

“YOU CAN’T ALWAYS GET WHAT YOU WANT”: THE TERRITORIAL SCOPE OF AN INDEPENDENT QUEBEC[©]

BY PETER RADAN^{*}

In *Reference Re Secession of Quebec*, the Court identified Quebec’s borders as a critical issue in any secession negotiation. Canadian constitutional law requires changes to existing borders, particularly if the Aboriginal communities of Ungava maintain their opposition to becoming part of an independent Quebec, for three reasons. First, an independent Quebec has no right to territory gained in 1898 and 1912 because those territories were granted on the condition that Quebec remain in the federation. Second, the existence of constitutionally entrenched fiduciary obligations owed by the Crown to Quebec’s Aboriginal peoples gives the latter a veto over a constitutional amendment that would transform provincial borders into international borders. Finally, the principle of federalism mandates that a constitutional amendment affecting the sovereignty of Aboriginal peoples, who comprise an effective third sovereign tier in Canada’s federal structure, requires the consent of those Aboriginal peoples.

Dans son *Rapport sur la Sécession du Québec*, la Cour qualifie la question des frontières du Québec d’élément critique pour toute négociation concernant une sécession. Le droit constitutionnel canadien impose des changements aux frontières existantes, pour trois raisons, particulièrement si les communautés autochtones d’Ungava continuent à s’opposer à faire partie d’un Québec indépendant. Premièrement, un Québec indépendant n’a pas droit aux territoires acquis en 1898 et en 1912, étant donné que ces territoires ont été accordés à la condition que le Québec demeure dans la fédération. Deuxièmement, les obligations fiduciaires incorporées dans la constitution et accordées par la Couronne aux peuples autochtones du Québec donnent à ces peuples un droit de veto sur tout amendement constitutionnel qui transformerait des frontières provinciales en frontières internationales. Enfin, le principe du fédéralisme exige qu’un amendement constitutionnel affectant la souveraineté de peuple autochtone, peuple qui constitue un troisième échelon effectif de souveraineté dans la structure fédérale du Canada, nécessite le consentement de ces peuples.

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I.	INTRODUCTION	

It is an article of faith among the francophone secessionists of Quebec that an independent Quebec would have the same territory as the province of Quebec, which is guaranteed¹ to the province under Canadian constitutional law.² However, many people in Quebec vigorously dispute this contention, including the Aboriginal communities in the Ungava region³ of northern Quebec.⁴ Ungava is part of the traditional homeland to a number of Quebec's Aboriginal peoples, such as the Cree and Inuit peoples. It also accounts for approximately two-thirds of Quebec's present

¹ Under the *Constitution Act, 1871*, (U.K.), 34 & 35 Vict., c. 28, s. 3 [*Constitution Act, 1871*] Quebec's territorial limits can only be altered with its consent. Under s. 43 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*] any alteration of Quebec's borders with other provinces can only be achieved with the consent of its National Assembly.

² The main pillar of support for this contention is the 1992 report of five international law experts commissioned by the government of Quebec: T. Franck et al., "L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté" in *Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, Les Attributs d'un Québec souverain, Exposés et études*, vol. 1, 377, (Quebec: Bibliothèque nationale du Québec, 1992). This report relied heavily on the principle of *uti possidetis juris* as applied to the breakup of Yugoslavia in the 1990s. For analysis of *uti possidetis* see Suzanne Lalonde, *Determining Boundaries in a Conflicted World, The Role of Uti Possidetis* (Montreal & Kingston: McGill-Queen's University Press, 2002) at 10; Peter Radan, *The Breakup of Yugoslavia and International Law* (London: Routledge, 2002) at 69 [Radan, *Breakup of Yugoslavia*]; Tomas Bartoš, "Uti Possidetis. Quo Vadis?" (1997) 18 Austral. Y.B. Int'l L. 37.

³ Although there is uncertainty about the precise territorial scope of Ungava, for the purposes of this article it includes the areas of northern Quebec that were the subject of Quebec border legislation of 1898 and 1912. This legislation is discussed in more detail in Part III, below.

⁴ Grand Council of the Crees, *Sovereign Injustice, Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec* (Nemaska: Grand Council of the Crees, 1995) at 171-217.

territory. None of Ungava's Aboriginal communities have agreed to be part of an independent Quebec. Rather, they insist that they cannot be separated from Canada without their consent.⁵ These Aboriginal peoples have consistently asserted that they have a legal right to remain within Canada if and when Quebec becomes an independent state. The Cree have also suggested that another option for them in this event is independent statehood for the Aboriginal peoples.⁶ For an independent Quebec, the practical implications of the Aboriginal peoples either staying in Canada or seeking their own independence are the same: Quebec's independence would result in new borders and a reduction of Quebec's territorial scope. In short, a secession of Quebec would partition the province.

The aim of this article is to analyze, from the perspective of Canadian constitutional law,⁷ the validity of the claims made by francophone secessionists in Quebec, particularly in relation to Ungava. In so doing, it is assumed that any future independence of Quebec will, following the ruling of the Supreme Court of Canada in *Reference Re Secession of Quebec*,⁸ be the product of principled negotiations leading to a constitutional amendment facilitating Quebec's legal secession from Canada.⁹ This article will argue that, should Quebec's Aboriginal peoples

⁵ Prior to the 1995 referendum on independence in Quebec, the James Bay Cree, the Inuit of Nunavik, and the Innu each held referendums. In every case, over 95 per cent of those voting rejected being separated from Canada without their consent. Claude-Armand Sheppard, "The Cree Intervention in the Canadian Reference on Quebec Secession: A Subjective Assessment" (1999) 23 *Vt. L. Rev.* 845 at 851. The Inuit held a similar referendum at the same time as the 1980 referendum on independence in Quebec: Grand Council of the Crees, *supra* note 4 at 317. The Inuit "have on four occasions, in four separate referendums, overwhelmingly expressed their desire to remain within Canada and not to allow themselves or the territory of Nunavik to be separated from Canada by a unilateral declaration of independence by Quebec": *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 (Factum of the Intervener Makivik Corporation at para. 2) [Makivik Factum]. See also *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 (Factum of the Intervener Grand Council of the Crees (Eeyou Estchee) at paras. 8-9) [Cree Factum].

⁶ Grand Council of the Crees, *supra* note 4 at 66.

⁷ International law principles about the right of peoples to self-determination and *uti possidetis* could also be relevant in determining an independent Quebec's borders. See Radan, *Breakup of Yugoslavia*, *supra* note 2 at 204-43 (for an analysis of these principles and how they were applied to the breakup of the former Yugoslavia); Lalonde, *supra* note 2 at 174-203.

⁸ [1998] 2 S.C.R. 217 [*Secession Reference*].

⁹ In *Secession Reference*, *ibid.* at 267-70, the Court made it clear that there is no absolute legal entitlement to secession in that, even if principled negotiations are held, agreement on a constitutional amendment might not be reached. However, at 274-75, the Court conceded that an illegal unilateral secession by Quebec might be recognized by the international community. This part of the Court's decision has been seen as an implicit concession by the Court that such recognition would likely be within Quebec's present provincial borders: Peter Radan, "The Supreme Court of Canada and the Borders of Quebec" [1998] *Austl. Int'l L.J.* 171 at 174-75.

continue to express clearly and democratically their collective will not to be separated from Canada, such a constitutional amendment will be possible only if the territorial scope of an independent Quebec is significantly reduced from that of the present Canadian province. Most, if not all, of Ungava would remain within Canada.

In Part II, this article will detail the emergence of the political and legal debate within Canada about the borders of an independent Quebec. Part III consists of a brief sketch of the historical development of Quebec's current northern provincial border. Finally, Part IV will analyze the major legal bases on which an independent Quebec would be denied the right to retain most, if not all, of Ungava.

II. THE EMERGENCE OF THE DEBATE ABOUT QUEBEC'S POST-SECESSION BORDERS

Only since the unsuccessful referendum on secession in 1995 have territory and borders become significant questions in the debate about secession. This significance derives from contributions of those Canadians (including Quebecers) who oppose secession. Most, but not all, of these Canadians believe that Quebec should be allowed to secede, but not with its current borders. These "partitionists" reject the view of the former Parti Québécois government of Quebec that its borders are inviolable. They argue that if Canada's borders are not inviolable, then neither are Quebec's. Thus, in 2003, Canada's minister for intergovernmental affairs, Stéphane Dion, wrote that "in the event that territorially concentrated populations within Quebec clearly asked to stay attached to Canada, the divisibility of Quebec's territory would have to be contemplated with the same spirit of openness which led to accepting the divisibility of Canada's territory."¹⁰ The partitionists, however, do not agree on how Quebec is to be partitioned.¹¹ On the other hand, partition of Quebec is not favoured by

¹⁰ Stéphane Dion, "Democratic Governance and the Principle of Territorial Integrity," online: The Minister <http://www.pco-bcp.gc.ca/aia/default.asp?Language=E&Page=minister&Sub=articles&Doc=20030716_e.htm>. See also the statement by the 1995 Canadian foreign minister, André Ouellet, quoted from S. Scott, "Ouellet questions whether borders would stay the same if Quebec separates," *The (Montreal) Gazette* (20 September 1995); Patrick J. Monahan & Michael J. Bryant with Nancy C. Coté, *Coming to Terms With Plan B: Ten Principles Governing Secession* (Toronto: C. D. Howe Institute, 1996) at 35 [Monahan & Bryant, *Plan B*]; Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1996) at 160 [Franck, *Fairness in International Law*].

¹¹ See e.g. Lionel Albert & William F. Shaw, *Partition: The Price of Quebec's Independence* (Montreal: Thornhill, 1980); David Varty, *Who Gets Ungava?* (Vancouver: Varty & Co., 1991); Scott Reid, *Canada Remapped: How the Partition of Quebec Will Reshape the Nation* (Vancouver: Pulp Press, 1992); Grand Council of the Crees, *supra* note 4; Trevor McAlpine, *The Partition Principle: Remapping Quebec After Separation* (Toronto: ECW Press, 1996); Monahan & Bryant, *Plan B*, *ibid.*; Richard Janda,

all of those Canadians who oppose the secessionist movement. These people argue that partition of Quebec is not practically feasible and that if Quebec secedes it should be with its current provincial borders.¹²

A. *The Secession Reference*

In 1998, the issue of partition was raised by the Supreme Court of Canada in its landmark decision in *Secession Reference*. One of the Court's rulings was that the unilateral secession of Quebec from Canada would be illegal under Canadian constitutional law.¹³ This decision does not mean that the secession of Quebec from Canada is legally impossible. Rather, the Court described "four fundamental and organizing principles"¹⁴ of Canada's constitution that could bring about a legal secession by constitutional amendment if certain preconditions were satisfied. The four principles are "federalism; democracy; constitutionalism and the rule of law; and respect for minorities."¹⁵ These principles mandate that, after a referendum in Quebec in which there is a "clear expression by the people of Quebec"¹⁶ of their will to secede from Canada,¹⁷ the federal government and other provinces would be obliged to negotiate with Quebec to seek an agreement on a constitutional amendment to facilitate Quebec's secession.¹⁸ Such a referendum would represent a "clear repudiation by the people of Quebec of the existing constitutional order [that] would confer legitimacy on the demands for secession."¹⁹ Any failure to reach an agreement on an appropriate constitutional amendment would render secession legally impossible.²⁰

Dual Independence, The Birth of a New Quebec and the Re-birth of Lower Canada (Montreal: Varia Press, 1999).

