 1981, Premier Robert Bourassa invoked override provisions in the Canadian Charter (section 33) and Quebec Charter of Rights to prohibit the use of any language but French on commercial signs. This was enacted under Bill 178. Ian Greene, *The Charter of Rights* 106 (1989).

148. Corbett, *supra* note 145, at 84.

149. Fitzmaurice, *supra* note 16, at 1-75. The concept of coming together of two

There are other considerations used to determine whether the Quebecois are a people. A homogeneous group with a wish to govern themselves is simply not enough. Colonial rule and alien domination are factors to be considered in whether a "people" are able to effect self-determination as prescribed by international law. It would not be logical to consider the people of Quebec subject to colonial rule or alien domination. Quebecois have the same rights as all Canadians and the province of Quebec is one of ten, together with the two territories that comprise Canada. There are some in Quebec that would argue, based primarily on emotion that their rights are under attack from a dominant English Canada. Quebec's position is not, however, what would normally be considered a colony or ruled by an outside force. Quebec has full representation and participation in the Canadian System and has not been treated "unfairly" or as a non-self governing unit. There has not been functional subjugation or disenfranchisement. Furthermore, the province of Quebec has the same rights and governing ability as the other Canadian provinces. It aids the "peoples" case if a "people" is located in an identifiable geographic area.

If Quebecois are a "people" as prescribed by international law, then is each ethnic group in Canada that dwells in a geographically defined area to be considered a "people"? The differences between Quebecois and other Canadian ethnic groups are that the Quebecois have representation through a provincial government, their language is one of Canada's national languages and further their cohesion and numbers give them greater political power than other groups. Therefore, if self-determination is a right under international law, then Quebec has the international legal right of self-determination.

2. Territories

Canada and its relationship with the Yukon and Northwest Territories cannot be properly compared to the United States and its relationship with Puerto Rico and the former Trust Territory of the Pacific Islands (Marshall Islands, Palau, Northern Mariana Islands, and the Federated States of Micronesia) in regards to the concept of separation. This is largely based on the fact that the Canadian Territories are more integrated than are the territories of the United States. Obviously the relationships are more complex than this, but for the purpose of analysis, this study focuses solely on the ability to separate.

peoples is an eighteenth century concept that has carried over to the current day. The two peoples are the English and French, who have their languages as the official languages of Canada. McWhinney, *supra* note 60, at 3-7. Canada's natives, technically the first people, are offended by this notion.

Canadian and American territories alike have territorial governments, but American territories have constitutions whereas the Canadian territories do not.¹⁵⁰ Puerto Rico and the Pacific Islands acquisition were the result of victory in war.¹⁵¹ Persons in the American territories are citizens of the United States. However, the "Americans" in the territories do not have all of the constitutional rights that mainlander and Hawaiian Americans have.¹⁵²

In Canada's territories, Canadian citizens have the same constitutional rights as Canadians in the provinces. Puerto Rico has a resident Commissioner in the House of Representatives (since 1904), who can speak in Congress and Committee, introduce legislation, and vote in the Committees to which he is elected; but he cannot vote on the House Floor.¹⁵³ The Pacific Islands do not have representatives in Congress as does Puerto Rico.¹⁵⁴ The Canadian territories have members of Parliament to represent them in the House of Commons but do not have Senate or Supreme Court representation.¹⁵⁵ The Northern Mariana Islands and Puerto Rico have the status of Commonwealth, and the other U.S. Pacific territories have agreements with the United States for military protection and economic assistance, and for this reason, have given up power to conduct their foreign affairs.¹⁵⁶ The Canadian territories have no such agreement because they are considered part of the Canadian whole and therefore they are subordinate to the Canadian Federal Government in the area of foreign affairs. In summary, the American territories have acted semi-autonomous, and the control of the American Federal Government has been, relatively speaking, at arms length. On the other hand, the Canadian Federal Territories have been integrated and are under greater Federal control.

Analyzing both American and Canadian territories under international law, it is evident that both lack the capacity to conduct international relations, and are therefore not states.¹⁵⁷ The diversity in the

150. Carter & Trimble, *supra* note 133, at 434, 436-37.

151. Puerto Rico was ceded to the United States by Spain in 1898 as a result of the Spanish-American War. The U.S. Pacific Islands have been administered by the United States since 1947 pursuant to a U.N. strategic Trustee Agreement; after the U.S. wrestled the territory from the Japanese. Previously, Japan administered the Islands under a post World War I League of Nations Mandate. Carter and Trimble, *supra* note 123, at 433, 436. The Canadian territories were peacefully joined to Canada. Hogg, *supra* note 17, at 31-32.

152. Carter and Trimble, *supra* note 133, at 433, 436. For example, Puerto Ricans cannot vote for president, and Mariana Labor regulations are less stringent.

153. *Id.* at 434.

154. *Id.* at 436.

