

## Right to Self-Determination in In Re Secession of Quebec

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## COMMENT

### RIGHT TO SELF-DETERMINATION IN *IN RE SECESSION OF QUEBEC*

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## I. INTRODUCTION

The right to self-determination<sup>1</sup> is one of the most complex issues in international affairs. The theory that all peoples have a right to determine their own political destinies has been almost universally embraced. Whom this right applies to, and what the right encompasses, however, is the subject of tremendous debate, not only among scholars, but also among international leaders. The debate focuses on the inherent tension between the desire to protect the state sovereignty and the desire to give groups within states the right to exercise their culture and political will. The international community fears that by giving groups the right to secede from recognized states, secession attempts will be encouraged, leading to an increase in the number of states and divisions among them. Some argue that the right to self-determination only includes the right to a representative government while others argue it is more expansive.

In recent years there has been a tide of nationalist movements and a rediscovery of ethnic identities.<sup>2</sup> This awakening has led to a demand for increased autonomy by many groups. There are an estimated 140 groups asserting their right to self-determination.<sup>3</sup> The Quebecois are one of these groups. At various points throughout Canadian history, the Quebecois have clamored for their independence from the rest of Canada. Their demands came to the forefront in the Canadian legal community when the Supreme Court of Canada addressed the issue in *In re Secession of Quebec*.<sup>4</sup> The opinion examined Quebec's right to independence under Canadian and international law. While acknowledging the right to self-determination, the Court ultimately determined that Quebec does not have the right to unilaterally secede.

The Court's decision brings two important issues to the forefront. First, is the Court's decision in line with the established principles of international law? Second, and perhaps more important, who should determine whether a people should be independent? This Note will examine

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1. The International Court of Justice in *Morocco v. Spain* defined the right of self-determination as "the need to pay regard to the freely expressed will of peoples." 1975 I.C.J. 12, at 33.

2. Edward Canuel, Note, *Nationalism, Self-Determination, and Nationalist Movements: Exploring the Palestinian and Quebec Drives for Independence*, 20 B.C. INTL. & COMP. L. REV. 85, 85 (1997).

3. Halim Moris, *Self-Determination: An Affirmative Right or Mere Rhetoric?*, 4 ILSA J. INT'L & COMP. L. 201, 201 (1997).

4. In the Matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1947, dated the 30<sup>th</sup> day of September, 1996. Indexed as: Reference re Secession of Quebec. 1998 Can. Sup. Ct. LEXIS 39 [hereinafter *In Re Secession of Quebec*].

both of these questions. However, before delving into those topics, some background of right to self-determination is necessary.<sup>5</sup> The first portion of the paper will discuss the case itself, including the Court's examination of its jurisdiction, secession under Canadian law, and secession under international law. The next portion will examine the principle of self-determination under international law as it is explained in various United Nations Declarations. How the principle is applied, the balance between self-determination and the protection of states, who has the right to self-determination, and the level of scrutiny that is applied to claims of the right to self-determination are issues that will be discussed. An examination of these issues demonstrates that the Court's decision is in line with current principles of international law. Finally, the paper will examine whether the Canadian Supreme Court should have decided whether Quebec has the right to secede.

## II. *IN RE SECESSION OF QUEBEC*

The Governor in Council brought the case to the Supreme Court.<sup>6</sup> The Court was asked to give its opinion regarding the legality of unilateral secession if Quebec passed a referendum in favor of secession. The Governor in Council presented three questions to the Court:

Question 1: Under the Constitution of Canada, can the National Assembly, legislature of government of Quebec effect the secession of Quebec from Canada unilaterally?

Question 2: Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

Question 3: In the event of a conflict between domestic and international law on the right of the National Assembly legislature of government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in

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5. The history of self-determination is extensive. Countless leaders and scholars have proposed numerous ways to interpret the right of self-determination. The purpose of this comment is not to present all of the theories of self-determination but to provide the reader with sufficient background so that s/he can draw his/her own conclusions about the soundness of the Court's reasoning.

6. *In Re Secession of Quebec*, *supra* note 4, ¶ 2.

Canada?<sup>7</sup>

After much discussion, the Court concluded that the Canadian Constitution does not give Quebec the right to unilaterally secede.<sup>8</sup> Furthermore, the Court determined that international law and the principle of self-determination do not confer the right to secession.<sup>9</sup> In view of the fact that the Court determined that there was no conflict between Canadian and international law, the Court did not answer the third question.<sup>10</sup>

Prior to examining these questions the Court first addressed the question of whether it had jurisdiction to answer the questions presented.<sup>11</sup> Ultimately, the Court concluded that they had jurisdiction<sup>12</sup> and proceeded to analyze the Canadian Constitution and international law in-depth. A summation of the Court's findings is given below.

#### A. *Jurisdiction of the Court*

In determining whether the Court has authority to answer the questions presented, the Court had to assess whether the Court had the authority to issue advisory opinions and whether, given the political and international implications, the Court could issue an opinion on this particular matter.<sup>13</sup>

After examining various Constitutional provisions, the Court concluded that it not only had the authority to issue advisory opinions, but indeed, it had a duty to do so.<sup>14</sup> The Court determined that it had the authority to issue advisory opinions on "legal questions touching and concerning the future of the Canadian federation,"<sup>15</sup> and therefore it had the authority to issue its opinion in this case. Thus, because secession concerns the future of Canada the Court had the obligation to answer the Governor in Council's question regarding secession under Canadian law.<sup>16</sup>

Next, the Court looked to see if they could answer questions that were political in nature and, at least to a certain degree, highly speculative.<sup>17</sup> Reasoning that the Canadian Constitution does not insist on a strict

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7. *Id.* ¶ 2.

8. *Id.* ¶ 147.

9. *Id.* ¶ 151.

10. *Id.* ¶ 144.

11. *Id.* ¶¶ 3-30.

12. *Id.* ¶ 30.

13. *Id.* ¶ 3.

14. *Id.* ¶ 7.

15. *Id.* ¶ 19.

16. *Id.* ¶ 30.

17. *Id.* ¶ 23.

separation of powers, the Court rejected an amicus curie's<sup>18</sup> argument that the Canadian Supreme Court, like the U.S. Supreme Court, could only answer actual cases and controversies.<sup>19</sup> Because the Court is not under the same "case and controversies" requirement they do not have to wait until a referendum in favor of secession is passed but could issue their opinion as to the legality of it prior to the referendums passage.<sup>20</sup> The Court also explained that they were not taking power away from the legislature to decide this question for itself but merely setting the ground rules that should control the political process.<sup>21</sup>

The amicus curiae's third objection to the Court's jurisdiction was that the Court should not answer the Governor in Council's second question because it would require the Court to interpret international rather than domestic law.<sup>22</sup> The Court's response to this proposal was straightforward: "This concern is groundless."<sup>23</sup> Having looked at international law for guidance in making other decisions, the court determined that it was in essence doing the same thing in this situation. Furthermore, they stated that by issuing an advisory opinion the Court would not be "purporting to 'act as' or substitute itself for an international tribunal,"<sup>24</sup> nor would their decision bind any other state or international tribunal.<sup>25</sup> Furthermore, the Court reasoned that it was not answering a question of pure international law but determining the legal rights and obligations of the government of Quebec which is under the legal system of Canada and thus under the jurisdiction of the Court.

### B. *Secession Under Canadian Law*

In assessing whether secession is valid under the Canadian Constitution, the Court examined the principles of federalism, democracy, Constitutionalism and the rule of law.<sup>26</sup> Since these principles are the central underpinnings for the Constitution, and thus governmental system of Ca-

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18. The Court does not specify who is the amicus curiae. *Id.* ¶ 3.

19. *Id.* ¶ 12.

20. *Id.* ¶ 26.

21. *Id.* ¶ 99.

22. *Id.* ¶ 20.

23. *Id.* ¶ 21.

24. *Id.* ¶ 19.

25. *Id.* ¶ 19.

26. *Id.* ¶¶ 31-104.

nada,<sup>27</sup> the Court discussed each at length.

### 1. *Federalism*

The Court noted that the existence of Quebec as a culturally unique group was one of the primary reasons for the formation of the federal system.<sup>28</sup> Canada was originally formed by merging the provinces of Canada West (Ontario), Canada East (Quebec), and the Maritime Provinces.<sup>29</sup> Each region wanted to maintain a certain amount of autonomy and Quebec wanted, and received, guarantees that French culture and language would be protected.<sup>30</sup> Significant powers were granted to provincial governments in order to accommodate the diverse interests in the initial confederation.<sup>31</sup> The Court noted that: "the principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction."<sup>32</sup>

The importance of federalism in a discussion of the right to self-determination cannot be underestimated. As will be discussed later, the right to self determination is the right to develop a society in the way that a particular People see fit. In explaining the principle of federalism, the Court is distinguishing between the right to determine the cultural and political development of a people and the right of those People to claim independence. The degree of autonomy that the provinces have in Canada confers the right to develop culturally and politically,<sup>33</sup> but the right to develop culturally and politically does not confer the right to secede.

### 2. *Democracy*

Democracy encapsulates the right of citizens to participate in government.<sup>34</sup> The Court noted that "democracy is commonly understood as being a political system of majority rule."<sup>35</sup> However, the Court clarified that since Canada is a federal system there may be different majorities at

27. *Id.* ¶ 48.

28. *Id.* ¶ 57.

29. The Court gives a brief history of the formation of Canada and the history of federalism since 1867. *Id.* ¶¶ 32-47.

30. *Id.* ¶ 37-40.

31. *Id.* ¶ 42.

32. *Id.* ¶ 56.

33. *Id.* ¶ 56.

34. *Id.* ¶ 63.

35. *Id.* ¶ 61.

different levels of government.<sup>36</sup> The wishes of majorities, both at the provincial and federal level, must be respected since neither majority is more legitimate than the other.<sup>37</sup> In a democratic system there is a continuous process of discussion since building majorities “necessitates compromise, negotiation and deliberation.”<sup>38</sup> The inevitable dissenting voices must be recognized and their concerns must be considered within the framework of the democratic system which all live.<sup>39</sup>

The legitimacy of governmental decisions, the Court notes, rests on the interactions between the wishes of the majority and the rule of law.<sup>40</sup> The rule of law creates the framework in which the sovereign will of the people can be implemented.<sup>41</sup> In order for a democratic institution to be legitimate its actions must be in accordance with the law and the moral values imbedded in Canada’s constitutional structure.<sup>42</sup>

### 3. *Constitutionalism and the Rule of Law*

The Canadian Constitution represents the basis for all Canadian laws.<sup>43</sup> “Any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”<sup>44</sup> The Constitution binds all governments, federal and provincial, because the government’s sole claim to authority is the power that is given to governments by the Constitution.<sup>45</sup> Thus, Quebec could not pass a law that would override the Constitution.<sup>46</sup> The Court held that the Constitution is beyond the reach of simple majority rule for three principle reasons: as a safeguard for fundamental rights and freedoms<sup>47</sup> to ensure that minorities have the “rights necessary to maintain and promote their identities against the assimilative pressure of the majority,”<sup>48</sup> to protect the different branches of government from having their power usurp by other branches.<sup>49</sup>

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36. *Id.* ¶ 64.

37. *Id.* ¶ 64.

38. *Id.* ¶ 66.

39. *Id.* ¶ 66.

40. *Id.* ¶ 65.

41. *Id.* ¶ 65.

42. *Id.* ¶ 65.

43. *Id.* ¶ 70.

44. *Id.* ¶ 70.

45. *Id.* ¶ 70.

46. *Id.* ¶ 73.

47. *Id.* ¶ 72.

48. *Id.* ¶ 72. For more discussion on the protection of minorities see ¶¶ 77-80.

49. *Id.* ¶ 72.



The Court explains that the principles of Constitutionalism are in harmony with the principles of democracy, in that Constitutionalism creates an "orderly framework within which people may make political decisions."<sup>50</sup> The constitutional rules are not meant to frustrate the will of the majority of people, but merely to define what majority must be consulted in order to alter "the fundamental balances of political power, individual rights, and minority rights."<sup>51</sup> The rules that the Court adopts require a majority in Quebec to negotiate and compromise with the majority in the rest of Canada if they wish to add a constitutional amendment that would allow Quebec to secede.<sup>52</sup> According to the Court this negotiation would ensure the fundamental rights of all involved,<sup>53</sup> and would harmoniously combine the principles of Constitutionalism and democracy.<sup>54</sup>

#### 4. *Constitutional Principles in the Context of Secession*

The Court concedes that the Constitution is silent about whether a province may secede from the union.<sup>55</sup> However, the Court explains that secession would alter the governmental structure of Canada in a way that is clearly inconsistent with the current constitutional arrangements.<sup>56</sup> The Court does, however, say that if a referendum in favor of secession is taken, and the majority of Quebecois vote to secede, the rest of Canada would have an obligation to negotiate constitutional changes with the Quebec government to respond to the Quebecois desire to secede.<sup>57</sup> Neither the federal government, nor the other provincial governments, would have a "basis to "deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others."<sup>58</sup> Once the majority of Quebecois vote in favor of secession, the Court continued, there would have to be a negotiation process and a reconciliation of the various rights and obligations between Quebec and the rest of Canada.<sup>59</sup>

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50. *Id.* ¶ 76.

51. *Id.* ¶ 74.

52. *Id.* ¶ 86.

53. *Id.* ¶ 74.

54. *Id.* ¶ 75.

55. *Id.* ¶ 82.

56. *Id.* ¶ 82.

57. *Id.* ¶ 86.

58. *Id.* ¶ 90.

59. *Id.* ¶ 86.

The Court determined that a decision by the Quebecois to secede would put the interdependent relationship between the provinces at risk and would affect the economic, social, and political environment of the country.<sup>60</sup> "Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec."<sup>61</sup> The magnitude of such a decision, and its myriad implications of that decision, would require both sides of the conflict to work together to arrive at an equitable solution.<sup>62</sup>

The Court carefully pointed out that in these negotiations neither party may exercise their rights so that the rights of the other party is absolutely denied.<sup>63</sup> "There can be no suggestion that either of these majorities trumps the other."<sup>64</sup> The parties should negotiate with the principles of federalism, democracy, Constitutionalism and protection of minorities in mind.<sup>65</sup> The Court mentioned that a refusal by either party to conduct negotiations in line with these principles would jeopardize the legitimacy of that party's asserted rights.<sup>66</sup> Furthermore, the Court comments that this refusal may jeopardize that parties position in the eyes of the international community.<sup>67</sup>

### C. *The Court's Evaluation of Secession Under International Law*

Having determined that there is no right for Quebec to unilaterally secede under Canadian law, the Court turned its attention to secession under international law. The Court began its discussion by asserting "it is clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their parent state."<sup>68</sup> In making this assertion, the Court argued that neither the absence of a provision explicitly denying the right to secession,<sup>69</sup> nor the right of self-determination implies that the right of secession for every group exists.<sup>70</sup>

In examining the absence of a provision denying the right to secede, the Court discussed the international communities' respect for the integ-

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60. *Id.* ¶ 94. See also Marchildon & Maxwell *infra* note 103 at 615-619.

61. *In Re Secession of Quebec, supra* note 4, ¶ 94.

62. *Id.* ¶ 94.

63. *Id.* ¶ 90.

64. *Id.* ¶ 91.

65. *Id.* ¶ 92.

66. *Id.* ¶ 93.

67. *Id.* ¶ 101.

68. *Id.* ¶ 108.

69. *Id.* ¶ 109.

70. *Id.* ¶ 135.

riety of states. "International law places great importance on the territorial integrity of nation states and by and large leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part."<sup>71</sup> The Court determined that since Quebec's secession would be contrary to the constitution and laws of Canada, the international law is likely to accept the Court's conclusion unless it is contrary to the right of self-determination.<sup>72</sup>

The right of self-determination has gone beyond mere convention and has become an established principle of international law that must be upheld.<sup>73</sup> Recognizing this, the Court proceeded to examine several United Nations agreements that acknowledge the right of self-determination and explained why these agreements are inapplicable in the Quebec/Canada situation. The four main agreements<sup>74</sup> that the Court looked to were the UN's International Covenant on Economic, Social and Cultural Rights,<sup>75</sup> the UN General Assembly's Declaration on Principles of International Law Concerning Friendly Relations,<sup>76</sup> the Vienna Decla-

71. *Id.* ¶ 109.

72. *Id.* ¶ 109.

73. *Id.* ¶ 111.

74. *Id.* ¶¶ 111-118.

75. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 220, 21 U.N. GAOR Supp. (No 16) at 49, U.N. Doc. A/ 6316, 993 U.N.T.S. 3 (1996). "All peoples have the right to self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development." *Id.* Art. 1.

76. United Nations General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A Res. 2625 (XXV), UN GAOR, 24 October 1970. [hereinafter Declaration on Friendly Relations.]

"By virtue of the principles of equal rights and self-determination of peoples enshrined in the Charter of the United Nations all peoples have the right freely to determine, without external interference their political status and to pursue their economic, social, and cultural development and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every state has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle in order:

- (a) to promote friendly relations and co-operation among states; and
- (b) to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every state has the duty to promote through joint and separate action universal re-

ration and Programme of Action,<sup>77</sup> and the Helsinki Final Act.<sup>78</sup> All of these agreements purport to give the right of self-determination to Peoples. However, the Court explains, international law expects that the right of self-determination can be exercised within the framework of established states, and only in exceptional circumstances should the territorial integrity of those states be infringed upon to give a Peoples the right to

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spect for and observance of human rights and fundamental freedoms in accordance with the Charter

The establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that peoples.”

77. Vienna Declaration and Programme of Action, U.N. Document A/CONF.157/24 October 13, 1993.

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.

Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination.

In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

78. Final Act of the Conference on Security and Co-operation in Europe, 14 I.L.M. 1292 (1975) [hereinafter Helsinki Final Act]. Part VIII:

“The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle.”

secede.<sup>79</sup>

The Court then proceeded to examine the definition of a People under international law. It recognizes that People may mean only a portion of the population in an existing state.<sup>80</sup> The Court concedes that much of the Quebec population has many characteristics of a People.<sup>81</sup> However, the Court determined that "it is not necessary to explore this legal characterization to resolve Question 2 appropriately."<sup>82</sup> According to the Court, even if the Quebecois are considered a people, that in itself does not give them the right to unilaterally secede from Canada.<sup>83</sup>

The right to self-determination must be balanced with respect to the territorial integrity of existing states.<sup>84</sup> These principles are not incompatible, particularly in countries like Canada.<sup>85</sup> Under international law, "a state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity."<sup>86</sup> As the basis for this assertion the Court cites the Declaration of Friendly Relations and the Vienna Declaration.<sup>87</sup>

The Court then addresses the issue of whether the Quebecois have the right to secede because they have been denied meaningful access to government.<sup>88</sup> The Court ultimately concludes that since they have access to government they do not have the right to secede.<sup>89</sup> The Court notes that Canada, as a democracy, guarantees all citizens the right to participate in government.<sup>90</sup> The Court cites numerous examples that indicate that the Quebecois have had meaningful access to government.<sup>91</sup> Primary among these examples is the fact that Quebecois have occupied prominent positions in the government of Canada.<sup>92</sup> Indeed, a Quebecois has been the Prime Minister of Canada for 40 out of the last 50 years.<sup>93</sup> Ac-

79. *In Re Secession of Quebec*, *supra* note 4, ¶ 119.

80. *Id.* ¶ 121.

81. *Id.* ¶ 122.

82. *Id.* ¶ 122.

83. *Id.* ¶ 122.

84. *Id.* ¶ 124.

85. *Id.* ¶ 127.

86. *Id.* ¶ 127.

87. *Id.* ¶¶ 125-126, *see supra* notes 56-57 and accompanying text.

88. *Id.* ¶¶ 131-135.

89. *Id.* ¶ 133.

90. *Id.* ¶ 59.

91. *Id.* ¶¶ 132-133.

92. *Id.* ¶ 133.

93. *Id.* ¶ 132.

ording to the Court, these facts indicate that "the Quebec people is manifestly not . . . an oppressed people."<sup>94</sup>

In summary, the Court concludes that:

[T]he international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions.<sup>95</sup>

### III. SELF-DETERMINATION UNDER INTERNATIONAL LAW

Woodrow Wilson, who was one of the first to articulate the right to self-determination, once stated that "No people must be forced under sovereignty under which it does not wish to live."<sup>96</sup> Upon reflecting on the effect of his words Wilson said: "When I gave utterance to those words I said them without the knowledge that nationalities existed . . . . You do not know and cannot appreciate the anxieties that I have experienced as the result of these many millions of people having their hopes raised by what I said."<sup>97</sup> These two statements reflect the inherent tension in the goal underlying the principle of self-determination. The goal is that all peoples should have the government they desire, but the reality of implementing this ideal is that states, and the international system

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94. *Id.* ¶ 132.

95. *Id.* ¶ 135.

96. Message from President Wilson to Russia on the Occasion of the Visit of the American Mission, reprinted in *Official Statement of War Aims and Peace Proposals*, December 1916 to November 1918, at 105 (James B. Scott ed., 1921). *Quoted in* Lawrence Eastwood Jr., *Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia*, 3 *DUKE J. COMP. & INT'L L.* 299, 299 (1993).

97. Text of a meeting between President Wilson, Frank P. Walsh and Edward F. Dunne, Paris, June 11, 1919, submitted for the record by Frank P. Walsh in testimony before the Senate Committee on Foreign Relations, 66th Cong., 1st Sess., *Treaty of Peace With Congress*, *quoted in* Jerome Wilson, *Ethnic Groups and the Right to Self-Determination* 11 *CONN. J. INT'L L.* 433, 458-459. For more about President Wilson's ideas regarding self-determination see Hurst Hannum, *Rethinking Self-Determination*, 34 *VA. J. INT'L L.* 1, 2-8 (1993).

based on statehood, would break down with hundreds of groups claiming independence.<sup>98</sup> President Wilson's second statement may illustrate that when he realized the number of nationalities in the world, he realized that the ideal he enunciated could not become reality in a system of states that are made up of different nations and peoples.<sup>99</sup>

Wilson's initial declaration has been the subject of a discussion among commentators and international leaders that has spanned the generations.<sup>100</sup> The principle of self-determination has been debated throughout the history of the United Nations, and its predecessor the League of Nations.<sup>101</sup> The League of Nations chose not to mention the right to self-determination in its Charter because it was fearful that mentioning it would lead to demands of independence by various ethnic and further fragmentation of countries.<sup>102</sup> The United Nations has sent mixed messages regarding what the right to self-determination means and to whom it applies.<sup>103</sup>

#### A. *The Principle of Self-Determination Under United Nations Declarations*

The United Nations Charter expresses "respect for the principle of

98. See Frederic Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 A.J.I.L. 304 (1994).

99. See also ROBERT LANSING, *THE PEACE NEGOTIATIONS: A PERSONAL NARRATIVE* 97-98 (1921).

The more I think about the President's declaration as the right to 'self-determination,' the more convinced I am of the danger of . . . such ideas . . . .

What effect will it have on the Irish, the Indians, the Egyptians, and the nationalist among the Boers? Will it not breed discontent, disorder, and rebellion? Will not the Mohammedans of Syria and Palestine and possibly Morocco and Tripoli rely on it? . . .

The phrase is simply loaded with dynamite. It will raise hopes which can never be realized. It will, I fear, cost, thousand of lives . . . . What a calamity that the phrase was ever uttered! What misery it will cause!

*Id.* quoted in Michael Kelly, *Political Downsizing: The Re-Emergence of Self-Determination, and the Movement Toward Smaller, Ethnically Homogenous States*, 47 DRAKE L. REV. 209, 210 (1999).

100. See Hannum, *supra* note 97.

101. For a discussion of self-determination in the League of Nations and the United Nations see Eastwood, *supra* note 96 at 302-304.

102. Carsten Ebenroth & Matthew Kemner, *The Enduring Political Nature of Questions of State Succession and Secession and the Quest of Objective Standards*, 17 U. PA. J. INT'L. ECON. L. 753, 805 n.284 (1996).

103. Gregory Marchildon & Edward Maxwell, *Quebec's Right of Secession Under Canadian and International Law*, 32 VA. J. INT'L L. 583, 602-608 (1992) (discussing contradictions in the development of the concept of self-determination).

equal rights and self-determination of peoples.”<sup>104</sup> The Universal Declaration of Human Rights states “The will of the people shall be the basis of the authority of the government.”<sup>105</sup> While this statement, in and of itself, does not affirm the right to self-determination, implicit in this statement is the idea that governments must follow the will of the people they govern. The International Covenant on Economic Social and Cultural Rights<sup>106</sup> is more explicit in regard to the right to self-determination. It, and the International Covenant on Civil and Political Rights,<sup>107</sup> which reiterates verbatim this portion of the Covenant on Economic Social and Cultural Rights, states, “[a]ll peoples have the right to self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>108</sup> The International Covenant on Civil and Political Rights elaborates and imposes a duty on member states to promote the realization of the right to self-determination.<sup>109</sup>

The Declaration on Friendly Relations<sup>110</sup> reaffirms the right of self-determination. It equates violating the principle of self-determination with violating fundamental human rights.<sup>111</sup> It is the first Declaration to declare that “establishment of a sovereign and independent state . . . constitute modes of implementing the right of self-determination.”<sup>112</sup> Commentators have suggested that this statement recognizes the legitimacy of secession in certain circumstances.<sup>113</sup>

Paragraph seven of the Declaration on Friendly Relations asserts:

Nothing in the foregoing paragraphs shall be construed as authorizing of encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination

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104. U.N. CHARTER art. 1, para 2 & art. 55.

105. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 Art. 21 Para. 3 (1948).

106. International Covenant on Economic, Social and Cultural Rights, *supra* note 75.

107. International Covenant on Civil and Political Rights, G.A. Res. 220, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 (1966).

108. Covenant on Economic Social and Cultural Rights *supra* note 75, Art. 1. International Covenant on Civil and Political Rights, Art. 1, *supra* note 107 art.1.

109. Covenant on Civil and Political Rights, *supra* note 107, Art. 1 sect. 3.

110. Declaration on Friendly Relations, *supra* note 76.

111. *Id.*

112. *Id.*

113. Mitchell Hill, *What the Principle of Self-Determination Means Today*, 1 ILSA J. INT'L & COMP. L. 119, 128 (1995).



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 colour.<sup>114</sup>

This statement has been interpreted to authorize secession of peoples from states that do not conduct themselves in compliance with the principle of self-determination.<sup>115</sup> Furthermore, the Declaration imposes a requirement that governments be representative of the people they govern.<sup>116</sup> If the government is not representative, this Declaration suggests that secession may be a legitimate exercise of the right of self-determination.<sup>117</sup>

The Helsinki Final Act<sup>118</sup> goes further than the Declaration on Friendly Relations in that it explicitly broadens the right of self-determination to include a right to secession. The Act states in relevant part: "By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status."<sup>119</sup> The internal right to self-determination is the right to have a representative government, while external self-determination is the right to secede.<sup>120</sup> The Helsinki Final Act recognized both of these rights. However, it is important to note that the Helsinki Final Act is not an international convention and has not yet attained the status of customary international law.<sup>121</sup> Nonetheless, the Act is significant because it strengthens the principle of self-determination articulated by the United Nations.<sup>122</sup>

The Vienna Declaration<sup>123</sup> was adopted at the World Conference on Human Rights in 1993. This Declaration recognizes the right of a peoples to take "any legitimate action" which is in compliance with the United Nation's Charter to realize their right to self-determination.<sup>124</sup> Furthermore, it reiterates paragraph seven of the Declaration on Friendly Relations that recognized the right to have a representative government.

114. Declaration on Friendly Relations, *supra* note 76.

115. Hill, *supra* note 113, at 129.

116. Declaration on Friendly Relations, *supra* note 76.

117. Hill, *supra* note 113, at 129.

118. Helsinki Final Act, *supra* note 78.

119. *Id.*

120. Moris, *supra* note 3, at 204-205.

121. The Helsinki Final Act has been signed by thirty-three states in Europe, as well as the United States and Canada; however it has "no legally binding effect." *Supra* note 78.

122. Marchildon & Maxwell, *supra* note 103, at 605.

123. Vienna Declaration, *supra* note 77.

124. *Id.*

It is apparent from these Declarations that the right of self-determination has become an actual, although limited, legal right under international law.<sup>125</sup> Self-determination is no longer merely a moral principle that states can overlook.

### B. *The Application of the Right to Self-Determination*

Because the right to self-determination, and to a lesser degree secession, is favorably addressed in United Nations Declarations, it is intriguing that many commentators suggest that positive international law does not recognize the right of national groups to separate themselves from their parent state.<sup>126</sup> The international community has limited the application of the right to self-determination.<sup>127</sup> In practice, the international community has not acted beyond the assertion that people have the right "to be free from foreign domination."<sup>128</sup> Both the scope of the right, and to whom the right applies, have undergone much transformation in recent years.<sup>129</sup>

#### 1. *The Scope of the Right of Self-Determination and the Legitimacy of States*<sup>130</sup>

Scholars and international leaders<sup>131</sup> have drawn a distinction between the right to self-determination and the right to secession. Some commentators believe that the right to self-determination is only an internal right in that it gives groups the right to have a government that represents them.<sup>132</sup> By having a representative government, groups have right

125. Marchildon & Maxwell, *supra* note 103, at 603.

126. Eastwood, *supra* note 103, at 302.

127. *See infra* notes 147-206 and accompanying text.

128. Moris, *supra* note 3, at 209.

129. *See* Eastwood *supra* note 96, at 315-332. Eastwood notes that after decolonization there was a reluctance by all states to recognize secessionist movements. However, following the recognition of secessionist movements in former Yugoslavia there was more willingness on the part of the international community to recognize these movements. Eastwood also points out that international law still does not have a positive right of secession. *Id.*

130. *See* Alison Grabell, Comment, *New Northern Neighbor? An Independent Quebec, the United States and the NAFTA*, 2 SW. J.L. & TRADE AM. 265, 268 (1995).

131. In 1970, United Nations Secretary General U. Thant stated "As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of a Member State." Secretary-General's Press Conferences, UN Monthly Chron., Feb. 1970, at 34-36, *quoted in* Eastwood, *supra*, note 96, at 304 n. 23.

132. For a discussion on internal and external self-determination, *see* Moris, *supra* note 3, at 210-212.

to shape their respective destinies by influencing leaders through the power to vote them out of office. The underlying justification for this interpretation is the protection of legitimate states, and to ensure international stability.<sup>133</sup>

Contemporary secession claims violate territorial integrity,<sup>134</sup> the central characteristic of international law.<sup>135</sup> Some commentators believe that giving minorities or groups within states the right to secede would "destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unit."<sup>136</sup> Thus, there is a rebuttable presumption in favor of statehood.<sup>137</sup> The reason for this presumption is clear. The United Nations is comprised of states and not of groups of peoples. Thus, one of the central precepts of the United Nations is that the integrity of legitimate states must be respected and preserved.<sup>138</sup>

The definition of a "legitimate" state, as well as the level of protection that states whose legitimacy is in question deserve, is unsettled. To reiterate what was briefly discussed in the previous section, the Declaration on Friendly Relations counsels that in order to be legitimate states must have a government that represents all of the people in the state without racial or ethnic distinctions.<sup>139</sup> Furthermore, it suggests that only states conducting themselves in compliance with this principle have the right to be free from interference.<sup>140</sup> Paragraph seven of that Declaration declares that secession may be a legitimate option for certain groups if the government is not representative.<sup>141</sup> However, the Declaration is quick to point out that nothing in that statement should be construed as encouraging dismemberment of states.<sup>142</sup> The Declaration on the Granting of In-

133. Eastwood, *supra* note 96, at 315.

134. Derege Demissie, Note, *Self-Determination Including Secession vs. The Territorial Integrity of Nation-States: A Prima Facie Case for Secession*, 20 SUFFOLK TRANS-NAT'L L. REV. 165, 170 (1996).

135. Lawrence Frankel, *International Law of Secession: New Rules for a New Era*, 14 HOUS. J. INT'L L. 521, 523 (1992).

136. Kirgis, *supra* note 98, at 305.

137. Eastwood, *supra* note 96, at 338.

138. See Hill, *supra* note 113, at 127.

139. Declaration on Friendly Relations, *supra* note 76. See also Hill, *supra* note 113, at 125.

140. Hill, *supra* note 113, at 127.

141. Declaration on Friendly Relations, *supra* note 76. The Declaration states: "The establishment of a sovereign and independent state, . . . constitutes modes of implementing the right of self-determination by that people." *Id.*

142. Declaration on Friendly Relations, *supra* note 76.

dependence to Colonial Countries and Peoples, clearly stated this constraint when it said that: "Any attempts aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."<sup>143</sup>

These Declarations indicate that secession may be legitimate in very limited circumstances and that a case by case analysis is necessary to determine whether the right to self-determination includes the right to secede. There are primarily only two recognized reasons for secession, either to undo past wrong as in cases of decolonization, or to undue present repression of a minority group.<sup>144</sup> There is a balancing test in assessing a group's right to secede. On the one hand, the international community seeks to protect the integrity of states and to discourage division. On the other hand, the community has an interest in protecting the human rights of minorities and preventing outbreaks of civil war over secessionist claims.

## 2. *Who Has the Right to Self-Determination?*

In certain circumstances the right to self-determination may include the right to secede; however, there is still division among commentator on who should be allowed to exercise that right.<sup>145</sup> Commentators agree that there are three requirements before a group may successfully assert their right to self-determination; a) they must be a people, b) they must be oppressed, and c) they must have been a colony.<sup>146</sup> Each of these categories has requirements within itself, and shall be examined separately and in the context of the Quebec.

### a. *People*

UNESCO outlined seven characteristics that define a people: a common history, a common racial or ethnic identity, cultural homogeneity, linguistic unity, common religion or ideological affinity, territorial connectedness, and a common economic life.<sup>147</sup> Under this definition a simple minority group that is dispersed throughout a state may not be considered a people with the right to secede because they fail to meet the "territorial connectedness" requirement. The United Nations Human

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143. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961).

144. Jane Stromseth, *Self-determination, Secession and Humanitarian Intervention by the United Nations*, 86 AM. SOC'Y INT'L L. PROC. 370, 371 (1992)

145. See *infra* notes 148-206 and accompanying text.

146. Marchildon & Maxwell, *supra* note 103, at 590.

147. Demissie, *supra* note 134, at 172.

Rights Committee has said that “peoples” have a right to self-determination but mere “minorities” do not have the same right.<sup>148</sup>

On the surface the Quebecois seem to meet all of the UNESCO requirements. The French Quebecois share a history, language, and religion that is distinct from the majority in Canada. The Quebecois originally were descendants of the French colonists. The English settled the rest of Canada. The Quebecois are predominately Catholic, whereas English-speaking Canada is predominately Protestant. While throughout history there has been much disunity between the two groups, there has also been a gradual integration on an economic level since Canada’s inception, over 131 years ago.<sup>149</sup>

It is significant that the government of Canada has recognized that the Quebecois have a history that is distinct from the majority of Canada. In 1987, the Prime Minister and ten Provincial Premiers signed the *Meech Lake Accord* that recognized Quebec as a distinct society.<sup>150</sup> The *Meech Lake Accord* was never ratified because of fears about its impact on Quebec’s language minorities and concerns about the impact of the “distinct society” clause.<sup>151</sup> In 1992, the *Charlottetown Accords* reiterated this recognition and sought to give Quebec the authority to preserve and promote that society. The Anglophone provinces eventually rejected the *Charlottetown Accords* because it gave Quebec special privileges. Quebec also rejected it because it felt Accord did not protect French culture enough.<sup>152</sup> Although the *Charlottetown Accords* was not ratified, the fact that it exists and was debated, illustrates that even within Canada there are groups on both sides of the debate that recognize the Quebecois as a distinct people, and a group that should have special protections.

The Supreme Court of Canada recognized Quebec’s distinctiveness in its discussion of federalism<sup>153</sup> and later when it discussed secession under international law.<sup>154</sup> The Court concluded that although the Quebecois are culturally unique, uniqueness alone does not confer the

148. Benedict Kingsbury, *Self-Determination and AIndigenous Peoples*, 86 AM. SOC’Y INT’L L. PROC. 383, 388 (1992).

149. *In re Secession of Quebec*, *supra* note 4, ¶¶ 37-40.

150. Rachel Guglielmo, “Three Nations Warring in the Bosom of a Single State” *An Exploration of Identity and Self-Determination in Quebec*, 21 SPG FLETCHER F. WORLD AFF. 197, 200 (1997).

151. Deborah Richardson, *The Quebec Independence Vote and Its Implications of English Language Legislation*, 26 GA. J. INT’L & COMP. L. 521 n.53 and accompanying text. (1997).

152. *Id.* at 531

153. *In re Secession of Quebec*, *supra* note 4, ¶ 57.

154. *Id.* ¶ 122. *See supra* notes 80-82 and accompanying text.

right to secession.<sup>155</sup> This evaluation is in accordance with the current requirements of international law. To have the right to secede a group must be an oppressed people in a former colony.<sup>156</sup>

The province of Quebec however is not solely comprised of French Quebecois. There are substantial Cree<sup>157</sup> and Anglophone populations. These populations do not share the same history, language, culture and ethnic-identity as the French Quebecois. Lucien Buchard, the leader of the separationist's movement in the Canadian Parliament once defended his movement by saying "Ours is not an ethnic nationalism, for it recognizes that the 'nation Quebecois' is constituted by the people as a whole who inhabit Quebec."<sup>158</sup> Yet, the results of the 1995 referendum indicate that there is a clear division on ethnic lines as to whether Quebec should secede.<sup>159</sup> The French speaking Quebecois voted by solid majority for secession, while voters whose mother tongue is English or a language other than French voted almost unanimously to remain a part of Canada.<sup>160</sup> This detail illustrates that if there were a separation the wishes of the Cree and Anglophone population must be reconciled with the wishes of the French Quebecois. Separation of Quebec from Canada could not be simply along provincial lines without a guarantee those Cree and Anglophone populations' rights would be protected. To date this guarantee has not been forthcoming.<sup>161</sup>

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155. *Id.*

156. *See infra* notes 162-206 and accompanying text.

157. Guglielmo, *supra* note 150, at 203-204.

The claim of the 12,000 Cree Indians living in Quebec, that they, too constitute a distinct people, is at least as strong as the claim made by the French-speakers. Cree speak a separate language, practice a distinct lifestyle, and embrace a different set of beliefs and values than the majority culture

*Id.*

158. Andrew Stark, *Adieu, Liberal Nationalism*, N.Y. TIMES, November 2, 1995, at A27.

159. *Id.*

160. *Id.* This article also notes that "Quebec's secessionist Premier, Jacques Parizeau, blamed the "ethnic vote" for the defeat, claimed moral victory because a francophone majority had supported independence, and promised "revenge.""<sup>159</sup> *Id.* This comment illustrates that there is deep division between the French Quebecois and the people who are not of French descent. Furthermore, it may be an indication that "minorities in a sovereign Quebec would receive unjust treatment from the new state." Bryan Schwartz & Susan Waywood, *A Model Declaration on the Right of Secession*, 11 N.Y. INT'L. L. REV. 1, 52 (1998).

161. Guglielmo, *supra* note 150, at 208. Guglielmo also notes that the "Vice-premier of Quebec Bernard Landry has been quoted in *Le Devoir*, a leading Quebec newspaper, as confirming that a sovereign Quebec will not fund ethnic groups to promote their own languages and that the PQ government is against multiculturalism." *Id.*

b. *Oppression*

The second requirement that a group claiming the right to self-determination must meet is that of oppression. The underlying purpose of this requirement is to ensure that states who do not violate a group's rights will not be dismembered unnecessarily. As mentioned earlier, there is a presumption in favor of maintaining the integrity of states.<sup>162</sup> This presumption can only be overcome if it is part of a decolonization plan or if there is evidence of oppression. What is important in the Quebec/Canada situation is the definition of oppression.<sup>163</sup>

It is generally accepted that physical oppression of a group may give rise to a right of self-determination. Nearly all of the successful secession attempts<sup>164</sup> involved some form of physical oppression, such as torture or imprisonment that are violations of human rights.<sup>165</sup> It is clear that the Quebecois have not suffered physical oppression under the Canadian government.<sup>166</sup> They do not claim that they have been tortured or mistreated. The Supreme Court decision says that because the Quebecois "are manifestly not an oppressed people" they are not entitled to unilaterally secede under international law.<sup>167</sup>

Physical oppression, however, is not the only form of oppression. Some scholars argue that in certain circumstances cultural suppression may be sufficient to meet the oppression requirement.<sup>168</sup> Alan Buchanan suggests that there may be a basis for secession on a cultural preservation ground if a culture is in genuine danger of being destroyed in the near future.<sup>169</sup> To be considered cultural oppression, the threat to a cul-

162. *Supra* note 137 and accompanying text.

163. Eastwood suggests that oppression could be defined "to include the violation of the fundamental human rights of the individuals making up the group or the discriminatory denial of political power, such as the right to vote or seek political office, to a particular group by the parent state." Eastwood, *supra*, note 96, at 341-342.

164. Not including those that were a part of decolonization.

165. The secession of Eritrea and the partition of Yugoslavia are examples of separation because of physical oppression.

166. See E.J. Arnett, "The law is on Canada's side, not the separatists," *GLOBE AND MAIL*, 3 January 1995, A17, *quoted in* Guglielmo, *supra* note 150, at 208. "The Quebecois have no legal right of secession under international law because they are not in a state of colonial oppression and are not suffering grave injustices. On the contrary, they have a high degree of "self-determination" within Canada." *Id.*

167. *In re* Secession of Quebec, *supra* note 4, ¶ 135.

168. Article 15 of the International Covenant on Economic, Social and Cultural Rights states that all parties to the Covenant "recognize the right of everyone: (a) To take part in cultural life." See *supra* note 75.

169. ALLEN BUCHANAN, *SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC* 52-64.

ture must be grave and immediate.<sup>170</sup> It cannot merely be a lack of support of a culture by the government, but must be demonstrated through an unwillingness of the government to allow a particular culture to express itself.<sup>171</sup>

The Quebecois Party bases their claim that Quebec should be independent on the belief that the government of Canada does not protect French culture sufficiently.<sup>172</sup> Quebec's rejection of the Charlottetown Accord, which would have given the province authority to promote French culture, based on the belief that it did not adequately protect French interests, suggests that Quebecois believe that there is a serious threat to French culture and that French culture must be preserved.<sup>173</sup> However, the law declaring that French and English are the official languages and must both be recognized and utilized demonstrates that the Canadian government is making efforts to promote, if not French culture, at least French language. As Rachel Guglielmo states, "Secession on the grounds of an immediate and serious threat to the survival of French culture does not seem justified. It seems questionable whether even full independence could grant the French leadership in Quebec any more control over protection of their collective identity than they already have."<sup>174</sup>

Mr. Parizeau and Mr. Bouchard, the secessionist leaders, have rationalized their movement by asserting that "Quebec had finally, after centuries, become 'conscious of its identity,' 'attained a new self-consciousness' or 'a sense of existing'; it therefore deserves 'recognition' and 'affirmation of its existence.'" <sup>175</sup> They argue that not allowing Quebec to secede is a suppression of its identity, and thus a form of cultural oppression.<sup>176</sup> The question that arises is whether every group that believes it has a distinct identity should have the right to form an independent state. In response to this question, commentators have proposed that because of an international system comprised of nation-states, every "nation," or distinct people, must acquire its own state in order to stand on equal footing with other nations that have states.<sup>177</sup> Peoples without states

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170. *Id.*

171. *Id.*

172. Richardson, *supra* note 151.

173. See *supra* note 152 and accompanying text.

174. Guglielmo, *supra* note 150, at 208. Guglielmo also notes that the "Quebecois recognize that even within their own province, where they exert considerable control over cultural and education matters and enjoy a high degree of political participation, there is still something missing. And that perception is not wrong: short of independence, without a state, they are still a 'second-class' nation." *Id.* at 197.

175. Stark, *supra* note 158.

176. See Guglielmo, *supra* note 150, at 207-208.

177. Guglielmo, *supra* note 150, at 197.



even if they are fairly autonomous are at a severe psychological disadvantage.<sup>178</sup> While some aspects of this argument may have merit, in practice the theory could not be fully implemented without leading to a world system that is composed of smaller and smaller, more homogenous states.<sup>179</sup> Thus, most scholars have rejected this theory as illegitimate.<sup>180</sup>

Although the Supreme Court did not consider cultural oppression, nor suppression of identity, it is unlikely that Quebec would have the right to secede on this ground. Even if there is a limited right to self-determination based on cultural oppression, the Quebec/Canada situation does not rise to the level necessary to be considered oppression in that there is no immediate and grave threat to French culture. This conclusion is supported by Eastwood's contention that:

permitting groups such as the Quebecois in Canada to invoke the right of secession based upon cultural or group identity alone would threaten to open the floodgates of secession, and could exacerbate group conflicts. It is difficult to imagine any clear limits upon a secession right that permits groups to secede from pluralistic, non-oppressive states such as Canada.<sup>181</sup>

One of the features of modern society is the amalgamation of cultures and the gradual erosion of cultural distinctions. While the Quebecois may rightly believe that French culture is being assimilated, it is not solely because they are a part of Canada, but rather because integration is a global phenomena.

### c. *Former Colony*

There is almost complete agreement that the right of self-determination applies to former colonies,<sup>182</sup> at least if the colonies were

178. *Id.*

179. *Id.* at 198.

180. *Id.*

181. Eastwood, *supra*, note 96, at 342.

182. The right of former colonies to self-determination was specifically addressed in the United Nations Declaration on the Granting of Independence to Colonial Countries and People. G.A. Res.1514, U.N. GAOR 15<sup>th</sup> sess., Supp. No. 16, U.N.Doc. A/4684 (1961). This Declaration was the first to use say that all peoples have a right to self-determination. The Declaration states "the subjugation of peoples to alien subjugation, domination, and exploitation constitutes a denial of fundamental human rights; it is contrary to the United Nations Charter, and is an impediment to the promotion of world peace and co-operation." *Id.* See also Marchildon & Maxwell, *supra* note 103, at 604.

dominated by a people of a different racial background.<sup>183</sup> It is clear that Quebec does not fall into the traditional category of a colony, since that definition is quite narrow. The United Nations has defined a colony as “a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it” and “arbitrarily placed in a position or status of subordination vis a vis the metropolitan state.” Quebec cannot be considered a colony under this definition because it does not satisfy all of the requirements. The French settled Quebec in the early 1600's.<sup>184</sup> It was later conquered by the British. Quebec remained a British colony distinct from the rest of Canada until 1867 when Canada East and Canada West merged under the British North America Act.<sup>185</sup> Since the union, the two groups have been represented equally in government. Furthermore, Quebec and Canada are geographically connected. While there may be a cultural distinction, neither group has attempted to subordinate the other and each group has the power to “administer” to itself through the provincial governments.

In support of their claim, secessionists can argue that Quebec is only a part of Canada because it was conquered and colonized by the British. This argument does have merit, since if the French had retained control over Quebec it is extremely improbable that a union with a British colony would have ever taken place. However, the fact that Quebec is equally represented in Canadian government, the lack of oppression and the territorial connectedness seems to override the validity of this argument. Furthermore, it is significant that it was the British who colonized Quebec and not the Canadians. If Quebec was seeking independence from Britain most likely it would be considered a former colony. Nonetheless, Canada, as such, has never sought to subjugate Quebec but rather to work with it for both groups mutual prosperity.

Having determined that Quebec is not a traditional former colony whether there is a right to self-determination outside of the context of decolonization must be examined. Hector Espiell, the special reporter for the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, explained that there is “unquestioned acceptance in international law of the fact that the right to self-determination applies only to peoples under colonial and alien domina-

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183. See Rupert Emerson, *Self-Determination*, 65 AJIL 459 (1971).

184. See generally JOHN FITZMAURICE, *QUEBEC AND CANADA: PAST, PRESENT AND FUTURE* (1985) (discusses the history of Quebec and the origins of the nationalist movement).

185. Kelly, *supra* note 99, at 256. See also Marchildon & Maxwell, *supra* note 103, at 592-598.

tion.”<sup>186</sup> Indeed, prior to the Declaration of Friendly Relations<sup>187</sup> the majority of states in the United Nations asserted that self-determination was limited to the right to be free from colonial domination.<sup>188</sup> This assertion was reiterated in the International Court of Justice’s advisory opinion on Western Sahara.<sup>189</sup> That opinion counsels that the General Assembly intended to give only decolonized people a legal right to self-determination.<sup>190</sup> Some commentators have suggested that it is inherently unfair to give one group of people a right to self-determination and deny it to another group based solely on the location of the territory in question. As Judge Dillard stated in his separate opinion in Western Sahara, “it is for the people to determine the destiny of the territory and not the territory the destiny of the people.”<sup>191</sup>

Indeed, United Nations Declarations that deal with the issue of self-determination on the surface do not make a distinction based on the location of a territory. In general, they state that “all peoples” have the right to self-determination.<sup>192</sup> Neither the U.N.’s International Covenant on Economic, Social and Cultural Rights, nor the Helsinki Final Act give any special status to former colonies.<sup>193</sup> The Vienna Declaration and the Declaration of Friendly Relations do, however, make special mention of people under colonial domination. The Vienna Declaration does not restrict the right of self-determination to former colonies, but merely states that colonial domination should be taken into account in determining whether a people have a right to self-determination.<sup>194</sup> The Declaration on Friendly Relations states that one of the purposes of the right of self-determination is “to bring a speedy end to colonialism;”<sup>195</sup> however, the Declaration also does not restrict the right solely to peoples under colonial rule.<sup>196</sup>

Even though the Conventions are not restrictive, in a practical sense, the right of self-determination and secession has only been applied to peoples in former colonies. The primary exception to this in recent years

186. Hill, *supra* note 113, at 125 quoting Hector Gros Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions* 11979 U.N. Sales No. E.79 XIV 5 para. 56.

187. Declaration on Friendly Relations, *supra* note 76.

188. Kirgis, *supra* note 98, at 309.

189. Western Sahara (Morocco v. Spain) 1975 I.C.J. 12.

190. *Id.* at 36.

191. *Id.* at 122 (Separate opinion of Judge Dillard).

192. See *supra* notes 75-78.

193. *Id.*

194. Vienna Declaration, *supra* note 77.

195. See Declaration on Friendly Relations, *supra* note 76.

196. *Id.*

is the partitioning of Yugoslavia and the secession of Croatia, Slovenia, and Bosnia-Herzegovina.<sup>197</sup> These provinces were part of an existing member state of the United Nations. Since the provinces were not a former colony, under the principle of territorial and political integrity they did not have a clear right to secede.<sup>198</sup> The United Nations under the Declarations of Friendly Relations eventually recognized the secession of these states.<sup>199</sup> Some commentators note that the recognition of the former Yugoslavian Republics' right to secede may indicate a new era in which the right to self-determination will be expanded to include more groups.<sup>200</sup> However, as Eastwood explains, "even if the international community's prompt recognition of the seceding Yugoslav republics marks the beginning of a new, more permissive approach to secession in state practice the recognition of a right of secession based upon state practice and international custom is not imminent."<sup>201</sup>

The Declarations on Friendly Relations provides that in certain circumstances the right to self-determination may be applied to groups that are not considered traditional former colonies.<sup>202</sup> These circumstances include subjection of people to "subjugation, domination and exploitation"<sup>203</sup> and forcible oppression of minority groups. If the government is not representative, the oppressed group may be treated as if they were under colonial domination and will have the right to self-determination.<sup>204</sup> In essence, they will be considered a pseudo-colony.<sup>205</sup> There may be an exception to the former colony requirement if there is oppression of a minority group within a state. If a group is not a minority in a former colony, and cannot prove oppression, it is unlikely that they will be considered to have the right to self-determination.

To reiterate, most commentators and international leaders agree that to have the right to self-determination and secession, a group must be seeking independence from colonial domination. If they are not under colonial domination the people must show that they are oppressed to be considered a pseudo-colony and have the right to unilaterally claim independence. It is evident that Quebec is not a colony under the United Nations definition of a colony. For groups in the situation of the Quebecois

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197. Hill, *supra* note 113, at 130.

198. *Id.* at 131.

199. *Id.*

200. Eastwood, *supra* note 96, at 332.

201. *Id.*

202. Hill, *supra* note 113, at 131.

203. Declaration on Friendly Relations *supra* note 76.

204. *Id.*

205. *Id.*

a balancing test may be applied between the level of oppression and the degree that foreign domination played in creation of the situation. Even if it can be argued that foreign domination was the primary cause of Quebec's union with Canada, the lack of historical oppression diminishes the forcefulness of this argument. As discussed in the section on oppression, Quebec is not oppressed to the level is necessary to have a valid claim to the right to self-determination under a pseudo-colony theory.

### C. *Scrutinizing Self-Determination Claims*

Another factor considered in evaluating whether a group has the right to secede is the degree of destabilization that secession will cause in the region. If the secession will cause a high degree of destabilization the group must show that the government is highly oppressive and unrepresentative.<sup>206</sup> As Kirgis explained it, “[i]f a government is at the high end of the scale of democracy, the only self-determination claims that will be given international credence are those with minimal destabilizing effect. If a government is extremely unrepresentative, much more destabilizing self-determination claims may well be recognized.”<sup>207</sup>

The degree of destabilization is crucial in determining the level of scrutiny that should be applied to the Quebecois claim. In short, all secessions cause destabilization and should be scrutinized carefully. Moreover, there is some concern that if Quebec secedes Quebec and the rest of Canada might fragment further.<sup>208</sup> The majority of Montreal is English speaking, and there is a fear that if Quebec secedes, Montreal, Quebec's capital city, may have an incentive to separate.<sup>209</sup> There are three main concerns about Quebec's secession's effect on the rest of Canada.

First, there is speculation that if Quebec secedes the “glue of federalism”<sup>210</sup> would disappear and that British Columbia, Alberta and Ontario, the wealthier provinces, may refuse to support the poorer provinces.<sup>211</sup> The second concern is that an independent Quebec would cut off, geographically at least, Newfoundland, New Brunswick, Nova Scotia,

206. Kirgis, *supra* note 98, at 311-312.

207. *Id.* at 312.

208. Charles F. Doran, *Will Canada Unravel?* FOREIGN AFFAIRS, September 1996/October 1996. “Neither the Canadian federal government nor the Quebec separatist government nor outside analysts favoring a split in Canada predict any fragmentation of Canada beyond Quebec. Ottawa probably has felt it must downplay all hints of the danger of disunity. Yet recently Ottawa has reversed that policy . . . .” *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

and Prince Edward Island from the rest of Canada.<sup>212</sup> Finally, some speculate that secession would heightened the “feeling of alienation from and dominance by the economic power of Ontario”<sup>213</sup> in the Western provinces. These three problems may lead to a demand for increased autonomy in the remaining provinces or may lead to further fragmentation of Canada. As one commentator put it, “If we’re not careful the question won’t be whether Quebec separates, but how many provinces join the U.S.”<sup>214</sup> While this is an alarmist view, it is evidence that if Quebec were to unilaterally secede it would cause a tremendous amount of destabilization within Canada. Therefore, before Quebec can have the right of secession they must show that the Canadian government is highly oppressive and unrepresentative. As the forgoing discussion illustrates, supporters of secession have not been able to demonstrate severe oppression or a lack of representation.

#### D. *Summary of Self-Determination*

Since Wilson first articulated the concept, there has been a dispute about what exactly the right to self-determination confers. Most commentators agree, and the United Nations Declarations declares, that the right of self-determination gives a people the right to participate in the government of their choice. If they are not allowed to participate in government, and are oppressed or under colonial domination, the right of self-determination may also include the right of secession.<sup>215</sup> To have a right to secede a group must be a people, must be oppressed and must be a former colony or pseudo-colony.<sup>216</sup> The Quebecois, while they can be considered a distinct people, do not have the right to unilaterally secede under international law<sup>217</sup> because they are neither oppressed nor under colonial domination.

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212. *Id.*

213. *Id.*

214. Editorial, *PQ Platform Includes Plans for Declaration and Referendum*, THE GAZETTE (MONTREAL), July 28, 1994, at B3, *quoted in* Tim Gebert, *Regional Report: The Future of Quebec*, 4 D.C.L. J. INT’L L. & PRAC. 185 (1995).

215. *See supra* notes 162-206 and accompanying text.

216. *Id.*

217. “The United Nations has indicated that one reason a secession attempt may be invalid is that the constitutional provisions of the sovereign member state in question were violated.” This indication is another reason that Quebec’s unilateral secession may be invalid under international law. Ebenroth & Kemner, *supra* note 102, at 812.

## IV. SHOULD A DOMESTIC COURT DECIDE WHETHER A PEOPLE HAVE THE RIGHT TO SECEDE?

The preceding analysis indicates that the Canadian Supreme Court's decision is equitable to all parties and is in accordance with the principles of international law regarding secession. After the release of the decision, Bouchard declared, "It is not up to the Supreme Court to determine the legitimacy of Quebecois' right to decide their future," and announced his plans to proceed with another referendum.<sup>218</sup> While Bouchard may not be an objective observer, his declaration does bring up an interesting point: Should the Court have made the determination that the Quebecois do not have the right to secede under international law?

Many states invoke Article 2(7) of the United Nations Charter, in answering the question of jurisdiction of state courts to decide questions of self-determination. They insist that disputes over secession are essentially within the domestic jurisdiction of a state.<sup>219</sup> Indeed, a state's right to decide issues that effect it can be characterized as one of the central principles of sovereignty.<sup>220</sup> However, recent developments indicate that a majority of states agree that compliance with United Nations' principles, especially those pertaining to protection of human rights, can no longer be regarded as a matter of domestic jurisdiction.<sup>221</sup> There are many reasons that a domestic court should not decide questions of secession. Primary among them is that the state is inherently interested in the outcome of the decision, the involvement of the international community would give more credence to the decision, and that for a new state to be formed the international community must recognize it and it would be easier for all if the community got involved at the front end.<sup>222</sup>

The desire for states to maintain their territorial integrity and political unity makes them an interested party in the decision. As an interested party, the decision by any branch of the government may not be given much credibility in the estimation of the group seeking to secede from that government. As stated earlier, the Canadian Court's decision seems to be an impartial assessment of the rights and obligations of all parties involved and illustrates that the Court understands the sentiments of the Quebecois independence movement. Indeed, people on both sides of the issue claimed to be satisfied with the judgment and said that it confirmed

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218. Bruce Wallace, *Moment of Decision*, MACLEAN'S, August 24, 1998, available in 1998 WL 17370356.

219. Stromseth, *supra* note 144, at 372.

220. *Id.*

221. *Id.*

222. *Id.* at 373.

what they had been arguing.<sup>223</sup> If the parties had not embraced the decision some feared that it would again stir up passions and increase the demand secession.<sup>224</sup> If the decision was made by an international body, whether the United Nations or the International Court of Justice, it would eliminate this fear inasmuch as the group seeking secession would be ensured of greater impartiality. Moreover, the group claiming independence could not use the decision as a rallying point by claiming that it illustrates that the state is oppressive or unrepresentative. As Frankel noted, "affected states should be encouraged to look at UN involvement as a blessing rather than a curse in that it will bring considerable meditative and diplomatic resources to bear on the problem in an effort to arrive at a just and peaceful solution."<sup>225</sup>

Another reason that the international community should get involved early in the process centers around the need for that community to recognize the seceding state. The Court itself recognized that the success of any secession would be dependent on recognition by the international community.<sup>226</sup> In the current system, individual countries recognize secessionist movements when they feel that it is in their political interests.<sup>227</sup> There is often not an objective reason for a country's decision to recognize or not recognize a movement.<sup>228</sup> The decisions are often based not on an examination of a group's right to self-determination, but on an examination of which group is likely to win the dispute.<sup>229</sup>

When a country recognizes a secessionist movement or supports that movement that country necessarily creates a conflict with the parent state.<sup>230</sup> Countries are often reluctant to recognize even a valid claim to self-determination because of the fear of retaliation by the sovereign.<sup>231</sup> There is a fear that any intervention by a third party "although morally justifiable, might be imprudent due to the potential carnage and risks to world order."<sup>232</sup> This fear has caused the international community to adopt a hands off approach until the outcome secessionist movement is

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223. Graham Fraser, *Day of Decision: The Quebec ruling: Canada must negotiate after Yes vote Supreme Court rejects unilateral secession, but says Quebecers' wishes can't be ignored*, THE GLOBE AND MAIL, August 21, 1998, at A1.

224. *Id.*

225. Frankel, *supra* note 135, at 545.

226. *In Re Secession of Quebec*, *supra* note 4, ¶ 103.

227. Ebenroth & Kemner, *supra* note 102, at 812.

228. *Id.*

229. *Id.* at 803.

230. *Id.* at 811.

231. *Id.* at 803.

232. Eastwood, *supra* note 96, at 339.



clear.<sup>233</sup> “International inactivity, inattention, and legitimation of violent outcomes is a recipe for continued instability, violence, and oppression. Any new system for dealing with secessionist movements must involve automatic, active engagement on the part of the international community.”<sup>234</sup> Focusing the world’s attention on secessionist claims, may lead governments to resist the temptation to suppress those movements through military action. This would ensure greater protection for minorities claiming the right to self-determination, would reduce the likelihood of secessionist movements turning into civil wars and would increase peace and stability in the world.

Despite the benefits of international involvement early on, there is reluctance by the United Nations to interfere with a member state’s sovereignty. This reluctance is based on the fact that the United Nations Charter recognizes the territorial integrity of all states.<sup>235</sup> However, it must be remembered that the Charter also recognizes the right to self-determination.<sup>236</sup> While the principle of self-determination maybe subordinate to the principle of territorial integrity<sup>237</sup> further support for international involvement at the earliest stages of secessionist movements are found in Article 39 of the UN Charter. Article 39 states that the “Security Council shall determine the existence of any threat to peace . . . and make recommendations, or decide what measures shall be taken.”<sup>238</sup> As discussed earlier, secessions cause destabilization. Destabilization may be considered a threat to peace and authorize the involvement of the Security Council.<sup>239</sup> This is not to say that there was any threat to peace

233. Frankel, *supra* note 135, at 545.

234. Frankel, *supra* note 135, at 544.

235. Preamble to the UN CHARTER.

236. U.N. CHARTER Art 1, para. 2, Art. 55 and Art. 73(b).

237. Gerry Simpson, *The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age*, 32 STAN. J. INT’L L. 255, 266 (1996).

The principle of self-determination was clearly subordinate to the prohibition on the use of force, to the right to territorial integrity (Article 2(4)), and to the general commitment to ensuring peace and security (Chapter VII, for example), all of which were regarded as the post-war international system’s foundational norms. In fact, the Charter is the most tentative of all U.N. instruments on the matter of self-determination.

*Id.*

238. UN CHARTER Art. 39.

239. Ebenroth and Kemner have proposed a system in which all secessionist claims would have to meet three requirements: 1) have traditional characteristics of a state, 2) have a willingness to follow the UN Charter, and 3) obtain consent of the parent state. All secessionist claims under this system would be subject to review by the UN Security Council and the International Court of Justice. According to Ebenroth and Kemner this “system would assist in averting armed conflicts in cases of secession. Ebenroth & Kem-

caused by the Canadian Court's decision. Rather the goal of this argument is to refute the notion that respect for territorial integrity prohibits international involvement, and suggest that since it is not prohibited, the United Nations should take a more active role in disputes over a peoples right to self-determination.<sup>240</sup>

A final reason that the United Nations should take a more active role is its experience, and the experience of the International Court of Justice, in resolving disputes involving issues of self-determination. The International Court of Justice has issued numerous advisory opinions regarding the right of various groups to self-determination. The basis of a group's rights to self-determination lie in the United Nations Declarations. The International Court has extensive experience in interpreting these documents. The Canadian Supreme Court is unquestionably the final authority on questions of Canadian Constitutional law, and it must decide whether secession is valid under the Canadian Constitution. The Canadian Court is not, however, the definitive authority on questions of international law, that authority rests in the United Nations and the International Court of Justice. The Canadian Court's decision is exemplary in nearly every respect. However, it would have been more so if the Court had referred questions of international law to an international tribunal.<sup>241</sup> By doing so, they would serve as an example to other states in similar disputes, and would have established an influential precedent for all countries in assessing the right of a people to self-determination. Even though the Court stated that it was not attempting to act as a international tribunal or bind any subsequent decision by an international court,<sup>242</sup> because of the magnitude of the decision and the international implications, it would have been preferable if the Court sought the advice of an international tribunal in support of its decision.

## V. CONCLUSION

In summary, the Canadian Supreme Court's opinion in *In Re Secession of Quebec* that a unilateral declaration of independence would violate Canadian and international law is in conformity with the principles of international law articulated in United Nations Declarations and international case law. Although the Quebecois may be a distinct people,

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ner, *supra* note 102 at 810.

240. See also Stromseth, *supra* note 144, at 370-74.

241. The Court did announce that it was not attempting to act as an international tribunal or purporting to substitute its decision for a later determination by and international court. See *supra* notes 22-25 and accompanying text.

242. *In Re Secession of Quebec*, *supra* note 4, ¶ 13.

based on the fact that they are not oppressed and have meaningful access to government they are not entitled exercise the right of unilateral secession. Despite the fact that the Court's decision is an equitable assessment of the rights and obligations of the parties involved under international law, the decision would have more credence if the Court had sought the advice of an international tribunal. The importance of international involvement in attempted secessions cannot be underestimated. Early involvement not only ensures that the rights of the minority group are protected but may lessen the destabilizing effects of attempts at secession.

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