¹² Reed Scowen, *Time to Say Goodbye: The Case for Getting Quebec Out of Canada* (Toronto: McClelland & Stewart, 1999) at 127; Robert A. Young, *The Secession of Quebec and the Future of Canada* (Montreal & Kingston: McGill-Queen's University Press, 1995) at 213-15.

¹³ *Secession Reference*, *supra* note 8 at 292-93.

¹⁴ *Ibid.* at 240.

¹⁵ *Ibid.*

¹⁶ *Ibid.* at 237. It is clear that in its reference to the "people of Quebec" the Court meant the population of Quebec.

¹⁷ *Ibid.* at 265.

¹⁸ *Ibid.* at 265, 294.

¹⁹ *Ibid.* at 266.

²⁰ *Ibid.* at 263, 271, 273.

The Court specifically acknowledged the importance of submissions made by Aboriginal groups on the issue of “defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by Aboriginal peoples.”²¹ In its submissions, the James Bay Cree asserted that a unilateral secession by Quebec would mean that,

Quebec would lose the guaranteed protection for its present administrative boundaries. [...] the consent of the [Quebec] National Assembly to any constitutional change in its provincial boundaries would have been effectively renounced. A seceding Quebec, if successful, would only keep those portions of the present territory in the province over which it had successfully managed to impose and maintain effective control.²²

The Inuit of Nunavik argued that their traditional homelands could form part of an independent Quebec only if the Inuit consented. Otherwise, the Canadian government had an obligation to preserve the integrity of the Inuit’s homelands.²³

In light of these submissions the Court observed:

Negotiations following a referendum vote in favour of seeking secession would inevitably address a wide range of issues, many of great import. After 131 years of Confederation, there exists, inevitably, a high level of integration in economic, political and social institutions across Canada. The vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces. Accordingly, while there are regional economic interests, which sometimes coincide with provincial boundaries, there are also national interests and enterprises (both public and private) that would face potential dismemberment. There is a national economy and a national debt. Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities, including Aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. 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.²⁴

The Court also stated that in secession negotiations “aboriginal interests would be taken into account.”²⁵ Given the proximity of these two passages, it is clear that “defining the boundaries” is one of the Aboriginal interests to be considered at such negotiations. The inescapable implication

²¹ *Ibid.* at 288.

²² Cree Factum, *supra* note 5 at para. 114.

²³ Makivik Factum, *supra* note 5 at paras. 24-26.

²⁴ *Secession Reference*, *supra* note 8 at 269.

²⁵ *Ibid.* at 288.

of the Court's decision is that the partition of Quebec is possible.

B. *The Clarity Act and Bill 99*

Since the *Secession Reference*, most of the debate about secession has focused on what majority referendum vote is needed to trigger the negotiation process and on what would be a clear question to ask the voters of Quebec. In *Secession Reference*, the Court indicated that the question must be "free of ambiguity."²⁶ The Court also ruled that the political process would determine what was a clear question.²⁷ Margaret Moore suggests this requirement "is justifiable both in terms of democratic accountability and as a requirement of fairness."²⁸ The federal government of Canada took the initiative and in early 2000 passed the ironically named *Clarity Act*.²⁹ The *Act* stipulates that, unless the House of Commons is satisfied both that the referendum question is clearly worded³⁰ and that a clear majority voted in favour of secession,³¹ the federal government has no obligation to enter into constitutional negotiations. In the *Secession Reference*, the Court expressly left the definition of "clear majority" to the political process.³² During both the 1980 and the 1995 referendums on secession, the Quebec provincial government maintained that a simple majority vote in favour of secession was sufficient.³³ The Court's judgment

²⁶ *Ibid.* at 265.

²⁷ *Ibid.* at 294.

²⁸ Margaret Moore, "The Ethics of Secession and a Normative Theory of Nationalism" (2000) 13 *Can. J.L. & Jur.* 225 at 247.

²⁹ *An Act to Give Effect to the Requirement for Clarity as Set Out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference, 2000*, S.C. 2000, c. 26 [*Clarity Act*].

³⁰ *Clarity Act, ibid.*, s. 1. In the October 1995 referendum in Quebec the question asked was "Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new Economic and Political Partnership, within the scope of the Bill respecting the future of Quebec and of the agreement signed in June 12, 1995?" In a CROP Opinion Poll of August 1999, 36 per cent of Quebecers thought this question was clear and 61 per cent of Quebecers thought it was not clear. The same poll indicated that 93 per cent of Quebecers agreed that a question in a future referendum on secession must be clear. Canada, Privy Council Office, *Summary of the CROP Opinion Poll "Research in Public Opinion", August 1999*, online: <<http://198.103.111.55/aia/docs/english/perspective/issues/cropopinion.htm>> (Privy Council commissioned public opinion poll conducted by the Centre de recherche sur l'opinion publique) [*CROP Opinion Poll*].

³¹ *Clarity Act, ibid.*, s. 2.

³² *Secession Reference, supra* note 8 at 294.

³³ In August 1999, 37 per cent of Quebecers thought a simple majority vote was sufficient and 60 per cent of Quebecers thought it was not. At the same time, 70 per cent of Quebecers thought a 60 per cent Yes vote would constitute a clear majority. *CROP Opinion Poll, supra* note 30.

suggests that it did not accept this proposition. Furthermore, the federal government has consistently asserted that a simple majority is not a clear majority. Requiring more than a simple majority is “justifiable in terms of establishing procedural barriers against too easy a right to exit that may undermine the very basis of democratic politics.”³⁴

In deciding whether the *Clarity Act* has been satisfied, the House of Commons must consider the views of various political actors in Canada as well as “any formal statements or resolutions by representatives of the Aboriginal peoples of Canada,” especially those in the province whose government proposed the referendum on secession.³⁵ The *Clarity Act* also stipulates several items to be negotiated in the wake of a successful referendum on secession.³⁶ Two of those items are “changes to the borders of the province” seeking to secede and the “rights, interests and territorial claims of Aboriginal peoples of Canada.”³⁷

Within days of the federal *Clarity Act*, the Quebec government responded by tabling *Bill 99* in Quebec’s National Assembly. The bill was passed in December 2000.³⁸ Apart from asserting that the wording of any referendum question on secession is in the exclusive domain of Quebec’s political institutions and that a simple majority of votes cast is sufficient for its approval,³⁹ *Bill 99* also stipulates that Quebec’s borders cannot be

³⁴ Moore, *supra* note 28.

³⁵ *Clarity Act*, *supra* note 29, ss. 1(5), 2(3).

³⁶ *Ibid.*, s. 3(2).

³⁷ In *Secession Reference*, *supra* note 8 at 288, the Court noted that in any secession negotiations “Aboriginal interests would be taken into account.” Janda suggests this implies that Aboriginal groups would be represented at such negotiations. Janda, *supra* note 11 at 100. See also Paul Joffe, “Quebec Secession and Aboriginal Peoples: Important Signals from the Supreme Court” in David Schneiderman, *The Quebec Decision, Perspectives on the Supreme Court Ruling on Secession* (Toronto: James Lorimer & Co., 1999) 137 at 139-40.

³⁸ *An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State*, 2000, S.Q. 2000, c. 46 [*Bill 99*]. For strong criticism of an earlier version of *Bill 99* see *Bill 99: A Sovereign Act of Dispossession, Dishonour and Disgrace*, Brief of the Grand Council of the Crees (Eeyou Istchee) to the National Assembly Committee on Institutions, February 2000, online: <http://www.gcc.ca/Political-Issues/bill_99.htm>.

³⁹ Section 4 of *Bill 99* is not in accordance with the clear majority requirement set out in the *Secession Reference*. See Patrick J. Monahan, *Doing the Rules, An Assessment of the Federal Clarity Act in Light of the Quebec Secession Reference* (Toronto: C.D. Howe Institute, 2000) at 12-13; and Cristie L. Ford, “In Search of the Qualitative Clear Majority: Democratic Experimentalism and the Quebec Secession Reference” (2001) 39 *Alta. L. Rev.* 511 at 559. See generally Allen Buchanan, “Self-Determination, Secession, and the Rule of Law” in Robert McKim & Jeff McMahan, eds., *The Morality of Nationalism* (New York: Oxford University Press, 1997) 301 at 315-16 (general comments rejecting a simple majority vote in any secession referendum); Franck, *Fairness in International Law*, *supra* note 10 at 169. Compare Thomas Flanagan, “Should a Supermajority be Required in a Referendum on Separation?” in John E. Trent, Robert Young & Guy Lachapelle, eds., *Quebec-Canada, What is the Path*

altered without the consent of the National Assembly and that the government of Quebec must ensure the territorial integrity of Quebec.⁴⁰ *Bill 99* does not, however, exclude the possibility of negotiated changes to Quebec's borders.⁴¹ On this point there is no conflict between the relevant provisions of the *Clarity Act* and *Bill 99*.

In negotiations involving the territory and borders of an independent Quebec, the fate of Ungava will be a major focal point.⁴² Any legal argument allowing Ungava to remain in Canada will feature prominently in such negotiations.⁴³ However, before analyzing these arguments, an understanding of the historical development of Quebec's current provincial borders is necessary.

III. HISTORY OF QUEBEC'S PRESENT NORTHERN BORDER

The Aboriginal populations in Ungava have occupied that land from time immemorial. In 1670, England's King Charles II proclaimed the land to be part of Rupert's Land. In the same proclamation, the Hudson's Bay Company was incorporated and granted extensive commercial rights over Rupert's Land.⁴⁴ In 1713, under the *Treaty of Utrecht*,⁴⁵ France recognized British sovereignty over Rupert's Land.⁴⁶ However, the exact

Ahead (Ottawa: University of Ottawa Press, 1996) at 129-34 (for arguments supporting a simple majority).

⁴⁰ *Bill 99*, *supra* note 38, s. 9.

⁴¹ Legal experts advising Quebec's government have recently indicated that Quebec's borders would be negotiable in the event of secession. See Paul Wells "Welcome to the post-separatist era" *National Post* (29 March 2002) A8.

⁴² Quebec's anglophone community would likely make claims that areas in which it is the majority population should be entitled to remain in Canada. The small anglophone Equality Party officially endorses a policy of partition in the event of Quebec's departure from Canada. On Quebec's anglophone community see Garth Stevenson, *Community Besieged: The Anglophone Minority and the Politics of Quebec* (Montreal & Kingston: McGill-Queen's University Press, 1999) at 225-29, 287-88.

⁴³ In August 1999, 72 per cent of Quebecers thought that it would be reasonable if the majority Aboriginal regions of northern Quebec remained in Canada. *CROP Opinion Poll*, *supra* note 30.

⁴⁴ *Royal Charter for Incorporating the Hudson's Bay Company*, 2 May 1670, reprinted in Bernard W. Funston & Eugene Meehan, *Canadian Constitutional Documents Consolidated* (Toronto: Carswell, 1994) at 64-74. As to the territorial extent of Rupert's Land pursuant to the *Royal Charter* see Kent McNeil, *Native Rights and the Boundaries of Rupert's Land and the North-Western Territory* (Saskatoon: University of Saskatchewan Native Law Centre, 1982) at 7-12 [McNeil, *Native Rights*].

⁴⁵ *Treaty of Utrecht*, 11 April 1713, reprinted in Fred L. Israel ed., *Major Peace Treaties of Modern History, 1648-1967* vol. 1 (New York: Chelsea House, 1967) at 177.

⁴⁶ McNeil, *Native Rights*, *supra* note 44 at 17-19; Renée Dupuis & Kent McNeil, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, vol. 2 *Domestic Dimensions* (Ottawa: Canada Communication Group, 1995) at 6.

border between Ungava and the French colony of New France was never clearly settled.⁴⁷ In February 1763, pursuant to the *Treaty of Paris*,⁴⁸ France ceded New France to England. On October 7, 1763, by Royal Proclamation,⁴⁹ King George III delimited the territory of Quebec.⁵⁰ In 1774, the territorial scope of Quebec was increased by the *Quebec Act, 1774*.⁵¹ However, the *Quebec Act, 1774* did not include Ungava in Quebec; the northern border of Quebec remained the southern border of the Ungava region of Rupert's Land.⁵² In 1791, Quebec was partitioned creating Upper Canada, which was largely populated by English speakers, and Lower Canada, which was largely populated by French speakers.⁵³ In 1840, Upper and Lower Canada were reunited to form the Province of Canada.⁵⁴

In 1867, the Canadian federation was created by the *Constitution Act, 1867*, which was known as the *British North America Act, 1867*⁵⁵ until 1982.⁵⁶ Two of its provinces were Quebec and Ontario. These two provinces corresponded to the former provinces of Lower and Upper Canada created in 1791.⁵⁷ The *Constitution Act, 1867*, in section 146, contemplated the future admission of Rupert's Land, and thus Ungava, to the Canadian

⁴⁷ E. E. Rich, *Hudson's Bay Company 1670-1870, Volume I: 1670-1763* (New York: The Macmillan Company, 1961) at 654-55.

⁴⁸ *Definitive Treaty of Peace*, France, Great Britain, and Spain, 10 February 1763, 42 Cons. T.S. 279.

⁴⁹ George R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No. 1. See also Proclamation, 7 October 1763, reprinted in Funston & Meehan, *supra* note 44 at 75.

⁵⁰ Norman L. Nicholson, *The Boundaries of the Canadian Confederation* (Toronto: Macmillan Company of Canada, 1979) at 19-21.

⁵¹ (U.K.), 14 Geo. III, c. 83, art. I; Nicholson, *ibid.* at 23-24. Quebec's territorial scope in 1774 extended south and west to the Ohio and Mississippi rivers. The southern parts of Quebec were ceded by the British to the United States of America under the terms of the *Treaty of Paris* of September 3, 1783, which ended the American War of Independence. The imprecise and ambiguous terminology of the 1783 treaty necessitated protracted negotiations between the United States and Great Britain. The *Webster-Ashburton Treaty* of August 9, 1842, finally settled the border between the United States and British North America. On this process see Francis M. Carroll, *A Good and Wise Measure: The Search for the Canadian-American Boundary, 1783-1842* (Toronto: University of Toronto Press, 2001).

⁵² McNeil, *Native Rights*, *supra* note 44 at 45; Varty, *supra* note 11 at 12, 29.

⁵³ *Constitutional Act, 1791* (U.K.), 31 Geo. III, c. 31, art. II; Nicholson, *supra* note 50 at 33-34.

⁵⁴ *Union Act, 1840* (U.K.), 3 & 4 Vict., c. 35, art. I; Nicholson, *supra* note 50 at 48-49.

⁵⁵ *British North America Act, 1867* (U.K.), 30 & 31 Vict., c. 3 [*Constitution Act, 1867*]; Nicholson, *supra* note 50 at 57.

⁵⁶ *Constitution Act, 1982*, *supra* note 1, s. 53(2).

⁵⁷ *Constitution Act, 1867*, *supra* note 55, s. 6.

federation.⁵⁸ On November 19, 1869, the Hudson's Bay Company surrendered its rights in Rupert's Land to the British Crown on the basis that Rupert's Land would be transferred to Canada.⁵⁹ In 1870, the British Crown transferred Rupert's Land to Canada for 300,000 pounds, paid by Canada to the Hudson's Bay Company.⁶⁰ Subsequently, parts of Ungava were given to Quebec through legislation enacted in 1898 and 1912. This process, undertaken without consulting the Aboriginal populations of the relevant territories,⁶¹ tripled Quebec's territory and placed Aboriginal populations in the added territory under the jurisdiction of Quebec for the first time.

The border legislation of 1898 and 1912 was facilitated by section 2 of the *Constitution Act, 1871*,⁶² which made it clear that Canada's federal parliament had the power to establish new provinces out of the former Rupert's Land. Furthermore, the *Constitution Act, 1871* enabled changes in the territorial scope of a province.⁶³

A. *The 1898 Quebec Border Legislation*

It is not clear whether the complementary border legislation of 1898, passed by Canada's federal parliament⁶⁴ and Quebec's provincial assembly,⁶⁵ expanded Quebec's territory by annexing part of Ungava or whether it merely confirmed Quebec's territorial scope as at 1867. This

⁵⁸ *Rupert's Land Act, 1868* (U.K.), 31 & 32 Vict., c. 105 and *An Act for the Temporary Government of Rupert's Land and the North-Western Territory when United with Canada, 1869*, S.C. 1869 (32 & 33 Vict.), c. 3, were enacted to facilitate the surrender of Rupert's Land to Canada.

⁵⁹ *Rupert's Land and North-Western Territory Order*, 23 June 1870, Schedule C (as am. by *Order of Her Majesty in Council Admitting Rupert's Land and the North-Western Territory into the Union*, renamed pursuant to *Constitution Act, 1982*, *supra* note 1, s. 53, Schedule, item 3) [*Rupert's Land Order*], reprinted in Funston & Meehan, *supra* note 44 at 189.

⁶⁰ *Rupert's Land Order*, *ibid.*, art. 1.

⁶¹ Grand Council of the Crees, *supra* note 4 at 212-14; Douglas Sanders, "If Quebec Secedes From Canada Can the Cree Secede From Quebec?" (1995) 29 U.B.C. L. Rev. 143 at 146.

⁶² *Supra* note 1.

⁶³ *Ibid.*, s. 3 ("The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed upon by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration in relation to any Province affected thereby.")

⁶⁴ *An Act Respecting the North-Western, Northern and North-Eastern Boundaries of the Province of Quebec, 1898*, S.C. 1898, c. 3.

⁶⁵ *An Act Respecting the Delineation of the North-Western, Northern and North-Eastern Boundaries of the Province of Quebec, 1898*, S.Q. 1898, c. 6.

uncertainty was reflected in the parliamentary debates about legislation to expand Quebec in 1912. Parliamentarians from Quebec argued the legislation merely confirmed an existing border, whereas their counterparts from English Canada argued the legislation added part of Ungava to Quebec.⁶⁶ Although the border between Quebec and Rupert's Land in 1867 was that stipulated by the *Quebec Act, 1774*, the location of that border was, and is, a matter of uncertainty.

The 1898 legislation on Quebec's borders, however, was part of the clarification of the northern borders of Ontario and Quebec. In 1889, Ontario's northern border was settled through the addition of territory to that province. By virtue of the 1898 legislation, a similar amount of territory was added to Quebec.⁶⁷ Kent McNeil suggests that the legislation was a confirmation of an existing border between Rupert's Land and Quebec because such a view accords with a ruling of the Privy Council in 1884 that determined the northern border between Ontario and Rupert's Land as at 1867.⁶⁸ Furthermore, in 1701 the Hudson's Bay Company was prepared to accept the same border as that described in the 1898 legislation as its then border with New France.⁶⁹ However, McNeil notes that the Privy Council's determination of the border between Canada and Labrador in 1927⁷⁰ is consistent only with the view that the 1898 legislation amounted to an extension of the territory of Quebec.⁷¹

An analysis of the wording of the 1898 legislation does not reveal whether it expanded or merely confirmed the northern border of Quebec. There are a number of factors indicating that the legislation confirmed an existing border rather than creating a new border. First, the federal legislation stipulating the border is a declaration following an agreement between the federal government and Quebec's provincial government. There is no explicit statement that the legislation extends Quebec's borders. Second, there is an absence of "terms and conditions" as required under section 3 of the *Constitution Act, 1871*. Third, the title of the Quebec

⁶⁶ *House of Commons Debates*, Vol. CVI (26 March 1912) at 6160-73 (Mr. Pugsley, Mr. Borden, Mr. Lemieux, Mr. Charlton, Mr. Pelletier); Kent McNeil, "Aboriginal Nations and Québec's Boundaries: Canada Couldn't Give What It Didn't Have" in Daniel Drache & Roberto Perin, eds., *Negotiating With a Sovereign Québec* (Toronto: James Lorimer & Company, 1992) 107 at 111.

⁶⁷ Nicholson, *supra* note 50 at 104-107.

⁶⁸ *Ontario Boundaries Case* (1884) Imp. P.C. This decision is not reported. See McNeil, *Native Rights*, *supra* note 44 at 20-33 (for an account of the case and its background).

⁶⁹ Nicholson, *supra* note 50 at 104.

⁷⁰ *Re Labrador Boundary*, [1927] 2 D.L.R. 401 (P.C.).

⁷¹ McNeil, *Native Rights*, *supra* note 44 at 45-47.

provincial legislation refers to “delimitation of [...] boundaries.” Finally, in the federal parliamentary debates, the minister responsible for the legislation stated its purpose as one of “ratifying a conventional boundary on the north and north-east of the province of Quebec.”⁷² All of these factors seem to indicate that the 1898 legislation confirmed part of Quebec’s existing northern border.

On the other hand, the preambles to both the federal and provincial legislation state that the legislation exists pursuant to the *Constitution Act, 1871*, which, in section 3, stipulates that the federal Parliament can, with the consent of a province, “increase, diminish, or otherwise alter the limits” of such a province. This provision is only concerned with changing the territorial configuration of a province and not with determining an existing border between Canada’s territorial units. Because the 1898 legislation was enacted on the basis of section 3 of the *Constitution Act, 1871*, it follows that the legislation changed the territorial configuration of Quebec, in this case by increasing its territory. Under this interpretation of the legislation, its references to an agreement between the federal and Quebec governments simply referred to, and confirmed, compliance with the requirement for such an agreement in section 3 of the *Constitution Act, 1871*. The declaration in the legislation is a declaration of an agreement extending Quebec’s territory, not a declaration confirming an existing border.

B. *The 1912 Quebec Border Legislation*

Whatever the case may have been in 1898, it is clear that the 1912 legislation extended Quebec territorial reach by adding territory from Ungava. The federal⁷³ and provincial⁷⁴ legislation explicitly refer, both in their titles and substantive parts, to an expansion of Quebec’s borders. The territory added to Quebec never belonged to the colony of New France or to Quebec as it existed prior to Confederation. This territory was clearly within sovereign British territory following the *Treaty of Utrecht*.⁷⁵

What emerges from this analysis of the 1898 and 1912 legislation is

⁷² *House of Commons Debates*, Col. XLVII (2 June 1898) at 6746 (Mr. Sifton).

⁷³ *The Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45, s. 2.

⁷⁴ *An Act respecting the extension of the Province of Quebec by the annexation of Ungava*, S.Q. 1912, c. 7, s. 1 [*Extension of Quebec Act*].

⁷⁵ McNeil argues that the British never had sovereignty over what is now most of northern Quebec because they did not have effective occupation and control over that territory. See Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, University of Saskatchewan, 2001) at 1-24 [McNeil, *Emerging Justice*].

that the legislation added Ungava to the territory that Quebec held in 1867. However, it is unclear whether the additional territory was granted to Quebec solely pursuant to the 1912 legislation or as the result of a two-stage process including the 1898 and 1912 legislation. This is a crucial issue because the first argument to be presented below will suggest that an independent Quebec has no legal claim to Ungava territory granted to Quebec by Canada after 1867. Therefore, the issue of whether this territory includes only that added by the 1912 legislation or whether it also includes territory covered by the 1898 legislation is of immense practical significance in determining the borders of an independent Quebec.

IV. LEGAL ARGUMENTS AGAINST UNGAVA REMAINING PART OF AN INDEPENDENT QUEBEC

Three lines of argument justifying the partition of Quebec in the event of secession are discussed below. Each argument gives effect to the claims of the Aboriginal peoples of Ungava that their traditional homelands should remain part of Canada. The first stems from the purpose and legal basis of the addition of the Ungava territory to Quebec. The second stems from the Crown's constitutionally imposed fiduciary obligations owed to Canada's Aboriginal peoples. The third stems from Canada's federal structure and the nature of Canadian federalism.

A. *The Purpose and Legal Basis of the Addition of Ungava to Quebec*

Quebec was not the only province to expand its borders in 1912; Ontario⁷⁶ and Manitoba⁷⁷ also gained more territory. Parliamentary debates and other records of the time clearly indicate that these territorial extensions did not compensate the provinces for any territorial claims they may have had to the territories gained but, rather, enabled the provinces to better develop as provinces, thereby unifying the Canadian federation.⁷⁸ The Manitoba extension, for example, was completed explicitly to preserve geographical symmetry and equality between the provinces, which was deemed essential for the purposes of Canadian federalism.⁷⁹ Canada also

⁷⁶ *The Ontario Boundaries Extension Act*, S.C. 1912, c. 40.

⁷⁷ *The Manitoba Boundaries Extension Act, 1912*, S.C. 1912, c. 32.

⁷⁸ Grand Council of the Crees, *supra* note 4 at 208-209.

⁷⁹ *Ibid.* at 209-10; Nicholson, *supra* note 50 at 195, 207; Steven R. Ratner, "Drawing a Better Line: *Uti Possidetis* and the Borders of New States" (1996) 90 A.J.I.L. 590 at 603.

wanted each of these provinces to have access to Hudson's Bay.⁸⁰

David Varty has argued that "[t]he sole basis of the transfer of jurisdiction to Ungava was Quebec's status as a province. The continuation of Quebec's status as a province was an implied condition of transfer."⁸¹ Similarly, Stephen Scott has argued that the purpose of the expansion of Quebec was related solely to its function as a province.⁸²

It is reasonable to speculate that in 1912 the legislators in Canada's federal parliament would not have contemplated that the borders then being created might become the borders of an independent Quebec.⁸³ If secession had been contemplated, different borders would undoubtedly have resulted. The same argument can be made about the legislation of 1898, if it was an extension, rather than a mere confirmation, of Quebec's territorial scope. Thus, the constitutional protection of Quebec's borders is contingent on it remaining part of the Canadian federation. If Quebec secedes from Canada it is not entitled to retain the territory it gained over and above what it had in 1867 as a result of the 1898 and 1912 border legislation. Quebec cannot insist upon enforcing a protection contained in a constitution that it is otherwise prepared to reject. As Steven Ratner aptly

⁸⁰ Grand Council of the Crees, *supra* note 4 at 209; Nicholson, *supra* note 50 at 143-44.

⁸¹ Varty, *supra* note 11 at 29.

⁸² Stephen A. Scott, "October 1992: Issue Relating to Quebec Independence" (Remarks at a Public Meeting, Holiday Inn, Pointe Claire, Quebec, 19 February 1992) (Montreal: Stephen A. Scott, 1992) at 24 ("These territories [...] were attached to Quebec by the federal Parliament *to form part of a Canadian province*, - Quebec, - and to be governed, by the institutions of that province, as a province and within its constitutional powers as such. Not for any other purpose."). See also David Jay Bercuson & Barry Cooper, *Deconfederation: Canada Without Quebec* (Toronto: Key Porter Books, 1991) at 151-52; Peter Russell & Bruce Ryder, "Ratifying a Postreferendum Agreement on Quebec Sovereignty" in David Cameron ed., *The Referendum Papers: Essays on Secession and National Unity* (Toronto: University of Toronto Press, 1999) 323 at 341-42; and Malcolm N. Shaw, "The Heritage of States: The Principle of *Uti Possidetis Juris* Today" (1996) 67 *Brit. Y.B. Int'l L.* 75 at 117. Shaw notes that internal borders "are not intended to constitute permanent boundaries. Nor are they protected as such under international law. They are created and exist solely under municipal law." A similar approach to internal borders was taken by the leadership of post-World War II Yugoslavia following the introduction of a federal structure to that country. Radan, *Breakup of Yugoslavia*, *supra* note 2 at 152-53.

⁸³ Peter W. Hogg, "Principles Governing the Secession of Quebec" (1997) 8 *N.J.C.L.* 19 at 43 [Hogg, "Secession of Quebec"]. In the context of administrative borders within Spanish Latin America prior to the independence movement in the early nineteenth century, the International Court of Justice has remarked that "no question of international boundaries could ever have occurred to the minds of those servants of the Spanish Crown who established administrative boundaries." The Court described the transformation of colonial administrative borders into international borders as "investing as international boundaries administrative limits intended originally for quite other purposes." See *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, [1992] *I.C.J. Rep.* 350 at 388. According to one of the most senior leaders of the time, Milovan Djilas Yugoslavia's, internal borders established after World War II were never intended to be international borders. See David Owen, *Balkan Odyssey* (London: Victor Gollancz, 1995) at 34-35.

puts it, Quebec secessionists cannot “have their cake and eat it, too.”⁸⁴

B. *Canada’s Fiduciary Obligations Owed to Aboriginal Peoples*

The second basis on which it can be argued that Quebec cannot achieve independence with its present borders is the Crown’s fiduciary obligations towards Aboriginal peoples. This argument requires the establishment of two propositions: the existence of a fiduciary obligation owed to Aboriginal peoples by the Crown and the scope of the obligation legally requiring the consent of Quebec’s Aboriginal peoples to a proposed constitutional amendment.

1. The existence of a fiduciary obligation

The existence of a fiduciary obligation depends on the scope of either or both of Aboriginal or treaty rights held in Ungava and on the law of constitutionally imposed fiduciary obligations owed to Aboriginal peoples.

a. Aboriginal and/or treaty rights in Ungava

A significant source of the rights of Aboriginal peoples in Ungava is the James Bay and Northern Quebec Agreement (JBNQA) of 1975. The roots of the JBNQA can, in part, be traced to *Rupert’s Land Order*.⁸⁵ By the terms of this order, Rupert’s Land, of which Ungava was a part, and the North-Western Territory became part of Canada on July 15, 1870.⁸⁶ The transfer of these territories to Canada was on certain terms and conditions. Article 14 stipulated: “Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the [Hudson’s Bay] Company shall be relieved of all responsibility in respect of them.”⁸⁷ This provision clearly acknowledged that the “Indians” had land claims in Rupert’s Land before 1870 and transferred responsibility for their

⁸⁴ Ratner, *supra* note 79 at 607.

⁸⁵ The Aboriginal rights of the peoples of Ungava are not dependent on the existence of *Rupert’s Land Order*. The Court has held that they are inherent rights not dependent on any executive order or legislative enactment. Paul Joffe, “Assessing the Delgamuukw Principles: National Implications and Potential Effects in Quebec” (2000) 45 McGill L.J. 155 at 181.

⁸⁶ *Rupert’s Land Order*, *supra* note 59. See McNeil, *Emerging Justice*, *supra* note 75 at 326-30 (on the background to this order).

⁸⁷ *Rupert’s Land Order*, *ibid.*, art. 14.

settlement to the Canadian government.

Furthermore, in a joint address of the Canadian Senate and House of Commons on May 28, 1869, which was attached to *Rupert's Land Order*, a protective provision provided that "upon the transference of the territories in question to the Canadian government it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer."⁸⁸ Although this protective provision was not contained in the terms of the order itself, but rather in a schedule to the order, the British Crown approved the joint address, as is explicitly stated in the order's preamble. Therefore, it is reasonable to conclude that the schedule has the same constitutional force as the order itself.⁸⁹ When Canada assumed jurisdiction over the territories subject to *Rupert's Land Order*, the British government transferred the existing rights and duties owed to the Aboriginal peoples in those territories to the federal government of Canada⁹⁰ because the federal government, by the terms of subsection 91(24) of the *Constitution Act, 1867* had exclusive legislative competence over "Indians, and Lands reserved for the Indians." In *Reference Re Eskimo*, a unanimous Court found the word "Indians" to mean all Aboriginal peoples in Canada as at 1867 and in those territories that, in 1867, were anticipated to become part of Canada.⁹¹ This latter category includes the Aboriginal peoples of Ungava.

McNeil suggests that the scope of the "interests" protected by *Rupert's Land Order* "should be construed broadly to include any interests that tribes might have, including, economic, social, cultural and political interests" and that "the protection relates to the Indian tribes' cultural and political existence as nations."⁹²

In 1912, pursuant to section 2 of the federal legislation extending its territorial scope, Quebec assumed partial responsibility for Aboriginal interests in the territory it gained as a result of the 1912 border legislation. In particular, subsection 2(c) of the federal legislation as adopted by Quebec,⁹³ obliged Quebec to "recognize the rights of Indian inhabitants in the territory" and to "obtain surrenders of such rights" in the same manner

⁸⁸ *Ibid.*, Schedule B.

⁸⁹ Dupuis & McNeil, *supra* note 46 at 27-28; McNeil, *Emerging Justice*, *supra* note 75 at 331-32.

⁹⁰ *Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 at 566 (T.D.); McNeil, *Emerging Justice*, *ibid.* at 330.

⁹¹ [1939] S.C.R. 104.

⁹² McNeil, *Emerging Justice*, *supra* note 75 at 335.

⁹³ The provisions of s. 2(c) were adopted by Quebec pursuant to the *Extension of Quebec Act*, *supra* note 74, s. 1.

as the Government of Canada had “recognized such rights” and “obtained surrender[s] thereof” to that date.

The enactment of subsection 2(c) raises two issues. The first issue is whether or not the federal delegation of power to Quebec was constitutionally valid. Generally, it is unconstitutional for the federal government to confer its exclusive legislative power under subsection 91(24) on a provincial government.⁹⁴ Therefore, subsection 2(c) was of no effect and the federal government retained its exclusive legislative competence granted by subsection 91(24) and remained solely responsible for the obligations imposed on it by *Rupert's Land Order*. Alternatively, however, it may be that these obligations became the joint responsibility of the federal and Quebec governments in the territory subject to the 1912 border legislation. In either case, the federal government remained bound by its obligations to the Aboriginal peoples in that territory after 1912.

The second issue raised by subsection 2(c) relates to the meaning of “rights” in that provision. The rights referred to in subsection 2(c) were not set out in the legislation. It could be argued that these rights are identical to the “interests” recognized by the Canadian government in the protective provision appended to *Rupert's Land Order*. However, it is also possible that “rights” has a narrower meaning than “interests.” This issue is only significant if subsection 2(c) resulted in the joint responsibility of the federal and Quebec governments for obligations owed to Aboriginal peoples in the territory subject to the 1912 border legislation. If “rights” and “interests” are identical, then the responsibility of the federal and Quebec governments was co-extensive. If “interests” is a broader concept than “rights” then the federal responsibility was broader in scope than that of Quebec.

The expansion of Quebec in 1912 markedly increased controversy between Ungava's Aboriginal peoples and the Quebec government. Generally, the latter ignored its responsibilities to Aboriginal peoples while it pursued policies of economic development and resource exploitation in the newly acquired territories.⁹⁵ The federal government, during this period and until the 1970s, was similarly neglectful of its obligations to the Aboriginal peoples.⁹⁶

⁹⁴ *Nova Scotia (A.G.) v. Canada (A.G.)*, [1951] S.C.R. 31. For a discussion of the so-called inter-delegation rule see Peter W. Hogg, *Constitutional Law of Canada*, looseleaf, vol. 1 (Scarborough: Carswell, 1999) at 14-14 – 14-23 [Hogg, *Constitutional Law*].

⁹⁵ *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075 at 1103-1104 [*Sparrow*].

⁹⁶ Glen St. Louis, “The Tangled Web of Sovereignty and Self-Governance: Canada's Obligation to the Cree Nation in Consideration of Quebec's Threats to Secede” (1996) 14 *Berkeley J. Int'l L.* 380 at 383-84.

The federal government's neglect of its obligations towards the Aboriginal peoples of Ungava allowed the Quebec provincial government to extend provincial services and programs into Ungava during the 1960s and led to a belief that provincial authorities could act essentially unilaterally to develop Ungava. Thus, in November 1971, Premier Robert Bourassa announced plans for a massive hydroelectric project in the James Bay area. This announcement galvanized Ungava's Aboriginal peoples, especially the Cree, into legal action opposing the development. In November 1973, the Quebec Superior Court granted an injunction halting the development based on claims that the development would violate Aboriginal rights and culture.⁹⁷ Although the injunction was suspended one week later,⁹⁸ it was clear to all parties that such a development could not proceed on a wholesale denial of Aboriginal rights.⁹⁹ Thereafter, a two-year period of negotiations culminated in the JBNQA of November 11, 1975.¹⁰⁰ The federal government, the Quebec government, the James Bay Energy Corporation, the James Bay Development Corporation, Quebec Hydroelectric Commission, the Grand Council of the Crees, and the Northern Quebec Inuit Association were all parties to the JBNQA.¹⁰¹ In 1978, the Northeastern Quebec Agreement amended the JBNQA by adding the Naskapi Indians of Quebec as a party.¹⁰² Section 1.16 of the JBNQA stipulated that the territory to which the JBNQA applied was that which was subject to the Quebec border legislation in 1898 and 1912.

One effect of the JBNQA was to clarify Quebec's obligations under the 1912 legislation to the Aboriginal populations in the territory that was subject to the JBNQA. Prior to 1975, these obligations had "remained undefined."¹⁰³ Section 1 of the JBNQA states that "Quebec now wishes to fully satisfy all of its obligations with respect to the Native people inhabiting the Territory."¹⁰⁴ In achieving this goal, the non-Aboriginal parties to the

⁹⁷ *Le Chef Max "One-Onti" Gros-Louis c. La Société de développement de la Baie James*, [1974] R.P. 38.

⁹⁸ *La Société de développement de la Baie James c. Chef Robert Kanatewat*, [1975] C.A. 166.

⁹⁹ Paul Rynard, "Welcome In, But Check Your Rights at the Door": The James Bay and Nisga'a Agreements in Canada" (2000) 33 *Canadian Journal of Political Science* 211 at 215-16.

¹⁰⁰ James Bay and Northern Quebec Agreement, 11 November 1975 [JBNQA].

¹⁰¹ The Cree have consistently maintained that their agreement to the JBNQA was obtained under duress: Grand Council of the Crees, *supra* note 4 at 249-62.

¹⁰² Dupuis & McNeil, *supra* note 46 at 34-35.

¹⁰³ *Cree Regional Authority v. Canada (Federal Administrator)* (1991), 81 D.L.R. (4th) 659 at 662 (F.C.A.).

¹⁰⁴ JBNQA, *supra* note 100, s. 1.

agreement agreed to “give, grant, recognize and provide” to the Aboriginal parties to the agreement certain “rights, privileges and benefits” set out in the agreement.¹⁰⁵ In return, the agreement’s Aboriginal parties agreed to “cede, release, surrender and convey all their Native claims, rights, titles and interests, whatever they may be” to Canada and Quebec.¹⁰⁶ Under section 2.15, the JBNQA can only be amended with the consent of all parties.

The JBNQA was implemented federally by the *James Bay and Northern Quebec Native Claims Settlement Act*¹⁰⁷ and provincially by the *Act Approving the Agreement Concerning James Bay and Northern Quebec*.¹⁰⁸ An important provision of the *James Bay Act* is section 3. In accordance with section 2.6 of the JBNQA, subsection 3(3) of the *James Bay Act* provides that “[a]ll native claims, rights, title and interests, whatever they may be, in and to the Territory, of all Indians and all Inuit, wherever they may be, are hereby extinguished.”¹⁰⁹ Through subsection 3(2) the “rights, privileges and benefits” accorded to the Aboriginal parties to the JBNQA came into effect simultaneously with subsection 3(3). The “rights, privileges and benefits” gained pursuant to the JBNQA are summarized in the Preamble to the *James Bay Act* as follows:

[T]he JBNQA provides, *inter alia*, for the grant to or setting aside for Crees and Inuit of certain lands in the Territory, the right of the Crees and Inuit to hunt, fish and trap in accordance with the regime established therein, the establishment in the Territory of regional and local governments to ensure the full and active participation of the Crees and Inuit in the administration of the Territory, measures to safeguard and protect their culture and to ensure their involvement in the promotion and development of their culture, the establishment of laws, regulations and procedures to manage and protect the environment in the Territory, remedial and other measures respecting hydro-electric development in the Territory, the creation and continuance of institutions and programs to promote the economic and social development of the Crees and Inuit and to encourage their full participation in society, an income support program for Cree and Inuit hunters, fishermen and trappers and the payment to the Crees and Inuit of certain monetary compensation.¹¹⁰

The Preamble to the *James Bay Act* also provides that “the Government of Canada and the Government of Quebec have assumed

¹⁰⁵ *Ibid.*, s. 2.2.

¹⁰⁶ *Ibid.*, s. 2.1.

¹⁰⁷ S.C. 1976-77, c. 32. [*James Bay Act*].

¹⁰⁸ S.Q. 1976, c. 46. For a critical account of the implementation of the JBNQA see Paul Rynard, “Ally or Colonizer?: the federal State, the Cree Nation and the James Bay Agreement” (2001) 36:2 J. Can. Stud. 8.

¹⁰⁹ *James Bay Act*, *supra* note 107, s. 3(3).

¹¹⁰ *Ibid.*, Preamble.

certain obligations under the [JBNQA] in favour of the [...] Crees and Inuit.”¹¹¹ This provision makes it clear that both governments have responsibilities, as set out in detail in the JBNQA, with respect to delivering the “rights, privileges and benefits” referred to in subsection 3(2) to the Aboriginal parties to the JBNQA. One of the significant federal government responsibilities, pursuant to section 9 of the JBNQA, was the establishment through federal legislation of local government for the Cree and the Naskapi. This was done in 1984 by virtue of the *Cree-Naskapi (of Quebec) Act*.¹¹²

In addition to the said rights, privileges, and benefits, the *James Bay Act* indicates a further, more general, responsibility to the Aboriginal parties. This responsibility is made clear in the Preamble, which provides that “the Parliament and the Government of Quebec recognize and affirm a special responsibility” for the Aboriginal parties.¹¹³ This provision must be read in the context of section 7 of the *James Bay Act* which, pursuant to section 2.5 of the JBNQA, repealed section 2 of the 1912 border legislation and removed whatever obligations Quebec had pursuant to that legislation, if any, towards the Aboriginal peoples of Ungava. As noted above, the 1912 legislation may have resulted in Canada and Quebec being jointly responsible for the Crown’s obligations towards the Aboriginal peoples of Rupert’s Land. The effect of section 7 of the *James Bay Act* was to restore sole responsibility for these obligations to Canada’s federal government and Parliament. The Preamble to the *James Bay Act*, in its recognition and affirmation of a federal government “special responsibility,” effectively acknowledged this result.¹¹⁴

b. The fiduciary obligations of the Crown

Given the existence of Aboriginal rights as set out in the JBNQA, it must be established that the Crown owes fiduciary obligations to the Aboriginal peoples of Ungava with respect to those rights. Such fiduciary obligations can be established in at least two ways.

First, the effect of the JBNQA, and of the federal and Quebec legislation implementing it, is to impose fiduciary obligations on the part of both the federal and Quebec governments towards the Aboriginal peoples

¹¹¹ *Ibid.*

¹¹² *Cree-Naskapi (of Quebec) Act, 1984*, S.C. 1984, c. 18.

¹¹³ *James Bay Act*, *supra* note 107, Preamble.

¹¹⁴ Grand Council of the Crees, *supra* note 4 at 357.

party to the agreement. In *Guerin v. The Queen*,¹¹⁵ the Court ruled that where an Aboriginal group surrenders its interest in land to the Crown, fiduciary obligations are owed by the Crown to that Aboriginal group.¹¹⁶ Justice Dickson explained that the mere fact that Aboriginal groups have an interest in land does not give rise to the Crown's fiduciary obligations. Rather, they arise because Aboriginal interests are inalienable except by surrender to the Crown. Justice Dickson concluded,

An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. [...] The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.¹¹⁷

In *Cree Regional Authority v. Canada (Federal Administrator)*,¹¹⁸ Justice Rouleau confirmed that the surrender of land pursuant to the JBNQA generates a fiduciary duty. He ruled that the federal government assumed fiduciary obligations to the Cree and Inuit by extinguishing rights pursuant to the federal act implementing the JBNQA. Justice Rouleau pointed out that “[i]n light of the fiduciary obligation imposed upon the federal government in its dealing with the native population [...] the Agreement mandates the protection of the Aboriginal people who relinquished substantial rights in return for the protection of both levels of government.”¹¹⁹ Given that pursuant to section 2.1 of the JBNQA rights were surrendered to both Canada and Quebec, the fiduciary obligations that flow from such surrenders would be imposed on both the federal and the Quebec provincial governments.

A second way in which the Crown's fiduciary obligations can be established is under section 35 of the *Constitution Act, 1982*. Subsection 35(1) stipulates that “[t]he existing Aboriginal and treaty rights of the Aboriginal peoples are hereby recognized and affirmed.”¹²⁰

In *Sparrow*,¹²¹ the Court ruled that the words “recognized and affirmed” in subsection 35(1) imposed fiduciary obligations on the Crown

¹¹⁵ [1984] 2 S.C.R. 335 [*Guerin*].

¹¹⁶ *Ibid.* at 376.

¹¹⁷ *Ibid.*

¹¹⁸ (1992), 84 D.L.R. (4th) 53 (F.C.T.D.).

¹¹⁹ *Ibid.* at 74-75. This decision was followed in *Lord c. Canada (Procureur général)*, [1999] J.Q. No. 5413 (C.S.).

¹²⁰ *Constitution Act, 1982*, *supra* note 1, s. 35(1).

¹²¹ *Sparrow*, *supra* note 95.

with respect to any legislation affecting Aboriginal and treaty rights.¹²² The Court stated that the “guiding principle” for subsection 35(1) is that “the Government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples. The relationship between the Government and Aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship.”¹²³ The Court stated that the Crown’s obligations pursuant to subsection 35(1) stemmed from the fiduciary obligations referred to in *Guerin* and the principle stated in *R. v. Taylor*¹²⁴ that, in its dealing with the Aboriginal peoples, “the honour of the Crown is always involved and no appearance of ‘sharp dealing’ should be sanctioned.”¹²⁵

Although *Sparrow* dealt with the fiduciary obligations of federal authorities, the Court stated that subsection 35(1) also afforded Aboriginal peoples constitutional protection from the exercise of provincial power.¹²⁶ Subsequent Court rulings have affirmed that subsection 35(1) governs provincial authorities.¹²⁷

Subsection 35(3) makes it clear that the treaty rights referred to in subsection 35(1) include rights that exist pursuant to land claim agreements. Thus, Aboriginal treaty rights impose fiduciary obligations on the Crown. Furthermore, there is authority placing the JBNQA within the scope of subsection 35(3), thereby imposing on the Crown fiduciary obligations respecting the treaty rights created by the agreement.¹²⁸ However, this has not been affirmed by the Court.

It must be recognized that the federal and Quebec governments have claimed that the JBNQA is not a treaty.¹²⁹ However, even if it is not a treaty, there is authority from the Court suggesting that the fiduciary obligations in subsection 35(1) arise “by analogy,”¹³⁰ irrespective of the type

¹²² *Ibid.* at 1109.

¹²³ *Ibid.* at 1108.

¹²⁴ (1981), 34 O.R. (2d) 360 (C.A.), MacKinnon A.C.J.O.

¹²⁵ *Ibid.* at 367. See also *R. v. Badger*, [1996] 1 S.C.R. 771 at 793-94, Sopinka J. [*Badger*]; *R. v. Marshall*, [1999] 3 S.C.R. 456 at 496-98 [*Marshall*].

¹²⁶ *Sparrow*, *supra* note 95 at 1105.

¹²⁷ *Badger*, *supra* note 124; *R. v. Cote*, [1996] 3 S.C.R. 139 at 185; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1107 [*Delgamuukw*]; and *R. v. Sundown*, [1999] 1 S.C.R. 393.

¹²⁸ *Eastmain Band v. Gilpin* [1987] 3 C.N.L.R. 54 at 66-67 (Que. Prov. Ct.); *Cree School Board v. Canada (A.G.)*, [1998] 3 C.N.L.R. 24 (Que. S.C.) [*Cree School Board*]; *Lord v. Quebec (A.G.)* [2000] 3 C.N.L.R. 78 at 100 (Que. S.C.).

¹²⁹ See e.g. submissions in *Cree School Board*, *ibid.* at 24.

¹³⁰ See *Badger*, *supra* note 125.

of document creating the relationship between the two. Fiduciary obligations “arise out of the nature of the relationship between the Crown and Aboriginal peoples”¹³¹ and not as a consequence of the characterization of an agreement between the Crown and Aboriginal peoples. Therefore, the Crown owes a fiduciary obligation to the Aboriginal peoples in Ungava.

2. The nature of the Crown’s fiduciary obligations

Although the existence of fiduciary obligations is clear, whether or not these obligations legally require the consent of Aboriginal peoples in Ungava depends on three questions. The first question relates to the application of the jurisprudence as developed to date. The second question considers the relevance of the Crown’s fiduciary obligations in the context of a constitutional amendment to facilitate the secession of Quebec. The third question is whether or not a constitutional amendment that would facilitate the secession of Quebec with its present provincial boundaries would be lawful if it was obtained without the consent of the Aboriginal peoples of Ungava.

a. The scope of the fiduciary obligation as defined by jurisprudence

The fiduciary obligation owed to the Aboriginal peoples deriving from Aboriginal treaty rights does not prevent a government from overriding those rights in certain circumstances. Prior to the introduction of section 35 of the *Constitution Act, 1982*, these rights, because they did not have constitutional status, could be overridden by legislation on the basis of the doctrine of parliamentary sovereignty.¹³² The constitutional requirement placed upon federal and provincial parliaments by section 35 does limit their capacity to override Aboriginal or treaty rights. The limitations only relate to rights that existed on April 17, 1982, the date on which section 35 came into effect.¹³³

In *Sparrow*, the Court observed that such surviving Aboriginal rights are not absolute and that the Crown has the legislative power to override these rights. However, overriding legislation would only be valid if “it meets the test for justifying an interference with a right recognized and affirmed under subsection 35(1).”¹³⁴ As the Court observed, the incorporation of

¹³¹ *Ibid.* at 782.

¹³² *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 538 [*Van der Peet*]; *Marshall*, *supra* note 125 at 496.

¹³³ *Sparrow*, *supra* note 95 at 1091.

¹³⁴ *Ibid.* at 1109.

fiduciary obligations by subsection 35(1) meant that “federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies Aboriginal rights.”¹³⁵

In *Sparrow*, the Court established the test to determine whether the Crown has fulfilled its fiduciary obligations when legislation that affects Aboriginal rights is passed. The test asks the following three questions:

1. Are there existing Aboriginal or treaty rights?
2. Has there been a *prima facie* infringement of those rights?
3. Can the infringement be justified?¹³⁶

In *R. v. Gladstone*, Justice L’Heureux-Dubé considered the second question and set a low threshold for infringement: “The only thing that the claimant must show is that, *on its face*, the legislation comes into conflict with a recognized aboriginal right, either because of its object or its effects.”¹³⁷

The question of justification, however, is more complicated, necessitating a two-step analysis. In *Delgamuukw*,¹³⁸ the Court required the government first to establish that the infringement of the Aboriginal right was “in furtherance of a legislative objective that is compelling and substantial.”¹³⁹ The Court held the second part of the justification process “requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples.”¹⁴⁰ An important feature of such an assessment is consultation with the relevant Aboriginal peoples.

In *Delgamuukw*, the Court also addressed, at length, the nature and scope of the duty to consult. Chief Justice Lamer stated, “[t]here is always a duty of consultation. [...] The nature and scope of the duty of consultation will vary with the circumstances. [...] Some cases may [...]

¹³⁵ *Ibid.*

¹³⁶ *Ibid.* at 1111-19.

¹³⁷ [1996] 2 S.C.R. 723 at 810. In *Sparrow*, *supra* note 95 at 1112, the Court held that the infringement test included a further three-part test: (i) is the limitation reasonable; (ii) does it impose undue hardship; and (iii) does it deny the right holders the preferred means of exercising their rights? This aspect of the infringement test has been subsequently rejected in favour of the quoted statement from *Gladstone*. See *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2002] 1 C.N.L.R. 169 (F.C.T.D.).

¹³⁸ *Delgamuukw*, *supra* note 127.

¹³⁹ *Ibid.* at 1107.

¹⁴⁰ *Ibid.* at 1108.

require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.”¹⁴¹ In *Marshall*, the Court ruled that the same justificatory test applied to both Aboriginal rights and treaty rights.¹⁴²

In summary, the JBNQA imposes fiduciary obligations upon both the federal and the Quebec governments.¹⁴³ The practical implication of such fiduciary obligations is that when legislation interferes with the rights of the Aboriginal parties to the JBNQA, the Crown must comply with its fiduciary obligation to consult with the Aboriginal peoples in accordance with *Sparrow*.

b. Fiduciary obligations and a constitutional amendment

Although it is clear that the *Sparrow* test is relevant in the context of federal or provincial legislation that affects existing Aboriginal or treaty rights, such as fishing, hunting, and trapping, it must be established that the same principles apply to a proposed constitutional amendment that affects Aboriginal or treaty rights. This is an important issue if, as will be analyzed below, a Quebec secession amendment is one that affects Aboriginal or treaty rights.

Part V of the *Constitution Act, 1982* sets out various procedures for amending Canada’s constitution, depending on the nature of the amendment. None of these procedures stipulate a justification test along the lines set out in *Sparrow*. Section 35.1 of the *Constitution Act, 1982* requires that a constitutional conference be convened in relation to amendments to subsection 91(24) of the *Constitution Act, 1867* or sections 25, 35, and 35.1 of the *Constitution Act, 1982*. More significantly, section 35.1 stipulates that representatives of Canada’s Aboriginal peoples be invited to participate in discussions at such a conference. However, the requirements of section 35.1 fall short of the justification principles in *Sparrow* in that all that is required is the participation of Aboriginal representatives in the constitutional conference.

Furthermore, section 35.1 may preclude any involvement of Aboriginal peoples, especially those of Ungava, in a constitutional amendment effecting the secession of Quebec even if such an amendment

¹⁴¹ *Ibid.* at 1113.

¹⁴² *Marshall*, *supra* note 125 at 505. For a critical evaluation of *Marshall* on this point see Leonard Rotman, “Marshalling Principles From the *Marshall* Morass” (2000) 23 Dal. L.J. 5 at 41-46.

¹⁴³ On provincial fiduciary obligations see Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at 241-43, 251-54 [Rotman, *Parallel Paths*].

affects Aboriginal or treaty rights. However, for this to be so, one must first accept the argument that section 35.1 sets out the only circumstances that require the involvement of Aboriginal peoples and that in no other cases of constitutional amendment do they have a role to play. On this basis, it could be argued that a Quebec secession amendment, not being an amendment to the four constitutional provisions set out in section 35.1, can be adopted without any Aboriginal involvement or consent. However, such a conclusion cannot be sustained for a number of reasons.

First, as Peter Hogg has stated, the fact that section 35.1 does not apply to all constitutional amendments does not exclude the application of the *Sparrow* justification test to all constitutional amendments that affect Aboriginal treaty rights.¹⁴⁴ Hogg does not explain in detail why the justification rules in *Sparrow* would apply to constitutional amendments that affect Aboriginal or treaty rights. However, it is simply illogical for the *Sparrow* rules not to apply because Aboriginal or treaty rights are being affected by a constitutional amendment rather than ordinary federal or provincial legislation. It is illogical to argue that the *Sparrow* rules do not apply to the former but do to the latter. Notwithstanding the fundamental nature of a constitution, it is in essence no different than ordinary legislative acts passed by a state. In the Canadian setting, both the constitution and ordinary legislative acts create rights and obligations that are capable of being changed. It is only with the prerequisites for changes that there is a difference between the two. The constitution, because of its centrality and importance, is more difficult to change than ordinary legislation. In the latter case, a simple parliamentary majority suffices unless that ordinary legislation affects existing Aboriginal and treaty rights. In such cases the legislation must satisfy the justification principles set out in *Sparrow*. That a constitutional amendment that affects Aboriginal or treaty rights needs to satisfy the more demanding procedure in Part V of the *Constitution Act, 1982*, is not reason enough to dispense with the justification rules in *Sparrow* because none of the Part V requirements relate to consulting with or obtaining the consent of Aboriginal peoples. If ordinary legislation affecting Aboriginal or treaty rights must conform with the *Sparrow* test, it is illogical to exempt amendments to Canada's constitution that affect Aboriginal and treaty rights from the same justification tests.

A second reason why section 35.1 does not exclude the *Sparrow* rules in cases of constitutional amendments that affect Aboriginal or treaty rights is that given by the Court in *Secession Reference*:

¹⁴⁴ Hogg, *Constitutional Law*, *supra* note 94 at 27-46.

The “promise” of s. 35 [of the *Constitution Act, 1982*], as it was termed in *R. v. Sparrow* [...], recognized not only the ancient occupation of land by Aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.¹⁴⁵

This passage makes it difficult to sustain the view that a constitutional amendment that affects Aboriginal or treaty rights could be adopted without compliance with the *Sparrow* justification principles. To suggest otherwise would render meaningless the Court’s ruling that Aboriginal rights reflect “an important underlying constitutional value.”

Thus, on the basis of the above arguments, the *Sparrow* principles apply to any constitutional amendment that affects Aboriginal or treaty rights and, therefore, section 35.1 of the *Constitution Act, 1982* cannot be construed to exclude the application of these principles in this context.

c. Application of fiduciary obligations to a secession amendment

Although it is clear that the *Sparrow* principles apply to a constitutional amendment that affects Aboriginal rights, their practical application to a constitutional amendment creating an independent Quebec is not clear, especially if Quebec were to retain its current borders. The difficulty of the application resides in the third *Sparrow* question; however, I shall treat each question as it relates to the Aboriginal peoples in Ungava.

i. Are there existing Aboriginal or treaty rights?

In light of the discussion in Part IV, above, it is clear that the JBNQA creates treaty rights held by the Aboriginal people in Ungava.

ii. Has there been a *prima facie* infringement of those rights?

The Crown’s fiduciary obligations towards the Aboriginal peoples are only relevant if the secession of Quebec would affect their Aboriginal or treaty rights. If Ungava were to remain part of an independent Quebec, Aboriginal rights under the JBNQA would dramatically be affected. Under the agreement, Aboriginal rights were surrendered to and accepted by both Canada and Quebec. Accordingly, the benefits granted to the Aboriginal peoples by the agreement require the involvement of both Quebec and Canada. The creation of an independent Quebec within its present

¹⁴⁵ *Secession Reference*, *supra* note 8 at 262-63.

provincial borders would automatically prevent Canada from fulfilling its fiduciary obligations under the JBNQA¹⁴⁶ and from fulfilling the “special responsibility” referred to in the preamble to the federal legislation implementing the JBNQA.¹⁴⁷

It may be that the secession of Quebec within its present territory would not impact Aboriginal rights if, as a condition of secession, the new Quebec government constitutionally entrenched all relevant Aboriginal rights by replicating present Canadian constitutional guarantees in its own constitution. Thus, there would be no infringement of Aboriginal rights.

Although this argument has superficial appeal, closer scrutiny reveals its deficiencies. The JBNQA was negotiated in the context of a federal political structure. As it makes no provision for the fulfilment of Canada’s obligations in the event of secession, it is reasonable to conclude that all parties entered into the agreement assuming the continued existence of such a federal structure.¹⁴⁸ Aboriginal people of Ungava would have negotiated distinctly different terms had Quebec been independent.¹⁴⁹ The importance of the federal structure to the Aboriginal parties to the JBNQA is stressed by Bradford Morse: “The simple presence of federalism provides some semblance of added protection to Aboriginal peoples, as there are two levels of government in place, thereby increasing the possibility that at least one level of government might advance their interests despite limited electoral or economic influence.”¹⁵⁰

Leaving the rights granted by the JBNQA to its Aboriginal signatories to be protected by a (presumably) unitary Quebec would greatly increase the risk that such rights could subsequently be abrogated, even if these rights were constitutionally entrenched in an independent Quebec’s constitution. Amendment of such a constitution would not be as difficult as amending the present Canadian constitution with its requirement of both federal and provincial support for any amendment. Even if a veto in favour of Aboriginal peoples were entrenched in the constitution of an

¹⁴⁶ Makivik Factum, *supra* note 5 at paras. 76-78.

¹⁴⁷ It would also be inconsistent with the very essence of the trust-like nature of the fiduciary relationship. On equitable fiduciary relationship principles it is almost certainly the case because in the present context only the Aboriginal peoples of Ungava could terminate the fiduciary relationship between themselves and the federal government. See Rotman, *Parallel Paths*, *supra* note 143 at 257; Hogg, “Secession of Quebec”, *supra* note 83 at 44.

¹⁴⁸ Hogg, “Secession of Quebec”, *ibid.* at 44.

¹⁴⁹ Makivik Factum, *supra* note 5 at para. 59. Grand Council of the Crees, *supra* note 4 at 278-79; Cree Factum, *supra* note 5 at paras. 56-59.

¹⁵⁰ Bradford Morse, “How Would Quebec’s Secession Affect Aboriginal Peoples and Aboriginal Rights?” (1999) 11 N.J.C.L. 107 at 122.

independent Quebec, their Aboriginal and treaty rights would inevitably be interpreted differently because the context of a unitary Quebec constitution would be markedly different from the existing federal constitution of Canada.¹⁵¹ An integral part of the rights of the Aboriginal parties to the JBNQA is the very strength of the constitutional protections they have because of the difficulties in amending Canada's federal constitution.¹⁵² Thus, transferring such rights to a constitutional structure that is inherently easier to amend becomes an infringement of those rights.

iii. Can the infringement be justified?

Assuming that a constitutional amendment transferring responsibility for the Aboriginal rights of the people in Ungava to a unitarian Quebec government infringes those rights, for the amendment to be legal the infringement must still be justified.¹⁵³

The first element of justification is that the infringement must be in furtherance of a legislative object that is compelling and substantial.¹⁵⁴ A sufficiently strong vote at a referendum in Quebec in favour of secession would give rise to a compelling and substantial legislative object. This much can be inferred from the fact that the *Secession Reference* requires commencement of constitutional negotiations for an amendment in the event of such a vote.¹⁵⁵ However, whether or not the compelling and substantial legislative object is the independence of Quebec within its present borders is open to doubt. Rather, it can be argued that there would be a compelling and substantial legislative object with respect to those parts of Quebec where support for secession was clear. On the assumption that the Aboriginal population of Ungava voted against secession, Ungava would not be included in the legislative object on the basis that opposition to secession of Quebec would "challenge the legitimacy of the Quebec government claiming a mandate for sovereignty that would automatically include [Ungava's Aboriginal] peoples."¹⁵⁶ Thus, by not satisfying the first part of the justification test, a constitutional amendment to facilitate the secession of Quebec within its present provincial borders could not succeed.

¹⁵¹ Grand Council of the Crees, *supra* note 4 at 279.

¹⁵² Sheppard, *supra* note 5 at 852.

¹⁵³ See notes 138-41 and accompanying text.

¹⁵⁴ *Delgamuukw*, *supra* note 127.

¹⁵⁵ See notes 13-19 and accompanying text.

¹⁵⁶ Alan C. Cairns, "Why Is It So Difficult to Talk to Each Other?" (1997) 42 McGill L.J. 63 at 86.

Furthermore, even if there was compliance with the first part of the justification test, the infringement of Aboriginal or treaty rights must also be consistent with the special fiduciary relationship that exists between the Crown and Aboriginal peoples. As previously noted, this element involves the requirement of consultation or in some cases, as was pointed out in *Delgamuukw*, “the full consent”¹⁵⁷ of the relevant Aboriginal peoples.

The departure of Ungava from Canada may pose such a serious infringement of Aboriginal or treaty rights that it would come within the category of infringements that require the full consent of the Aboriginal parties to the JBNQA before the second element described in *Delgamuukw* could be satisfied. Such a departure would, as already noted, excuse Canada’s federal government from its obligations under the JBNQA. However, the federal government cannot be excused from its obligations without the consent of the Aboriginal parties to the JBNQA. The JBNQA itself requires such consent in section 2.15, which states that any changes to the JBNQA must be approved by all parties to it.¹⁵⁸

Therefore, the independence of Quebec within the scope of its present provincial borders can be achieved only with the consent of the Aboriginal parties to the JBNQA to the appropriate constitutional amendment. Without such consent a constitutional amendment effecting secession would be invalid and illegitimate.

C. *The Nature of Canadian Federalism*

The third basis on which it can be argued that Quebec cannot justifiably achieve independence within the scope of its present provincial borders is based on the principle of Canadian federalism. The federal principle, which is one of the underlying principles that “inform and sustain the constitutional text,”¹⁵⁹ requires more than mere compliance with Part V of the *Constitution Act, 1982* in the creation of constitutional amendments that affect Aboriginal or treaty rights. In *Reference Re Resolution to Amend the Constitution*¹⁶⁰ the Court stated, “[t]he federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities.”¹⁶¹ By analogy, it is impossible to reconcile this

¹⁵⁷ *Delgamuukw*, *supra* note 127 at 1113.

¹⁵⁸ *Makivik Factum*, *supra* note 5 at para. 64.

¹⁵⁹ *Secession Reference*, *supra* note 8 at 247.

¹⁶⁰ [1981] 1 S.C.R. 753.

¹⁶¹ *Ibid.* at 905-906.

federal principle with an amendment to Canada's constitution by the unilateral action of federal and provincial authorities where such an amendment has the effect of modifying existing Aboriginal or treaty rights. In effect, Canada's Aboriginal peoples form a third tier within Canada's federal system.¹⁶²

The Court has consistently recognized that one purpose of subsection 35(1) of the *Constitution Act, 1982* is to reconcile the sovereignty of the Crown with the sovereign rights of the Aboriginal peoples of Canada who lived as "independent nations and political communities"¹⁶³ before European settlement of the continent. Thus, in *R. v. Van der Peet*¹⁶⁴ the Court's majority said,

[T]he doctrine of Aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the Aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.¹⁶⁵

Subsection 35(1) recognizes the sovereignty of the Aboriginal peoples prior to European settlement of North America and affirms the continued existence of such sovereignty after such settlement, albeit in a diminished form. This Aboriginal sovereignty also survived the process of Confederation in 1867. The distribution of legislative power between federal and provincial governments pursuant to sections 91 and 92 of the *Constitution Act, 1867* was not exhaustive in the sense that there remained no other competent legislative authority. Rather, sections 91 and 92 simply distributed, between federal and provincial authorities, such legislative competence as was enjoyed prior to 1867 by colonial authorities within

¹⁶² Morse refers to Aboriginal peoples as "constitutional entities": Morse, *supra* note 149 at 111. On the issue of native Americans amounting to a third tier in the federal structure of the United States of America see Carol Tebben, "An American Trifederalism Based upon the Constitutional Status of Tribal Nations" (2003) 5 U. Pa. J. Const. L. 318.

¹⁶³ *Campbell v. British Columbia (A.G.)* (2000), 189 D.L.R. (4th) 333 at 357 (B.C.S.C.) [*Campbell*].

¹⁶⁴ *Van der Peet*, *supra* note 132.

¹⁶⁵ *Ibid.* at 538-39.

British North America.¹⁶⁶ Any other legislative competence, including that belonging to Aboriginal peoples, remained untouched.¹⁶⁷

In *Campbell*, Justice Williamson held that any Aboriginal legislative competence that survived the European settlement of Canada was constitutionally guaranteed by subsection 35(1).¹⁶⁸ To a large extent this entrenchment was justified by the principle of the rule of law and constitutionalism set out by the Court in the *Secession Reference*. In particular the Court referred to the need for a constitution “to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against assimilative pressures of the majority.”¹⁶⁹

The constitutionalization of Aboriginal rights in subsection 35(1) gives rise to a form of shared sovereignty between the Crown and Aboriginal peoples. In the Court decision of *Mitchell v. M.N.R.*,¹⁷⁰ Justices Major and Binnie expressed support for a view that “sees Aboriginal peoples as full participants with non-Aboriginal peoples in a shared Canadian sovereignty. Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are part of it.”¹⁷¹ The reconciliation of Crown sovereignty and Aboriginal sovereignty is, as stated in *Van der Peet*, one of the central purposes of subsection 35(1). As stated in *Delgamuukw*, the preferred means to achieve this integration is through negotiated treaty settlements.¹⁷² Such treaties are accorded the constitutional protection of subsection 35(1).¹⁷³

Therefore, just as constitutional amendments affecting provincial legislative powers are not legal without provincial support, a constitutional amendment that affects or modifies Aboriginal rights is not legal without the support of affected Aboriginal peoples. A constitutional amendment to effect Quebec’s secession would clearly affect the sovereign rights of Ungava’s Aboriginal peoples and, therefore, would require their consent for it to be legally adopted. In effect, the necessity of support of the

¹⁶⁶ *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437 at 441-42.

¹⁶⁷ *Campbell*, *supra* note 163 at 352-53.

¹⁶⁸ *Ibid.* at 366-68.

¹⁶⁹ *Secession Reference*, *supra* note 8 at 259.

¹⁷⁰ [2001] 1 S.C.R. 911.

¹⁷¹ *Ibid.* at 980-81. See Cree Factum, *supra* note 5 at para. 23; and see Brian Slattery, “First Nations and the Constitution: A Question of Trust” (1992) 71 Can. Bar Rev. 261 at 272.

¹⁷² *Delgamuukw*, *supra* note 127 at 1123-24

¹⁷³ *Campbell*, *supra* note 163 at 376.

Aboriginal peoples to such an amendment is critical to the justification of a secession amendment.

V. CONCLUSION

If Canada is ever required to hold a conference for the purposes of negotiating a constitutional amendment to facilitate the secession of Quebec, a critical issue will be that of an independent Quebec's territory and borders. This is particularly true in relation to Ungava, which accounts for approximately two-thirds of Quebec. Given that the Aboriginal peoples of Ungava want to remain in Canada in the event of Quebec's independence, this article has suggested three constitutional bases preventing Quebec from insisting that its current provincial borders be transformed into international borders.

First, even though Quebec's provincial borders are constitutionally protected and cannot be altered without its consent, such protection exists only for as long as Quebec remains part of Canada. Given that the purpose of Quebec's territorial expansion, under the 1912 border legislation, was the development of Quebec as a province within Canada, Quebec would be required to relinquish its claim to the territory acquired in 1912 if it chose to secede. If the 1898 legislation had the effect of extending Quebec's territorial scope, a similar relinquishment would be required.

Second, the constitutional entrenchment of Aboriginal and treaty rights by subsection 35(1) of the *Constitution Act, 1982* and the consequential fiduciary obligations owed by the Crown to the Aboriginal parties to the JBNQA requires the approval of these parties to any constitutional amendment affecting their rights. A secession of Quebec would affect Aboriginal treaty rights under the JBNQA. Any negotiated constitutional amendment stipulating that Quebec's current provincial borders become international borders would be illegal if it did not have, in accordance with the justification principles set out in *Sparrow*, the approval of the Aboriginal parties to the JBNQA.¹⁷⁴ These Aboriginal parties to the JBNQA have signaled their desire to remain within Canada. Therefore, for Quebec to gain independence, the necessary constitutional amendment also partitions Quebec.

Finally, the principle of federalism requires the Aboriginal peoples, as an effective third sovereign tier in Canada's federal structure, to consent

¹⁷⁴ It is suggested that in the event that Quebec's Aboriginal peoples and the government of Quebec were in agreement as to Quebec seceding within the territorial scope of its present provincial borders the federal government's consent would be required on the basis that the JBNQA requires the consent of all of its parties to any alterations to it.

to any constitutional amendment that would affect this sovereignty. Such consent is not likely to be granted in the current climate of Aboriginal hostility towards Quebec secession without partitioning the province and allowing Ungava to remain with Canada.

Thus, although Quebec has consistently and vigorously maintained its claim to its existing provincial borders, in the event of its secession from Canada, this claim cannot be sustained under Canadian constitutional law. From this perspective, Quebec's position is aptly summarized by the words of Mick Jagger and Keith Richards: "You can't always get what you want."¹⁷⁵

¹⁷⁵ Song by Rolling Stones, "You Can't Always Get What You Want", *Let it Bleed* (1969).