155. Hogg, *supra* note 17, at 168, 201.

156. Carter & Trimble, *supra* note 133, at 433-37.

157. See Montevideo Convention of 1933 and Restatement (Third) of Foreign Relations Law § 201 (1986). See also *supra* note 111.

Yukon and possibly the Northwest Territories does not allow the regions to come under the international concept of "people."¹⁵⁸ However, the larger number of Inuit in the Canadian Territories may qualify as a "people." Puerto Ricans as a whole, and Micronesian groups (or as a whole), can more easily be found as a "people." Furthermore, under international law it appears as if a group only needs the consent of the predecessor state and the will of the people to have a successful separation. The official position of the United States is that Puerto Rico has a right to self-determination and independence.¹⁵⁹ Puerto Ricans have yet to assert their will. The United States has yet to assert its consent to the Pacific territories just as Canada has not yet asserted its consent for its territories to separate. Thus, it appears Puerto Rico is the only territory that has a chance in the near future to become a sovereign state.

3. First Nations¹⁶⁰

Self-government by native peoples in both America and Canada appears to be inherent under international law. Natives in both the United States and Canada meet the subjective standard of viewing themselves as a distinct ethnic group separate from other groups in Canada and abroad. However, this self-government concept is not without its complications. It is probable that the Inuit,¹⁶¹ Metis,¹⁶² and other native groups view themselves as being distinct from one another. This analysis also applies to most natives' beliefs that they were originally and are now sovereign. It is difficult to determine which groups believe themselves to be sovereign. However, the use and application of the term "First Nations" indicates that each nation is separate and therefore possibly sovereign.

158. These regions do not meet the criteria as set forth by International Law. For example the regions do not subjectively identify themselves as a "people" in the manner set forth in International Law.

159. Carter & Trimble, *supra* note 133, at 434.

160. The term native is used in two manners in this analysis: 1) as the entire group of Canadian aboriginal peoples in Canada and 2) as the group of aboriginal peoples distinct from the Metis and Inuit.

161. The Inuit are aboriginal people that live in Canada's northern extremities. They are different both in culture and language from other aboriginal peoples in Canada. These people are often mistakenly called eskimo. Frideres, *supra* note 81, at 12-13.

162. Traditionally the Metis are a group of people that are culturally and ethnically both native and French, Scottish, or English. The Metis are distinct culturally, ethnically, and by language from other groups in Canada. Historically, they have also played a large role in the formation of Canada. In 1885, some Metis under their leader, Louis Riel, attempted to separate from Canada. The North-West Rebellion (as it is called in Canadian texts) was put down when the Metis were crushed by Canadian soldiers at Batoche, Saskatchewan. *Id.* at 12; George Stanley, Louis Riel 324-39 (1963).

The objective standards required to be a "people" also appear to be met by the Canadian Natives, Metis, and Inuit. Geographically, a large number of natives live in reserves.¹⁶³ These reserves are dispersed across both the United States and Canada. This dispersion appears to be acceptable for meeting the objective standard, except when one such "nation" is divided among different reservations.¹⁶⁴ Natives may argue the First Nations' division was caused by the federal government and therefore the division should not affect their meeting the objective standard.

Culturally, natives have been under attack from the contrasting, dominant European culture. It may be difficult to separate natives beyond Metis, Inuit, and Natives in relation to ethnicity. The languages of the natives are as numerous as are First Nations. Unfortunately, these languages have given way to English and French, the dominant national languages. Some First Nations do, however, persist in maintaining their own languages.¹⁶⁵ Religion among Natives is also varied. Some Natives retain or have returned to their native religions while others have embraced European religions, primarily Christian denominations.¹⁶⁶ The various religious beliefs are a weak and probably inconsequential link for the natives in their assertion as a "people." The economy of the Natives is closely tied to the federal governments in the United States and Canada. They have become heavily dependant upon government funds to operate the reserves.¹⁶⁷

Finally, from a historical perspective, the North American natives have always been treated as a different group of people in comparison to the Europeans who came to forge a New World. The Europeans (usually British) made treaties with the Natives as sovereigns. However, this became a hinderance to European expansion and the quest for Europeanization of North America; therefore, the view of natives as sovereign lost popularity. This led to fewer treaties and the breaking of past treaties. To the Europeans of the time, this made perfect sense. The natives were conquered or could not match the military power of the new North Americans, and so they had to submit to the white man's rule. Recently, a movement has developed in North America to

163. Dickason, *supra* note 84, at 418.

164. For example, the Mohawks are dispersed in different reservations in Canada (e.g., Kahnawake, Chateauguay) as well as different countries (the U.S and Canada). Although this does not preclude their claim that they are one people, it does weaken it. Scott Reid, *Canada Remapped: How the Partition of Quebec Will Reshape the Nation* 121-23 and 129-33 (1992); Rick Hornung, *One Nation Under the Gun*, VIII, 77-79 (1991).

165. Dickason, *supra* note 84, at 145-46.

166. *Id.* at 146.

167. Frideres, *supra* note 81, at 294-312.

honor past treaties, grant self-government, and return some, if not all, of the land that was taken in violation of past treaties.¹⁶⁸ This new perspective implies a respect or recognition of native sovereignty once more.

Natives in Canada meet both the subjective and objective standards set forth by the international law principle of self-determination. The Canadian government's support of the natives, as evidenced by the Charlottetown Agreement, and the support of the Canadian public imply that in the near future Canadian natives will achieve more autonomy. Self-government will be the likely form of this new found autonomy. The natives will probably not attain full autonomy because of the numerous nations, lands, their numerous locations, and the improbability of financial self-sufficiency. Regardless, natives in Canada will soon have some of the autonomy they so desire.

In conclusion, it would appear that the territories lack the ability to qualify for self-determination under international law. However, the Quebecois people may have a better claim of self-determination, and the natives assuredly have a solid claim. Whether these international legal claims influence Canadian lawmakers may rest upon the pressure they receive internationally and internally. Support for most provinces and territories can be presumed to be insignificant. Support for Quebec, however, due to its notoriety should garner significant support. Support for the natives as aboriginal peoples will certainly be substantial and find sources throughout the world. The reason for this is the world trend of recognizing aboriginal rights and the value in preserving these rights.¹⁶⁹ The United States, the country that can influence Canada like no other, will probably not put any pressure on Canada to grant native rights because this would damage its own domestic position in relation to natives in the United States.

V. CONCLUSION

Contrary to reality is the notion that "Canada is probably finished as a viable country anyway. So let's party."¹⁷⁰ Canada is not yet in the process of separation. It is, however, on the brink. While it may be possible to temporarily satiate the parties reform within the current system or even changing the present system is preferable to separation.

However, should a province, territory, or the natives desire to separate from Canada they will be required to have consent from the rest of Canada, a constitutional amendment, or possibly establish a successful new government which in itself establishes a new legal order. Interna-

168. Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 *Yale J. Int'l L.* 127, 159-60 (1991).

169. *Id.* at 155-63.

170. This is what Peter C. Newman believes is Trudeau's rallying cry. Peter C. Newman, *Blaming Trudeau for Our Troubles*, *Maclean's*, Sept. 28, 1992, at 46.

tional law allows separation, however, recognition of a new entity may not be readily forthcoming, thus hindering its acquisition of state status. Whatever the outcome may be, one thing is certain—the constitutional structure of Canada will not remain the same.

Kevin Sneesby

New World Ordered: The Asserted Extraterritorial Jurisdiction of the Cuban Democracy Act of 1992

In an attempt to promote democratic change, the Cuban Democracy Act of 1992¹ extended the existing prohibition of trade with Cuba.² The Act purports to prohibit transactions with Cuba or its nationals by firms, wherever organized or doing business, that are owned or controlled by United States residents or nationals.³ The nations within which these firms are located have expressed their opposition to this extraterritorial prohibition.⁴ They claim it is a violation of the sovereignty and equality of states under principles of international law.

Part I of this comment examines the Cuban Democracy Act and the regulations it modifies. Part II addresses whether the United States has the authority under international law to prohibit trade between Cuba and United States owned or controlled firms organized and operating in third countries. Finally, Part III addresses whether the United States has the authority to do so under United States law, considering particularly the Constitution and the role of international law in the United States legal system.

I. THE CACR AND THE CUBAN DEMOCRACY ACT

Under the authority of the Trading With the Enemy Act of 1917 (TWEA),⁵ the Treasury Department issued the Cuban Assets Control Regulations (CACR)⁶ in 1963. The CACR prohibits all "transactions

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1. Pub. L. No. 102-484, §§ 1701-1712, 106 Stat. 2575 (1992).

2. Cuban Assets Control Regulations, 31 C.F.R. pt. 515 (1992).

3. *Id.* § 515.329.

4. David C. Scott, *The World From Mexico City*, Christian Science Monitor, Oct. 28, 1992, at 3 (Officials from Mexico, Uruguay, Venezuela, Argentina express their opposition to the Cuban Democracy Act); Pascal C. Fletcher, *Cuba Says U.S. Trade Squeeze Could Backfire*, Reuter Library Report, Oct. 23, 1992 (Britain, Canada, and EC express opposition to the Cuban Democracy Act).

5. Ch. 106, 40 Stat. 411 (codified as amended at 50 U.S.C. app. § 1-44 (1988)). *Regan v. Wald*, 468 U.S. 222, 225-26, 104 S. Ct. 3026, 3029 (1984). "[In 1963, the TWEA gave the President broad authority to impose comprehensive embargoes on foreign countries as one means of dealing with both peacetime emergencies and times of war." In 1963, § 5(b) of TWEA provided:

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe,