

International Law and the Right of Indigenous Self-Determination: Should International Norms be Replicated in the Canadian Context?

By

Jennifer E. Dalton
Osgoode Hall Law School

ABSTRACT

In international law Indigenous self-determination is often given different meaning and content than in the Canadian domestic context. However, there is no firm agreement on what Indigenous self-determination entails. This paper argues that Indigenous self-determination is the right of Indigenous peoples to choose how they live their shared lives and structure their communities based on their own norms, laws, and cultures. It includes the freedom and equal human right to control one's destiny, usually in the context of communities. More specifically, this article argues that in the Canadian context, Aboriginal communities constitute "peoples," and therefore, should be accorded the right of self-determination as defined by international law.

Following a brief historical analysis of the development of Indigenous self-determination in international law, the paper includes a closer examination of the concept of self-determination, particularly from the standpoint of internal versus external forms. This leads to an application of self-determination to "peoples," including legal analyses of who constitutes "peoples" under international and Canadian common law. In so doing, the relevant defining features of "peoples" and the right of "peoples" to self-determination are defined in the Canadian context.

1. INTRODUCTION

In the context of international law Indigenous self-determination is often given different meaning and content than in the Canadian context. In fact, the term "self-determination" is more often used in the international legal context, while "self-government" is used in the Canadian context as an expression of the right of self-determination.

However, this neither negates nor diminishes the importance of self-determination as an overarching objective for many Aboriginal peoples in Canada. As stated by Alan Cairns,

...domestic developments could not have brought us to where we are now without the support offered by the international environment. Indeed, Aboriginal nationalism, cultural pride, and the pursuit of self-government would all be much weaker in the absence of supportive messages by the international environment. ... International law, which formerly 'facilitate[d] empire building and colonization ... [now] provides grounds for remedying the contemporary manifestations of the oppressive past.' It is easier to underestimate than to overestimate the impact of external developments on domestic politics, especially when we are dealing with attitudes, values, and implicit assumptions about the direction in which the world is moving. It is easy to track the movement of goods and peoples across frontiers – less easy to detect the influence of changes in the border-crossing messages we receive simply by being awake in a changed world.¹

In other words, Cairns emphasises the impact of international law and the international legal arena on the Canadian legal and political realms. In particular, he is pointing out the effects of international law and legal norms on Aboriginal issues and rights in the Canadian context. These issues and rights arguably include the right of self-determination for Aboriginal peoples in Canada.

However, there is no firm agreement on precisely what self-determination entails, either under international law or in the Canadian context. Mary Ellen Turpel argues that "Indigenous claims unite legal, historical, political, moral, and humanitarian arguments in a body of doctrine that may be viewed as a third generation of

¹ Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 40-42.

international human rights law focussing on the uniquely collective nature of Indigenous claims. This new generation of human rights has been termed the 'rights of peoples'.² In the Canadian context, Aboriginal peoples have employed the term because of its relevance for their objectives and, more importantly, due to the resonance it holds in describing their inherent and historically-based rights. In these ways, the right of self-determination can be applied in the Canadian context based on the essential meanings and goals behind the concept.

Generally speaking, it is argued here that Aboriginal self-determination is the right of Aboriginal peoples to choose how they live their shared lives and structure their communities based on their own norms, laws, and cultures. It includes the freedom and equal human right to control one's destiny, usually in the context of communities.

According to S. James Anaya, there are five fundamental characteristics embodied in self-determination: freedom from discrimination; respect for cultural integrity; social welfare and development; lands and natural resources; and self-government.³ Freedom from discrimination should be an expected standard in contemporary, liberal society, and social welfare and development are important tools required for Aboriginal peoples to be freed from the current social constraints in which they find themselves.⁴ Cultural issues are often embedded within a complex array of so-called minority and ethnic considerations and debates. The last two characteristics are also highly controversial since they stress the importance of autonomy in

² Mary Ellen Turpel, "Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition" (1992) 25 *Cornell Int'l L.J.* 579 at 580 [Turpel, "Indigenous"].

³ S. James Anaya, *Indigenous Peoples in International Law*, 2nd ed. (New York: Oxford University Press, 2000) at 97-98, 104-105, 107, 109-110 [Anaya, *Indigenous*].

⁴ Such tools arguably should come from the Canadian government, but in providing any resources it is crucial to be sensitive to the aspirations of Aboriginal peoples.

governance based on the interplay between laws, land use, and resources,⁵ which can conflict with jurisdictional authority at the federal, provincial, or territorial levels. At the same time, the right to self-governing powers is likely one of the most expansive rights since it encompasses many of the larger goals of self-determination as a whole. For example, self-government can include a range of powers, depending on the type of self-government which is adopted,⁶ such as decision-making, law-making capabilities, and varying degrees of autonomy. In addition, self-government is often attached to a land base or territory, and in many instances cultural integrity plays an important role. In these ways, self-government can ensure that Aboriginal peoples live according to their own norms and values.⁷

Anaya further defines "self-determination [as giving] rise to remedies that tear at the legacies of empire, discrimination, suppression of democratic participation, and cultural suffocation."⁸ Further, Turpel observes that

Indigenous claims are multifaceted because they bring together requests for land, requests for autonomy from the political structures and cultural hegemony

⁵ Anaya, *Indigenous*, *supra* note 3 at 98, 104-105, 109-110.

⁶ As there are several different conceptions of self-government it is not possible to go into specific details at this point. Thomas Isaac notes that Aboriginal self-government "is an often-used term with as many meanings as there are Aboriginal groups in Canada" (Thomas Isaac, *Aboriginal Law: Commentary, Cases and Materials*, 3rd ed. (Saskatoon, Saskatchewan: Purich Publishing Ltd., 2004) at 453).

⁷ Depending on the degree of power accorded to Aboriginal groups in any given self-governing arrangement, self-government can be quite similar in nature to the right of self-determination. For further discussion of the relationship between self-determination and self-government, see Turpel, "Indigenous", *supra* note 2 at 593, 595; *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, "Restructuring the Relationship," in *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (CD-ROM) (Ottawa: Libraxus Inc., 1997) at paras. 452-469, 512-518 [RCAP].

⁸ Anaya, *Indigenous*, *supra* note 3 at 75.

of dominant “settler” societies, and pleas for respect for their distinct Indigenous cultural and spiritual world views. The claims also seek redress for systemic discrimination against Indigenous peoples in the legal (criminal justice) and political systems, the social services sector, and the workforce.⁹

However, while some equate the desire for self-determination with the pursuit of secession from Canada, this occurs only in a minority of cases. The majority of Aboriginal peoples focus on self-determination as the reinstatement of autonomy over “political, social and cultural development” *within* Canada and freedom from state interference so as to allow the preservation and transmission of cultures to future generations.¹⁰ The key rationale behind these claims is rooted in the historical injustice that Aboriginal peoples have faced, the attempted obliteration of their cultures, laws, knowledge, political authority, and territorial rights, and the corresponding subjugation and assimilation that they have endured as a result of colonialist forces. In seeking self-determination, the power to define how Aboriginal peoples live is returned to those who are properly equipped with the knowledge of what is best for themselves, namely Aboriginal peoples. Ultimately, Aboriginal peoples see the right of self-determination as a prerequisite to all other rights.¹¹

However, in international law self-determination is a right vested in “peoples,” and this is where much of the controversy lies. How are “peoples” defined at international law? How might this definition be reproduced in the Canadian context? Should Aboriginal peoples be considered “peoples” with a right of self-determination in Canada, and what extent of

self-determination powers should they be accorded?

In this article it will be argued that Aboriginal peoples in Canada do indeed constitute “peoples,” as that term is used in the context of self-determination. They should, therefore, be accorded the right of self-determination as defined by international law. However, in the Canadian context this right focuses around *internal* forms of self-determination. While it is not assumed at this point that the question of secession might not arise at some point in the future, the quandary of the right of *external* self-determination within a federalist system such as Canada involves the exploration of other legal, jurisdictional, political, social, cultural, and economic nuances. These matters are reserved for another article.

Before dealing with the principal subjects outlined above, a brief historical analysis of the development of Indigenous self-determination in international law is in order. This will help situate the aforementioned debates within the relevant historical context from the perspective of international law. Following this, a closer examination of the concept of self-determination will be explored, specifically from the standpoint of internal versus external forms. This will lead to an application of self-determination to “peoples,” and an international legal assessment of who constitutes these “peoples.” Ultimately, this will allow for an application to the Canadian context, including legal analyses of the ways in which Aboriginal groups constitute peoples within Canada. In so doing, the relevant defining features of “peoples” and the right of “peoples” to self-determination will be defined in the Canadian context.

2. SELF-DETERMINATION IN INTERNATIONAL LAW

Aboriginal peoples in Canada have found that, in some ways, international legal mechanisms have been more conducive to their goal of achieving self-determination than has been the case within the domestic context. This is due, in large part, to the higher level of consideration accorded self-determination within international law. In the Canadian common law system, the possibility of self-government for Aboriginal

⁹ Turpel, “Indigenous,” *supra* note 2 at 580.

¹⁰ *Ibid.* at 593.

¹¹ Dalee Sambo, “Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?” (1993) 3:13 *Transnat’l L. & Contemp. Probs.* 13 at 23; see *RCAP*, *supra* note 7 at paras. 452-469.

peoples is usually raised, while self-determination receives little attention.¹² Part of

¹² Of course, it should be remembered that the entire Canadian common law system is constitutionally based on the conception of “one sovereign.” The existence of only one sovereign, specifically the Crown, makes the granting of self-determination or self-government powers to Aboriginal peoples potentially more difficult. The granting of such powers might represent or result in conflicting jurisdictional issues between Aboriginal peoples and the Crown. At this point it is important to note that Aboriginal jurisprudence places the sovereignty of the Crown over and above any other ruling powers. For example, the Supreme Court of Canada has clearly stated that Aboriginal prior occupancy, Aboriginal prior sovereignty, and general Aboriginal rights under s. 35(1) of the *Constitution Act, 1982* must be reconciled with the assertion of Crown sovereignty. For example, in *Delgamuukw* Lamer C.J. affirmed the sovereignty of the Crown along with a broad range of legislative objectives which might legitimately infringe Aboriginal rights under s. 35(1). *Delgamuukw* is one of the most important Supreme Court of Canada rulings on Aboriginal rights under s. 35(1) in part because it expanded significantly the range of legitimate legislative objectives following the *Van der Peet* trilogy (*R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*]; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723). For further analysis of the *Van der Peet* trilogy, including legislative infringement, see Russel Lawrence Barsh and James Youngblood Henderson, “The Supreme Court’s *Van der Peet* trilogy: Naïve Imperialism and Ropes of Sand” (1996-1997) 42 McGill L.J. 993. The range of legislative objectives outlined in *Delgamuukw* serves to demonstrate the level at which Aboriginal rights are subordinate to the sovereignty of the Crown under Canadian common law. Lamer C.J. stated the following:

In the wake of Gladstone, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that “distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community... .” In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic

the reason for this lies in the conceptions of “nations” and “peoples,” which are part and parcel of self-determination as recognised under international law. The task of defining “peoples” is addressed later in this article. However, before proceeding to that discussion, it is important to briefly review the history and development of self-determination in international law, particularly in relation to Indigenous peoples.¹³

development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 165 [emphasis in original]).

For further analysis of the infringement of Aboriginal rights under s. 35(1) see Kent McNeil, “How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?” in Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon, Saskatchewan: Native Law Centre, University of Saskatchewan, 2001) 281. For an in-depth discussion of *Delgamuukw*, more generally, see Kent McNeil, “Defining Aboriginal Title in the 90s: Has the Supreme Court Finally Got it Right?”, Twelfth Annual Robarts Lecture, York University, Toronto, Canada, 25 March 1998; Kent McNeil, “The Post-*Delgamuukw* Nature and Content of Aboriginal Title,” in Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon, Saskatchewan: Native Law Centre, University of Saskatchewan, 2001) 102; Kent McNeil, “The Onus of Proof of Aboriginal Title,” in Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon, Saskatchewan: Native Law Centre, University of Saskatchewan, 2001) 136; John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia*” (Fall 1999) 37:3 *Osgoode Hall L.J.* 537.

¹³ In the context of international law the term “Indigenous” is more prevalent, and so will be used in this article when dealing with international legal norms and over-arching principles. However, in the context of the Canadian common law system “Aboriginal” is the “accepted” terminology, and therefore, is used accordingly herein. It should be noted that a shift is occurring whereby Aboriginal peoples, through the right of self-naming, are leaning towards the term “Indigenous” over “Aboriginal,” in order to signify

(a) A History of Indigenous Self-Determination

Essentially, the principle of self-determination first gained international political recognition after the First World War as a result of the disintegration of the Austro-Hungarian, Russian, and Ottoman empires.¹⁴ The purpose of negotiating peace at the time ultimately included the specification that peoples and nations should exercise their own sovereign wills, without fear of domination by other states.¹⁵ Darlene Johnston notes that the principle of self-determination was “an impetus to the formation of the League of Nations,”¹⁶ but it was not formally acknowledged as an international norm until the formation of the United Nations.¹⁷ Such recognition appears in Articles 1 and 55 of the *Charter of the United Nations*,¹⁸ although at that

their status as original inhabitants. Of course, it can be argued that “Aboriginal” carries with it similar connotations, but the point here is to note a trend where the process of “labelling” is changing to reflect more the desires and needs of Aboriginal peoples, and less so the opinions and perceptions of non-Aboriginals. A similar process occurred wherein previous delineations of “native” and “Indian” were replaced by “Aboriginal” and “First Nation.” It should also be noted that Aboriginal peoples do not constitute a single homogeneous group, but rather they are “as historically different from one another as are other nations and cultures in the world... Canadian Indigenous peoples speak over fifty different Aboriginal languages from twelve distinct language families, which have as wide a variation as do the language families of Europe and Asia. These nations’ linguistic, genealogical, and political descent can be traced back through millennia to different regions or territories in northern North America” (John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 3).

¹⁴ Anaya, *Indigenous*, *supra* note 3 at 76; S. James Anaya, “A Contemporary Definition of the International Norm of Self-Determination” (1993) 3 *Transnat’l L. & Contemp. Probs.* 131 at 134-136.

¹⁵ Anaya, *Indigenous*, *supra* note 3 at 76.

¹⁶ Darlene Johnston, “The Quest of the Six Nations Confederacy for Self-Determination,” in S. James Anaya, ed., *International Law and Indigenous Peoples* (Burlington, VT: Dartmouth, 2003) 85 at 87.

¹⁷ Anaya, *Indigenous*, *supra* note 3 at 76-77.

¹⁸ *Charter of the United Nations* (1945), 59 Stat. 1031, TS no. 993, 3 Bevens 1153, 1976 YBUN 1043.

time self-determination was not referred to as a “right.”¹⁹ Article 1, paragraph 2, describes the organization as designed “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.” Article 55 notes “the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”

Since that time, international law has developed with respect to the right of self-determination for peoples, appearing in other resolutions and declarations. However, self-determination is still considered a “political principle *but not yet a rule of international law*.”²⁰ For example, the General Assembly resolution 1514 (XV),²¹ which contains the “Declaration on the Granting of Independence to Colonial Countries and Peoples,” was a central, early stepping-stone in the recognition of self-determination. According to Erica-Irene Daes, this declaration “has formed the cornerstone of what may be called the ‘New United Nations Law of Self-determination’.” According to this resolution, “all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”²²

In addition, the right of self-determination for peoples is clearly articulated in the *International Covenant on Economic, Social and Cultural*

¹⁹ Erica-Irene Daes, “The Right of Indigenous Peoples to ‘Self-Determination’ in the Contemporary World Order,” in Donald Clark and Robert Williamson, eds., *Self-Determination: International Perspectives* (New York: St. Martin’s Press, 1996) 47 at 47 [Daes, “Right of Indigenous Peoples”].

²⁰ Robert Coulter, “Indigenous Peoples and the Law of Self-Determination: A Possible Consensus,” *Indian Law Resource Center*, Helena, Montana, 18 October 2002 at 3 (emphasis in original) [Coulter, “Indigenous Peoples”].

²¹ United Nations, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGA Res. 1514 (XV), 15 UN GAOR, Suppl. (no. 16), UN Doc. A/4684 (196), at 66.

²² Daes, “Right of Indigenous Peoples,” *supra* note 19 at 48.

*Rights (ICESCR)*²³ and the *International Covenant on Civil and Political Rights (ICCPR)*.²⁴ Article 1 of each states that “all peoples freely determine their political status and freely pursue their economic, social and cultural development.” Moreover, as noted by Daes, the right of self-determination is connected to “what has come to be termed ‘permanent sovereignty’ over natural wealth and resources’.”²⁵

Finally, two of the most recent developments in the international arena with regard to self-determination, applicable specifically to Indigenous peoples, are the Organization of American States (OAS) and the United Nations *Draft Declaration on the Rights of Indigenous Peoples (Draft Declaration)*. Within the OAS, the Inter-American Commission on Human Rights approved the *Proposed American Declaration on the Rights of Indigenous Peoples* in February 1997, which is currently undergoing further examination at the request of the OAS General Assembly.²⁶ Both support the right of self-determination as a fundamental right for Indigenous peoples, but the *Draft Declaration* is more ambitious and less “integrationist.”²⁷ In particular, Article 3 of the *Draft Declaration* states that “Indigenous Peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”²⁸ As noted by

Daes, this wording is identical to that found in Article 1 of the above-mentioned *Covenants*, supporting the assertion of many Indigenous peoples of their right to self-determination under international law.²⁹

(b) Who are “Peoples”? External versus Internal Self-Determination

Many critics of the right of self-determination for Indigenous peoples claim that Indigenous peoples do not constitute “peoples” recognised under international law, and therefore the right of self-determination cannot be applied to them, either internationally or domestically in Canada. However, there is no “internationally accepted [definition] of the [term] ‘peoples’.”³⁰

Uncertainty over the meaning of “peoples” often finds its roots in debates over the form that self-determination might take. Such form is often placed on a continuum of external versus internal conceptions of self-determination. External self-determination involves independent statehood, including recognition as a nation under international law, provided that the nation in question has a permanent population, a defined territory, a government, and the capability of entering into relations with other states. Conversely, internal self-determination refers to those rights which support and preserve “Indigenous cultural difference through independent political institutions” within an existing nation-state.³¹ While internal self-determination has already been given some support at the Canadian federal and provincial

²³ *International Covenant on Economic, Social and Cultural Rights*, 6 ILM 360 (1967).

²⁴ *International Covenant on Civil and Political Rights*, 6 ILM 368 (1967).

²⁵ Daes, “Right of Indigenous Peoples,” *supra* note 19 at 49.

²⁶ Joanna Harrington, “Canada’s Obligations under International Law in Relation to Aboriginal Rights,” conference paper, Pacific Business & Law Institute, Ottawa, April 28-29, 2004 at 16 [Harrington].

²⁷ *Ibid.*

²⁸ United Nations, *Draft Declaration on the Rights of Indigenous Peoples*, Doc. E/CN.4/Sub.2/1994/2/Add.1, Art. 3, p. 3 [*Draft Declaration*]. For an in-depth analysis of the content, history, and potential benefits of the *Draft Declaration* see Catherine Iorns, “Indigenous Peoples and Self-

Determination” (1992) 24 Case W. Res. J. Int’l L. 199 [Iorns].

²⁹ Daes, “Right of Indigenous Peoples,” *supra* note 19 at 55.

³⁰ Gudmundur Alfredsson, “Different Forms of and Claims to the Right of Self-Determination,” in Donald Clark and Robert Williamson, eds., *Self-Determination: International Perspectives* (New York: St. Martin’s Press, 1996) 58 at 71 [Alfredsson].

³¹ United Nations, *Declaration by the International NGO Conference on Discrimination Against Indigenous Populations in the Americas* (U.N. Doc. E/Cn.4/Sub.2/1986/7); Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 37 [Macklem, *Indigenous*].

levels through various self-governing arrangements,³² external self-determination is much more controversial.³³ This is due, in large part, to the depiction of “independent statehood” and “the capability of entering into relations with other States,” which could amount to jurisdictional conflicts or secession of Aboriginal peoples from the Canadian state.³⁴

³² The creation of Nunavut might come to mind, but the “independence” of the governmental apparatus is debatable since it is a public government that also represents a minority non-Aboriginal population. In this context, while the majority of the population is Aboriginal, the government still exercises delegated authority, rather than a more independent form of self-government. Band councils are another example of delegated authority, but their powers are even more limited in nature. Once again, the degree of governing “independence” is debatable.

³³ For further discussion of external self-determination see Benedict Kingsbury, “Reconstructing Self-Determination: A Relational Approach,” in Pekka Aikio and Martin Scheinin, eds., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku/Åbo, Finland: Institute for Human Rights, Åbo Akademi University, 2000) 19 at 25-26; Hurst Hannam, “Rethinking Self-Determination” (1993) 34 *Va. J. Int’l L.* 1 at 23-24.

³⁴ With regard to the potential for pursuing external self-determination, the *Draft Declaration on the Rights of Indigenous Peoples* (Commission on Human Rights, Explanatory note concerning the Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc.E/CN.4/Sub.2/1993/26/Add.1 (19 July 1993) para. 21 [provisional] states:

Once an independent State has been established and recognized, its constituent peoples must try to express their aspirations through the national political system, and not through the creation of new States. This requirement continues unless the national political system becomes so exclusive and non-democratic that it no longer can be said to be “representing the whole people.” At that point, and if all international and diplomatic measures fail to protect the peoples concerned from the State, they may perhaps be justified in creating a new State for their safety and security.

International law has not recognised the right of Indigenous peoples’ self-determination precisely due to the tensions which exist surrounding who

Other conceptions of internal self-determination emphasise the importance of cultural definition and preservation, economic self-sufficiency, and political autonomy including self-government arrangements and various forms of democratic, political, and representative rights.³⁵ Essentially, these sorts of conceptions are limited to self-determination powers *within* states, and thus do not require attempts at secession or absolute political independence.³⁶

Nevertheless, it is often because of fears of potential secession or significant jurisdictional conflict that states are hesitant to define various groups as “peoples.” Many are hesitant to accord Indigenous peoples the title of “peoples” or “nations” since international law does not permit secession of Indigenous populations from larger states, and accordingly, attempts at secession are usually viewed as both unacceptable and unfeasible by nation states.

Furthermore, it is feared that defining “peoples” as including Indigenous peoples might result in a “slippery slope,” wherein other groups will expect recognition as “peoples.” It is feared that this would ultimately lead to instability and political unrest.³⁷ Instead, states often prefer to define such groups, including Indigenous peoples, as “minorities.” There is significant and

constitutes “peoples” and how possible definitions of “peoples” are tied to issues of territory, boundaries, and the potential for secession (Patrick Macklem, “Normative Dimensions of an Aboriginal Right of Self-Government” (1995-1996) 21 *Queen’s L.J.* 185 at 200 [Macklem, “Normative”]).

There is also somewhat of a parallel between the concept of self-determination as used by Indigenous peoples and the concept as used by the Québécois, particularly with regard to sovereignty and secessionist claims. There has been and continues to be a strong secessionist undercurrent among some Quebecers, which has waxed and waned over the past decades. Canada faces political difficulty with the concept of self-determination for “peoples,” including Aboriginal peoples, because this concept is used by Québécois as a key argument supporting the right of that province to secede from Canada and form its own country.

³⁵ See Alfredsson, *supra* note 30 at 65-66, 71-78.

³⁶ See Iorns, *supra* note 28 at 215-217, 220, 222-228.

³⁷ Coulter, “Indigenous Peoples,” *supra* note 20 at 13.

contentious debate over whether Indigenous peoples, including Aboriginal peoples in Canada, constitute minorities rather than peoples or nations. This debate includes significant cultural, historical, and territorial issues which are beyond the scope of this article.³⁸

Ultimately, most states need not fear the threat of secession by Indigenous peoples. While many might argue for a right to unilaterally secede under international law, “international law neither forbids nor supports secession”³⁹ because it is neither proscribed nor sanctioned as a legal right.⁴⁰ Additionally, as noted earlier, in the context of Aboriginal peoples in Canada, most groups do not seek secession or other external mechanisms of self-determination.

S. James Anaya emphasises internal modes of self-determination, but he does so in tandem with defining “peoples.” He outlines three competing approaches to self-determination that are generally applied when attempting to define “peoples.” The first denies that self-determination applies to any populations within territories unless they are subject to classical

conditions of colonisation.⁴¹ A second approach supports the application of self-determination only to the entire population of a state as a whole.⁴² The third approach endorses self-determination for groups based solely on the “strength of ethnic cohesion or accounts of historical sovereignty,” but this approach is not often supported in international law due to inattention given to territorial or state boundaries.⁴³

Anaya postulates a plausible alternative to these approaches. He emphasises the significance attached to the interdependencies which exist among individuals, groups, and states in the contemporary realm.⁴⁴ He suggests that associations between the varying levels of society, both domestically and globally, are key to explaining “[t]he term *peoples* as it relates to a contemporary understanding of self-determination.”⁴⁵ Aboriginal peoples should not be denied recognition as peoples, but recognition should not be based on issues of territory, ethnicity, or history alone. Anaya states the following:

The limited conception of “peoples,” accordingly, largely ignores the multiple, overlapping spheres of community, authority, and interdependency that actually exist in human experience. Humanity effectively is reduced to units of organization defined by a perpetual grip of statehood categories; the human rights character of self-determination is thereby obscured, as is the relevance of self-determination values in a world that is less and less state centered. ... *Group challenges to the political structures that engulf them appear to be not so much claims of absolute*

³⁸ For further discussion on the debate see *RCAP*, *supra* note 7 at paras. 997-1027, 5719-5727; Macklem, “Normative,” *supra* note 34 at 211-215; Patrick Macklem, “Distributing Sovereignty: Indian Nations and Equality of Peoples” (1992-1993) 45 *Stan. L. Rev.* 1311 at 1353-1355; Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995); Richard Spaulding, “Peoples as National Minorities: A Review of Will Kymlicka’s Arguments for Aboriginal Rights from a Self-Determination Perspective” (1997) 47:1 *U.T.L.J.* 35; John Borrows, “Uncertain Citizens: Aboriginal Peoples and the Supreme Court” (2001) 80 *Can. Bar Rev.* 15; Leighton McDonald, “Regrouping in Defence of Minority Rights: Kymlicka’s Multicultural Citizenship” (1996) 34:2 *O.H.L.J.* 291.

³⁹ Robert Coulter, “The Possibility of Consensus on the Right of Self-Determination in The UN and OAS Declarations on the Rights of Indigenous Peoples,” Draft Discussion Paper, Indian Law Resource Center, Helena, Montana, 18 October 2002 at 5 [Coulter, “Possibility of Consensus”].

⁴⁰ *Ibid.*

⁴¹ Anaya, *Indigenous*, *supra* note 3 at 77. This is also known as the “salt water thesis” or the “blue water thesis.” The thesis restricts the right of self-determination to colonies that are separated by ocean or sea from the colonisers. In this instance, self-determination powers do not extend to Indigenous populations within the colonies, but rather, to the colonies as whole entities (see *Ibid.* at 43, 60 n. 29).

⁴² *Ibid.*

⁴³ *Ibid.* at 78.

⁴⁴ *Ibid.* at 79.

⁴⁵ *Ibid.* at 78.

*political autonomy as they are efforts to secure the integrity of the group while rearranging the terms of integration or rerouting its path.*⁴⁶

The significance of this passage is the multidimensional approach that Anaya takes in defining the relationship that exists between “peoples” and self-determination. This relationship is multifaceted, existing in a world where there is continual and increasing integration on a global level between states and peoples within states.⁴⁷

Additionally, Anaya’s approach emphasises the role played by internal forms of self-determination, not independent statehood or outright political separation. Such *interdependence* is relevant in the Canadian context, arguably reducing fears of secession as a priority of most Aboriginal groups in Canada. However, what does this mean for Indigenous populations? In light of the competing definitions of “peoples,” do Indigenous groups qualify?

Indigenous groups have histories that are directly linked to the history of classical colonialism. This results in very complex and distinctive definitions of Indigenous peoples, including how their pre- and post-contact societies might be described, how their societies were and continue to be connected to their territories, and the ultimate impact of colonialism on Indigenous traditions, cultures, institutions, and laws. Essentially, their histories make defining Indigenous populations a multifaceted and complex task. Such complexity

⁴⁶ *Ibid.* at 78-79 (emphasis added).

⁴⁷ *Ibid.* at 79. Anaya further depicts this integration and interdependence in the Great Law of Peace as envisioned by the Iroquois Confederacy, or the Haudenosaunee. The Great Law of Peace refers to a huge tree which has roots which extend in all directions to all peoples in the world. All of these peoples are invited to follow the roots of the tree, and take part in peaceful coexistence under the long leaves of the tree. This conception promotes unity among individuals, groups, and nations, while still allowing for “the integrity of diverse identities and spheres of autonomy” (*ibid.*).

is seen in the working definition originally proposed by the United Nations *Study on Indigenous Populations*. While it is lengthy, its inclusion is warranted due to the historical information and defining features it offers regarding who constitutes Indigenous peoples. It reads as follows:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to the future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence, as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

The historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

- (a) Occupation of ancestral lands, or at least of part of them;
- (b) Common ancestry with the original occupants of these lands;
- (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an Indigenous community, dress, means of livelihood, life-style, etc.);
- (d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- (e) Residence in certain parts of the country, or in certain regions of the world;
- (f) Other relevant factors.

On an individual basis, as Indigenous person is one who belongs to these Indigenous populations through self-identification as Indigenous (group consciousness) and is

recognized and accepted by these populations as one of its members (acceptance by the group).

This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.⁴⁸

While this working definition is very useful in its degree of detail, as noted earlier international law does not have a formal definition of who constitutes peoples. Nevertheless, there are various approaches to defining Indigenous populations as “peoples.” Most importantly, Indigenous populations view themselves as peoples. For example, at the second general assembly of the World Council of Indigenous Peoples, the “International Indian Treaty Council described Indigenous populations as ‘composed of nations and peoples, which are collective entities entitled to and requiring self-determination...’”⁴⁹ Erica-Irene Daes describes a “people” along the following lines:

Whether a group constitutes a “people” for the purposes of self-determination depends, in my view, on the extent to which the group making a claim shares ethnic, linguistic, religious or cultural bonds, although the absence or weakness of one of these bonds or elements need not invalidate a claim. The extent to which members within the group perceive the group’s identity as distinct from the identities of other groups should be evaluated according to a subjective standard.⁵⁰

According to this definition, it would appear that most Indigenous peoples, including Aboriginal peoples in Canada, could fall under this depiction. However, it is argued here that this is a much more complex issue. It is beyond the

⁴⁸ United Nations, *Study on Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 at 50-51.

⁴⁹ Macklem, “Normative,” *supra* note 34 at 200.

⁵⁰ Daes, “Right of Indigenous Peoples,” *supra* note 19 at 50.

scope of this paper to discuss in detail which Indigenous peoples might be characterised as “peoples,” but the above discussion is relevant for outlining some of the significant issues.

(c) Applying the Right of Self-Determination to Indigenous Peoples under International Law

While the specific form that self-determination should take is discussed minimally in the related literature, internal forms of self-determination are usually epitomised as more feasible and appropriate than are external forms.⁵¹ For example, as noted above, Anaya places a great deal of emphasis on internal forms of self-determination. He argues that fears of secession are unfounded since most Indigenous peoples’ goals are realistic *within* the context of “parent” states. Equally important, and as noted earlier, international law does not recognise a legal right to secession for peoples *within* a state, ultimately reducing the potential for seceding successfully.⁵²

⁵¹ See Alfredsson, *supra* note 30 at 60-79 for an in-depth assessment of various forms of internal and external self-determination.

⁵² While secession might arguably lead to the political creation of a new state, the new state must also receive international legal recognition of its new status as a nation. As the Supreme Court of Canada discussed in the *Quebec Secession Reference*, such recognition is, in part, dependent on the legitimacy of the secession process (see *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras 142-143 [*Quebec Secession Reference*]). It would appear that such international legal recognition might be very difficult for Indigenous peoples to secure in light of the fact that international law normally defers to the domestic law of the state in question. In this instance, unilateral secession from the Canadian state would be deemed unconstitutional, under both Canadian common law and international law. While international law does not explicitly prohibit unilateral secession, the Supreme Court did provide the following clarification in the *Quebec Secession Reference*: “The notion that what is not explicitly prohibited is implicitly permitted has little relevance where...international law refers the legality of secession to the domestic law of the seceding state and the law of that state holds unilateral secession to be unconstitutional (*ibid.* at para. 143). For further information pertaining to this international legal norm, see Hugh Kindred, et al., *International Law: Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto:

This debate over the form that self-determination should take is part and parcel of the larger debate concerning the recognition of Indigenous peoples as holders of the right of self-determination. This broader discussion is exemplified in the *Draft Declaration on the Rights of Indigenous Peoples* inasmuch as the related negotiations have sought to determine whether Indigenous peoples have a right of self-determination and to what extent that right should be recognised and protected. However, the mere existence of the *Draft Declaration*, and the fact that negotiations have been occurring for many years, indicates that under international law, Indigenous populations have made gradual progress in gaining recognition as “peoples.” Even though there is no firmly-established international legal definition of “peoples,” and no formal recognition of Indigenous self-determination under international law, it is becoming increasingly acceptable under international law to recognise Indigenous communities as “peoples” and “nations” who are entitled to some degree of self-determination.

For example, Robert Coulter asserts this contention, providing an abundance of supporting claims for internal forms of self-determination. Coulter seeks to demonstrate how Indigenous peoples are unique from other “minority” populations. For Coulter, this inherent difference means that Indigenous peoples should be treated as peoples with internal self-determination rights, and consequently, such rights are not warranted for other “minority” groups.⁵³ Coulter asserts that many Indigenous peoples are legally recognised “as distinct political or social entities” with ongoing social activities, practices, norms, and institutions; they are organised as communities that are historical and current, independent, and self-governing.⁵⁴ Most Indigenous peoples “had or still have a definite or distinct territory and legally defined membership,” and they stress the importance of their connectedness to their

lands.⁵⁵ These characteristics are combined to demonstrate the distinctiveness of Indigenous peoples from other groups.

Additionally, Coulter provides further claims in support of Indigenous self-determination beyond the uniqueness of Indigenous peoples. Coulter maintains that Indigenous ways of life, including Indigenous cultures, social institutions, languages, and spiritual traditions are “gravely threatened by the dominant societies.”⁵⁶ Indigenous peoples experience this threat irrespective of their historical recognition as nations, despite the legally-binding treaties into which they entered, and regardless of the fact that they “pre-date the states where they are located.”⁵⁷ Further, most Indigenous peoples have been excluded from constitutional state-building⁵⁸ and political participation, and they have been “forcibly or wrongfully deprived of their lands and resources..., suffered unjust warfare, discrimination, and the suppression of their political, social and cultural rights.”⁵⁹ Finally, Coulter notes that Indigenous peoples are still subjected to political and economic situations which resemble former vestiges of colonialism, such as minimal power within states, high levels of discrimination, and social injustice.⁶⁰ Coulter maintains this set of claims to demonstrate the need for Indigenous peoples to have a right of self-determination so as to protect their rights, restore control over their lives, and rebuild the societies that were taken from them.

Erica-Irene Daes is also a strong supporter of an Indigenous right of self-determination. She argues that the *Draft Declaration on the Rights of Indigenous Peoples* should include the following important paragraph:

Indigenous peoples have the right to self-determination in accordance with international law, subject to the same criteria

Emond Montgomery Publications Limited, 2000) at 131, 281 [Kindred et al.].

⁵³ Coulter, “Indigenous Peoples,” *supra* note 20 at 13.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Erica-Irene Daes also confirms this point (see Daes, “Right of Indigenous Peoples,” *supra* note 19 at 53).

⁵⁹ Coulter, “Indigenous Peoples,” *supra* note 20 at 13.

⁶⁰ *Ibid.* at 13-14.

and limitations as applied to other peoples in accordance with the Charter of the United Nations. By virtue of this, they have the right, *inter alia*, to negotiate and agree upon their role in the conduct of public affairs, their distinct responsibilities, and the means by which they manage their own interests.⁶¹

In addition to this argument, Daes notes the relevance of Article 31 of the *Draft Declaration* in support of *internal* forms Indigenous self-determination. She asserts that Article 31 provides general guidelines for the exercise of Indigenous self-determination rights through “*autonomy or internal self-government within existing states.*”⁶² Article 31 states the following:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.⁶³

While even internal forms of Indigenous self-determination are not yet formally recognised under international law, progress can be seen, as evident in the *Concluding Observations* of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) and the United Nations Human Rights Committee (HRC) in December 1998 and March 1999 respectively. At the time, these two committees had undertaken analyses of Canada’s human rights record with regard to Aboriginal peoples. While previous assessments had occurred, this was the first time that the CESCR and HRC had applied Article 1 of both the *ICESCR* and the *ICCPR*. As argued by

Andrew Orkin and Joanna Birenbaum, this application was significant because it applied the notion of “peoples” and the right of self-determination as embodied in Article 1 to Aboriginal peoples in Canada, adding to the currency and relevance of these terms in the Canadian context.⁶⁴ The *Concluding Observations* included the following pertinent statement:

The Committee notes that, as the State Party acknowledged, the situation of the Aboriginal peoples remains ‘the most pressing human rights issue facing Canadians.’ In this connection, the Committee is particularly concerned that the State Party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). *With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of Aboriginal self-government will fail, the Committee recommends that the right of self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent Aboriginal rights be abandoned as incompatible with article 1 of the Covenant.*⁶⁵

Despite this apparent progress, the debate over whether Indigenous peoples constitute “peoples” under international law continues.⁶⁶ While various

⁶¹ Daes, “Right of Indigenous Peoples,” *supra* note 19 at 54.

⁶² *Ibid.* at 55 (emphasis in original).

⁶³ *Draft Declaration, supra* note 28.

⁶⁴ Andrew Orkin and Joanna Birenbaum, “Aboriginal Self-Determination within Canada: Recent Developments in International Human Rights Law” (1999) 10:4 *Const. Forum Const.* 112 at 114.

⁶⁵ Human Rights Committee, *Concluding Observations on Canada*, 65th Session, CCPR/C/79/Add.105 (7 April 1999) (emphasis added).

⁶⁶ For further analysis of this ongoing debate see Alfredsson, *supra* note 30 at 63-65.

states are gradually supporting some internal form of self-determination powers for Indigenous populations, this right has not yet been formally recognised under international law and a consensus among states has not yet been achieved.⁶⁷ Nevertheless, the fact that some states, including Canada, are starting to emulate the international consideration of Indigenous peoples as constituting “peoples” and “nations” gives credence to Alan Cairns’ emphasis on the role of international law affecting the domestic laws of states.

However, even at the level of preliminary, informal recognition of Indigenous peoples as “peoples” under international law, the right of self-determination is still expected to be internal in nature. This is primarily due to the international legal recognition of the sovereignty of states and respect for territorial boundaries; potential secession of Indigenous populations would seriously hinder the territorial integrity of states. However, this does not mean that external self-determination should not be a right accorded to Indigenous peoples in appropriate circumstances, nor does it mean that the present author does not support such a right. Instead, as others have noted, the right of external self-determination may be a crucial component for some Indigenous groups, particularly those suffering from wrongful domination, oppression, and colonialism.⁶⁸ This is a significantly large and complex issue, warranting further assessment in another forum.⁶⁹

⁶⁷ Daes, “Right of Indigenous Peoples,” *supra* note 19 at 55; Coulter, “Possibility of Consensus,” *supra* note 39.

⁶⁸ For example, see Coulter, “Possibility of Consensus,” *ibid.* at 5; Daes “Right of Indigenous Peoples,” *supra* note 19 at 51-55; Erica-Irene Daes, “Some Considerations on the Right of Indigenous Peoples to Self-Determination” (1993) 3 *Transnat’l L. & Contemp. Probs.* 1 at 6-7.

⁶⁹ Under international law, a right of external self-determination, including secession, is permitted under specific circumstances, usually as a basis for “decolonisation of dependent territories,” but also under conditions where there is the denial of fundamental human rights, extreme domination, or subjugation. These provisions are laid out in the U.N. General Assembly’s *Declaration on Principles of*

3. SELF-DETERMINATION OF “PEOPLES” IN THE CANADIAN CONTEXT

What does this mean for Aboriginal groups in Canada? Do they constitute “peoples”? Can and should international legal norms be replicated in Canada? The following discussion will examine the Canadian context with an eye to evaluating whether Aboriginal groups in Canada constitute “peoples” with a right of self-determination.

(a) Replicating International Legal Norms of Self-Determination in the Canadian Context

Applying international legal norms to the Canadian context is not necessarily a cut-and-dried affair. There are several sources of international law, including the following: conventional international law, consisting of treaties⁷⁰; customary international law, which is developed by state practice over time;⁷¹ and

International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970 (*Declaration on Friendly Relations*). For further discussion see Kindred et al., *supra* note 52 at 53-56.

⁷⁰ Treaties are also called conventions. According to the *Vienna Convention on the Law of Treaties*, a treaty is defined as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation” (*Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 U.N.T.S. 331, Can. T.S. 1980 No. 37 (entered into force 27 January 1980), Article 2(1)(a)).

⁷¹ As noted by Joanna Harrington, customary international law “is the original source of international law... . Not all acts of state practice, however, constitute customary law.” Customary law finds its source in reasonably consistent state practice. “It must be constant and uniform, and it must be fairly common to a significant number of states.” However, in order for a norm of customary international law to be recognised, it is also necessary for states to “recognize it as binding upon them as law. In other words, the state practice must be accompanied by a belief that the practice is obligatory, rather than merely convenient or habitual” (see Harrington, *supra* note 26 at 5; Kindred et al., *supra* note 52 at 5-9, 129-133).

general principles found in judicial decisions and scholarly writing.⁷²

While customary international law is applicable in the Canadian context, it is necessary for it to be treated as obligatory in order for it to take its full effect. “To the extent that customary law can be established, it is as binding on Canada as ratified treaties. [Fortunately,] [c]ustomary international law is thought to be the law of the land, subject of course to the right of the legislature to override it by enacting a statute.”⁷³ Conventional international law includes self-implementing treaties and non-self-implementing treaties. While Canada might be a signatory to non-self-implementing treaties, such agreements are unenforceable under Canadian domestic law unless they are legislatively implemented by Parliament.⁷⁴ Consequently, it is not possible to assume the application of conventional international law in the Canadian context. While international legal norms certainly inform Canadian law, including “statutory interpretation and judicial review,”⁷⁵ it is necessary for Canada to play an active role in adhering to international legal norms. This is relevant in the context of the right of Indigenous self-determination under international law and whether it is applicable to Aboriginal peoples in Canada.

⁷² As clarified by Harrington, there is significant debate surrounding the potential of these sources to constitute international law. However, she does clarify that judicial decisions of international judicial bodies are relevant, as are national court judicial decisions, which hold “weight as...law-identifying source[s] for international law.” Scholarly writing is generally given less weight as a “subsidiary source of international law,” with reference given only to those who are most highly qualified in their fields (see *Ibid.* at 6-7). Other sources of international law might include the normative value of decisions and standards of certain international organisations, but these are more likely to simply add “normative value towards the establishment of customary laws” (*Ibid.* at 7). For further discussion see Kindred et al., *supra* note 52 at 154-157.

⁷³ *Ibid.* at 19.

⁷⁴ *Ibid.* at 18.

⁷⁵ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70, cited in Harrington, *supra* note 26 at 19.

(i) Indian Status and Lovelace: Application of International law

The case of *Sandra Lovelace v. Canada*⁷⁶ is important, most notably in the way that it demonstrates the influence of international law on Canadian law. This case was decided in 1981, prior to the enactment of the *Canadian Charter of Rights and Freedoms*. In this case, Sandra Lovelace had lost her Indian status under the *Indian Act*⁷⁷ because she married a non-status man. Upon the dissolution of her marriage, she was denied the right to return to the Tobique reserve where she had been born and raised, and had spent the majority of her life, because she had lost her Indian status.

The United Nations Human Rights Committee decided that the Canadian government was in breach of Article 27 of the *ICCPR*, to which Canada is a signatory. Article 27 provides: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” The United Nations Human Rights Committee decided that the Canadian government had breached Article 27 by continuing to deny Sandra Lovelace “the opportunity to live on the reserve, the only place that she could practice her culture in community with other members of the group.”⁷⁸ Consequently, the discrimination incurred by Lovelace, and all Indian women who married non-Indian men, as a result of s. 12(1)(b) of the *Indian Act*, was in conflict with the civil and political rights as outlined in the aforementioned *International Covenant*.

This decision “was considered a landmark case because there was a recognition of ‘a right for minority groups and their members to define

⁷⁶ *Sandra Lovelace v. Canada*, Communication No. R.6/24, Report of the Human Rights Committee, U.N. GOAR, 36th Sess., Supp. No. 40, at 166, U.N. Doc. A/36/40, Annex 18 (1977) (views adopted Dec. 29, 1977) [*Lovelace*].

⁷⁷ *Indian Act*, R.S.C. 1970, c.I-6, s. 12(1)(b).

⁷⁸ *Lovelace*, *supra* note 76 at 1.

themselves’,⁷⁹ including the significance of cultural and familial connections to one’s overall identity. Most significantly, this decision helped lead to the introduction and implementation by the Canadian Parliament of Bill C-31, the main purpose of which was to reinstate Indian status to those who had lost it under the discriminatory provisions of the *Indian Act*.⁸⁰ Ultimately, in

⁷⁹ Margaret Jackson, “Aboriginal Women and Self-Government,” in John Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues* (Saskatoon: Purich Publishing, 1994) 181 at 182.

⁸⁰ *Ibid.* The amendments became part of the *Indian Act*, R.S.C. 1985, c. I-5. The significance of this bill for those Aboriginal women who had lost their status cannot be overemphasized. However, there has occurred among many Aboriginal communities great difficulty, and even inability, to maintain sufficient resources to cover the increased costs of new and returning Aboriginal members. In other words, Bill C-31 had the effect of increasing the financial burden on many Aboriginal communities who must now provide for those members who previously had been excluded. Consequently, some groups fought against Bill C-31, and therefore, have fought against the renewed rights of those Indian women who have been discriminated against. Consequently, many Aboriginal women are concerned that their rights will continue to be infringed simply within the climate of exclusion and subjugation that was created and fostered in Aboriginal societies through the implementation of Eurocentric values. This, in turn, is related to the much larger question of whether the Canadian Charter of Rights and Freedoms should be applied to Aboriginal self-governing arrangements so as to protect the rights of Aboriginal women. See Wendy Moss, “Indigenous Self-Government in Canada and Sexual Equality Under the *Indian Act*: Resolving Conflicts Between Collective and Individual Rights” (1990) 15:2 *Queen’s L.J.* 279 at 295-296; Joyce Green, “Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government” (1993) 4:4 *Const. Forum Const.* 110 at 110, 113; Mary Ellen Turpel, “Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women,” (1993) 6:1 *C.J.W.L.* 174 at 181; Kent McNeil, “Aboriginal Governments and the Canadian Charter of Rights and Freedoms,” in Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon, Saskatchewan: Native Law Centre, University of Saskatchewan, 2001) 215. See also Kent McNeil, “Aboriginal Governments and the Charter: Lessons from the United States (2002) 17 *C.J.L.S.* 73.

acting on *Lovelace* the Canadian government demonstrated that it concurred with the Committee’s decision.

Additionally, the relevance of the *Lovelace* case is demonstrated in the effect that international law can have on Canadian law. The case demonstrates the seriousness with which the United Nations Human Rights Committee viewed the violation of the rights in question, while the creation of Bill C-31 as the Government’s response indicated Canada’s acceptance of *Lovelace* and its provisions as set out by the United Nations Human Rights Committee.

(ii) Applying International Legal Norms: “Peoples” in Canada

Canada is both a member of the United Nations and a signatory to the *Charter of the United Nations* and relevant international covenants, such as the *ICCPR* and the *ICESCR*. Additionally, Canada supports the right of internal forms of self-determination for Aboriginal groups, as noted at the Commission on Human Rights Working Group on the *Draft Declaration on the Rights of Indigenous Peoples*:

Our goal at this working group will be to develop a common understanding, consistent with evolving international law, of how this right is to apply to Indigenous collectivities, and what the content of this right includes. Once achieved, this common understanding will have to be reflected in the wording of Article 3.

[T]he Government of Canada accepts a right of self-determination for Indigenous peoples *which respects the political, constitutional and territorial integrity of democratic states*. In that context, exercise of the right involves negotiations between states and the various Indigenous peoples within these states to determine the political status of the Indigenous peoples involved, and the means of pursuing their economic, social and cultural development.⁸¹

⁸¹ Commission on Human Rights, 53rd Session, *Statements of the Canadian Delegation* (31 October

This Canadian position was reiterated in 2000 at the Commission Working Group on the *Draft Declaration*, and it is still Canada's current position.⁸² Similar sentiments are evident in the "Statement of Reconciliation: Learning from the Past," which is part of a larger report entitled, "*Gathering Strength: Canada's Aboriginal Action Plan*," released by the federal government in 1997. The Statement, referring to the Aboriginal peoples of Canada, states:

For thousands of years before this country was founded, they enjoyed their own forms of government. Diverse, vibrant Aboriginal nations had ways of life rooted in fundamental values concerning their relationships to the Creator, the environment, and each other, in the role of Elders as the living memory of their ancestors, and in their responsibilities as custodians of the lands, waters and resources of their homelands. ... The Government of Canada recognizes that policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong country. *We must instead continue to find ways in which Aboriginal people can participate fully in the economic, political, cultural and social life of Canada in a manner which preserves and enhances the collective identities of Aboriginal communities, and allows them to evolve and flourish in the future.*⁸³

While the above quotation does not deal directly with the right of Aboriginal self-determination, it does demonstrate the attitude that the "collective identities" of Aboriginal peoples must be respected and safeguarded by the

1996), Statement on Article 3, the Right to Self-Determination (emphasis added).

⁸² Coulter, "Possibility of Consensus," *supra* note 39 at 4.

⁸³ Minister of Indian Affairs and Northern Development, *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: Public Works and Government Services Canada, 1997) at 4-5 (emphasis added).

Government of Canada. Arguably, when viewed together with the previous quotation made by the Canadian delegation at the Commission on Human Rights Working Group, the position of the Government of Canada becomes clear with regard to the right of Aboriginal self-determination. In light of these statements, it would appear that the Government of Canada supports Aboriginal self-determination, however, it must be *internal* in nature, while respecting the territorial integrity of Canada.

Moreover, it is argued that Canada views as important the adoption and support of international legal norms as they relate to Aboriginal peoples. It is seemingly apparent from the above statements that Canada recognises Aboriginal populations as constituting "peoples" with internal self-determination rights, as per the emerging standards of international law. However, the definition of Aboriginal populations as "peoples" in the Canadian context is still vague. As discussed earlier in this paper, there is no precise formal definition of "peoples" or of who constitutes "peoples," either under international law or in the Canadian context. Yet, a further-developed definition of "peoples" would be useful in clarifying and solidifying the place of Aboriginal peoples in Canadian society as "peoples" and "nations" with a right of self-determination.

(b) Canadian Legal Analyses of "Peoples" and "Self-Determination"

In addition to a small number of relevant judicial decisions, the *Royal Commission on Aboriginal Peoples (RCAP)* offers important insight into Aboriginal populations as constituting "peoples" with a right of self-determination. The following discussion will review some of the central arguments made by the *RCAP* to this effect, in addition to undertaking a legal analysis of two central judicial decisions related to the subject. The purpose herein is to develop a more advanced, concrete definition of how to define Aboriginal "peoples" in the Canadian context in order to allow for greater ease in applying a right of self-determination beyond the international arena, in the Canadian context.

(i) Royal Commission on Aboriginal Peoples: Defining Aboriginal Peoples

One of the central sources dealing with the issue of defining Aboriginal communities as constituting “peoples” is the *RCAP* Report, released in 1996. Volume 2, entitled, “Restructuring the Relationship,” assesses various factors which can help to determine which Aboriginal peoples in Canada can be classified as “peoples” with a right of self-determination, thereby providing some insight into defining “peoples,” more generally, within the Canadian federation.⁸⁴ For instance, the *RCAP* Report asserts the basic premise that Aboriginal peoples are nations vested with self-determination powers.⁸⁵ The *RCAP* Report clarifies this further in the following detailed quotation:

By Aboriginal nation, we mean a sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or group of territories. There are 60 to 80 historically based nations in Canada at present, comprising a thousand or so local Aboriginal communities.

Aboriginal peoples are entitled to identify their own national units for purposes of exercising the right of self-determination. ...

The more specific attributes of an Aboriginal nation are that the nation has a collective sense of national identity that is evinced in a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland; it is of sufficient

size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner; and it constitutes a majority of the permanent population of a certain territory or collection of territories and, in the future, will operate from a defined territorial base.⁸⁶

While this definition is not necessarily complete, it does allude to issues of identity and culture as discussed in earlier statements regarding the international legal context. It also incorporates the relevance of territories and a permanent and “sizeable” population as important components of Aboriginal “nationhood.” It suggests that, by limiting the right of self-determination to sizeable Aboriginal nations, a balance is struck between very small Aboriginal communities and much larger Aboriginal populations:

Which Aboriginal groups hold the right of self-determination? Is the right vested in small local communities of Aboriginal people, many numbering fewer than several hundred individuals? Were this the case, a village community would be entitled to opt for the status of an autonomous governmental unit on a par with large-scale Aboriginal groups and the federal and provincial governments. In our opinion, this would distort the right of self-determination, which as a matter of international law, is vested in ‘peoples.’ Whatever the more general meaning of that term, we consider that it refers to what we will call ‘Aboriginal nations.’⁸⁷

The above statements provide significant descriptive detail about how to define Aboriginal “peoples.” Equally important, the *RCAP* Report demonstrates significant support for the recognition of various Aboriginal communities as constituting peoples with a right of self-determination.

(ii) The Quebec Secession Reference: Self-Determination and “Peoples”

⁸⁴ Of course, this neither denies nor diminishes the individual right of self-determination, also known as the right to life and liberty, which is accorded to everyone, provided that such a right is exercised within the confines of law (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 7).

⁸⁵ *RCAP*, *supra* note 7 at para. 543.

⁸⁶ *Ibid.* at paras. 454-455, 5757-5760.

⁸⁷ *Ibid.* at para. 5729.

Canadian common law, and in particular Supreme Court judgments, have not dealt with the right of self-determination of “peoples” to any great extent. While there are a few exceptions, the common law system has tended to treat these issues as falling under the general rubric of international law, and therefore, less relevant in Canadian cases. Despite this general inattention, it is important to assess two key rulings in order to demonstrate the ways in which international legal norms, as they relate to Indigenous peoples and the right of self-determination, have been replicated in the context of Canadian law. This, in turn, will confer further legitimacy on the claim that Aboriginal populations constitute “peoples” in Canada.

The *Quebec Secession Reference*⁸⁸ provides fairly recent insight into how the Supreme Court of Canada defines “peoples” and “self-determination,” both under international law and in the Canadian context. The applicable facets of international law were discussed earlier in this article, and therefore, there is no need to go into further detail in this regard. However, it is important to note the ways in which the Supreme Court has applied international law to the Canadian context in defining “peoples” and “self-determination.”

While the *Quebec Secession Reference* dealt with the potential for Quebec to unilaterally secede from the Canadian state, Aboriginal peoples were only briefly mentioned. In particular, the Supreme Court noted that in negotiating the potential for Quebec secession, after a clear majority of Quebecers vote on a clear referendum question in support of secession, the rights of various cultural and linguistic minority groups in Quebec would need to be taken into consideration. The Court deemed this as appropriate and fair to all of the parties affected by negotiations. While the Court recognised that the interests of Aboriginal peoples, many of whom live in the northern regions of Quebec, would have to be considered in the process of negotiations, this was the extent

⁸⁸ *Quebec Secession Reference*, *supra* note 52.

of attention given to Aboriginal peoples in this case. This was because the Court determined that Quebec could not unilaterally secede under Canadian constitutional law or international law, and therefore the specific questions raised by various Aboriginal groups were not relevant at that time, but instead, would become relevant under the above-noted conditions.⁸⁹

Nevertheless, the Court did spend a significant amount of time discussing the concept of self-determination and its portrayal as a right accorded to peoples. While the Court was looking at these issues as they relate to Quebec, it is asserted here that the Supreme Court’s definitions of “peoples” and “self-determination” are also applicable to Aboriginal peoples in Canada.

Specifically, the Court noted that “international law places great importance on the territorial integrity of nation states and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part.”⁹⁰ This statement is important in that it demonstrates one aspect of the relationship between international law and domestic law: international law defers to domestic law on questions of territorial integrity and jurisdictional issues.

The Court proceeded to note that “[t]he existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond ‘convention’ and is considered a general principle of international law.”⁹¹ However, the Court asserted that “international law expects that the right to self-determination will be exercised by peoples *within the framework of existing sovereign states* and consistently with the maintenance of territorial integrity of those states. Where this is not possible, in...exceptional circumstances..., a right of secession may arise.”⁹²

⁸⁹ *Ibid.* at paras. 96, 139.

⁹⁰ *Ibid.* at para. 112.

⁹¹ *Ibid.* at para 114.

⁹² *Ibid.* at para 122 (emphasis added).

The Court continued with a definition of who constitutes “peoples,” noting that there is uncertainty under international law. The Court’s definition of “peoples” is not overly detailed, but this is partly because to do so might restrict various conceptions of “peoples.” Instead, the Court clarified that a “people” might be just one portion of an entire population, and is often bound by various factors such as a common language or common culture.⁹³ In addition, it was specified that the right of self-determination as accorded to “peoples” has developed as a human right. The Court made the following important point:

The right to self-determination...is generally used in documents that simultaneously contain references to “nation” and “state.” The juxtaposition of these terms is indicative that the reference to “people” does not necessarily mean the entirety of a state’s population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate the remedial purpose.⁹⁴

Following these explanations the Court assessed internal and external forms of self-determination, as discussed earlier in this paper. While it is not necessary to repeat this information at this point, it should be noted that, despite apparent restrictions on external forms of self-determination, the Court determined that internal self-determination and territorial integrity are not fundamentally at odds with each other; they are not mutually exclusive:

While the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-

determination in terms that are normally attainable within the framework of an existing state. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a “people” to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.⁹⁵

In other words, the Supreme Court accepts the existence of various peoples *within* the Canadian federation. Aboriginal peoples arguably must be included within this framework, considering the fact that they have their own distinct and unique cultures, languages, practices, customs, traditions, laws, and histories, factors that, as discussed earlier, are often considered part of “peoplehood.”

Indeed, the Court has recognised the fact that Aboriginal peoples lived on the land in groups from time immemorial. In the *Van der Peet* decision the Court affirmed that

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. ...

[T]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.⁹⁶

⁹³ *Ibid.* at paras. 123-125.

⁹⁴ *Ibid.* at para. 124.

⁹⁵ *Ibid.* at para. 130.

⁹⁶ *Van der Peet*, *supra* note 12 at paras. 30, 33 (emphasis in original). The second paragraph of this

This statement serves to illustrate the distinct status attached to Aboriginal peoples by the Supreme Court of Canada. Additionally, it includes various crucial components which are relevant to defining “peoples.” For example, it emphasises that Aboriginal peoples were “living in communities on the land” and that they had “distinctive cultures.” These factors speak to the importance of territory, cultural practices, and community involvement, each of which is important in determining whether a group constitutes a “people.” It is argued, therefore, that the above illustrates the potential for Canadian common law to treat Aboriginal peoples as “peoples” with the right of self-determination.

At the same time, it is apparent from the above quotations that the Supreme Court is generally supportive of *internal* forms of self-determination. While the *Quebec Secession Reference* deals with self-determining powers for the Québécois, the Supreme Court is also speaking in general terms about the applicability of international legal norms to Canada regarding the right of self-determination for peoples. Consequently, it is argued here that the Supreme Court of Canada would support *internal* forms of self-determination for Aboriginal peoples if it were formally determined that Aboriginal populations do indeed constitute “peoples” or “nations.”

(iii) The Powley Decision

The *Powley*⁹⁷ decision helps to shed further light on how “peoples,” including Aboriginal peoples, are defined under Canadian common law. *Powley* dealt with an Aboriginal right to hunt for food as applied to Métis people under s. 35 of the *Constitution Act, 1982*. This case is a legal watershed because it represents the first opportunity for the Supreme Court of Canada to deal with the rights and inclusion of Métis peoples under s. 35.⁹⁸

quotation was originally stated by Judson J. in *Calder v. A.G.B.C.*, (1973), 34 D.L.R. (3d) 145 at 156.

⁹⁷ *R. v. Powley*, [2003] 2 S.C.R. 207 [*Powley*].

⁹⁸ More specifically, s. 35(2) delineates the Métis people as one of the Aboriginal peoples of Canada: “In this Act, ‘aboriginal peoples of Canada’ includes

At issue in *Powley* was subsection (1) as defining the relevant Aboriginal rights in the case, as well as subsection (2) as specifically including the Métis people as entitled to those rights. While these two subsections have been in effect since the patriation of the Canadian Constitution in 1982, s. 35 has remained largely ineffective for Métis peoples because Canadian governments have taken “the position that the Métis [have] no existing Aboriginal rights protected by s. 35, thereby refusing to negotiate or deal with the Métis people and their rights.”⁹⁹

This has changed with the *Powley* decision. Steve Powley and Roddy Charles Powley, members of a Métis community near Sault Ste. Marie, had been charged for hunting contrary to the Ontario *Game and Fish Act*.¹⁰⁰ However, both pleaded not guilty because they claimed an Aboriginal right to hunt for food in the Sault Ste. Marie locality. They argued further that subjection to the relevant provision of the *Game and Fish Act* was a violation of their rights under s.35(1).¹⁰¹ At the trial court level, the Superior Court level, and the Ontario Court of Appeal, the rulings favoured the Powleys.¹⁰² The ruling of the Supreme Court of Canada was also positive for the Powleys, reaffirming their Aboriginal right to hunt for food as Métis people.

The Supreme Court dealt with a few issues that are relevant for the purposes of this paper. These issues relate to the task of defining “peoples,” including more specifically, Métis peoples. While defining Métis peoples is potentially too limited to apply to all Aboriginal peoples due to the characteristic differences between the Métis and other Aboriginal groups, it is nevertheless fruitful to assess the Supreme Court’s approach to defining the Métis as “peoples.” The Court was careful to note that it

the Indian, Inuit and Métis peoples of Canada” (*Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11).

⁹⁹ Métis National Council, *Fulfilling Canada’s Promise: Métis Rights Recognized and Affirmed* (Ottawa: Métis National Council, 2003) at 1.

¹⁰⁰ *Game and Fish Act*, R.S.O. 1990, c. G.1, ss.46, 47(1).

¹⁰¹ *Powley*, *supra* note 97 at para. 6.

¹⁰² *Ibid.* at para. 7.

could not attempt to “enumerate the various Métis peoples that may exist.”¹⁰³ However, the Court did place sufficient emphasis on how to define a claimant as Métis for the purposes of entitlement to an Aboriginal right under s. 35(1).¹⁰⁴ The Court limited its analysis to “indicating the important components of a future definition [of Métis peoples], while affirming that the creation of appropriate membership tests *before* disputes arise is an urgent priority.”¹⁰⁵

There were three central aspects that the Court enumerated in defining Métis identity for the purpose of claiming rights under s. 35: self-identification, ancestral connection, and community acceptance. Self-identification requires that an individual identify as a member of a Métis community. However, such self-identification should not be of “recent vintage” or simply for the purposes of benefiting from a s. 35 right. In other words, genuine self-identification as a member of a Métis community is expected.¹⁰⁶ While ancestral connection does not require a minimum blood quantum level, it does require that an individual demonstrate that his or her “ancestors belonged to the historical Métis community by birth, adoption, or other means.”¹⁰⁷ Finally, in demonstrating Métis identity, it is important for an individual to be “*accepted by the modern community* whose continuity with the historic community provides the legal foundation for the right being claimed.”¹⁰⁸

¹⁰³ *Ibid.* at para. 12.

¹⁰⁴ The Court also focused on determining relevant Métis rights under s. 35(1) using the *Van der Peet* test, albeit adjusted to account for historical differences between Métis peoples and other Aboriginal peoples with regard to the time of contact with and settlement of European settlers. This new test was referred to as a “post-contact pre-control test” (see *Ibid.* at paras. 36-50). However, the scope of this paper does not require an in-depth legal analysis of this component of the case. Instead, only those aspects of the case that are relevant to defining “peoples” will be discussed.

¹⁰⁵ *Ibid.* at para. 30 (emphasis in original).

¹⁰⁶ *Ibid.* at para 31.

¹⁰⁷ *Ibid.* at para. 32.

¹⁰⁸ *Ibid.* at para. 33 (emphasis in original).

This last requirement was more vague, with the Court providing that the Métis should determine acceptance for themselves. However, the Court did emphasise the importance of involvement in the community, a shared culture, customs and traditions, and overall “contextual understanding” of the community.¹⁰⁹ Once again, the relevance of genuine involvement in and acceptance by a Métis community was argued as crucial in defining Métis identity.

In addition to outlining the requirements for recognition of Métis identity, the Court provided a general definition for the Métis Nation as a whole:

The term Métis in s. 35 of the *Constitution Act, 1982* does not encompass all individuals with mixed Indian and European heritage; rather, *it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, and recognizable group identity separate from their Indian or Inuit and European forebears. A Métis community is a group of Métis with a distinctive collective identity, living together in the same geographical area and sharing a common way of life.*¹¹⁰

This quotation, along with the defining features of individual Métis identity, demonstrate the importance of several factors which were discussed earlier as having relevance when defining “peoples.” For example, self-identification, ancestral connection, and

¹⁰⁹ *Ibid.* at para. 33.

¹¹⁰ *Ibid.* at 1 (emphasis added). For further discussion on the distinctiveness of Métis peoples as unique from other individuals with mixed Indian and European heritage, see John Giokas and Paul L. A. H. Chartrand, “Who are the Métis in Section 35?: A Review of the Law and Policy Relating to Métis and ‘Mixed-Blood’ People in Canada,” in Paul L. A. H. Chartrand, ed., *Who are Canada’s Aboriginal Peoples?: Recognition, Definition, and Jurisdiction* (Saskatoon, Saskatchewan: Purich Publishing Ltd., 2002) 83; Paul L. A. H. Chartrand and John Giokas, “Defining ‘The Métis People’: The Hard Case of Canadian Aboriginal Law,” in Paul L. A. H. Chartrand, ed., *Who are Canada’s Aboriginal Peoples?: Recognition, Definition, and Jurisdiction* (Saskatoon, Saskatchewan: Purich Publishing Ltd., 2002) 268.

community acceptance, along with a shared “common way of life” and “geographical area,” accentuate community, collective identity, and culture. In addition, the importance of territory is apparent, while the overall emphasis on community ultimately includes communal activities such as customs and traditions. These aspects are strikingly similar to those included in Daes’ definition of “peoples” and to the definition of Aboriginal peoples as constituting “nations,” as discussed in the *RCAP* Report.

While none of these specifications constitute formal recognition of Aboriginal peoples as constituting “peoples,” they certainly allow for a more detailed, thorough conception of how Aboriginal populations, including the Métis, constitute “peoples.” This, in turn, supports the argument that, as “peoples,” Aboriginal peoples in Canada should have a right of self-determination, as provided for under international law.

4. CONCLUDING REMARKS: THE CASE FOR ABORIGINAL PEOPLES’ RIGHT OF SELF-DETERMINATION IN THE CANADIAN CONTEXT

Many Aboriginal people, including Métis people, live off-reserve, in urban centres, or away from their communities, and therefore, their attachment to a land base or shared territory may be uncertain. It becomes very challenging to define these people as constituting “peoples” if some sort of land base or territorial attachment is a requirement, as posited in several of the above discussions. In such circumstances, one option might be to look to national Aboriginal organisations or home communities to speak for one’s interests and to embody the right of self-determination. However, this option does not deal with other issues such as isolation from one’s community, difficult personal circumstances, loss of culture, loss of language, or other factors which may diminish the likelihood of involvement in one’s own Aboriginal group. Consequently, even the best attempts at defining Aboriginal “peoples” with a right of self-determination may fall short, ultimately excluding individual members for a variety of reasons. This serves to demonstrate the complexity of these issues.

Nevertheless, this article has shed light on a number of important issues relating to the difficult task of defining Aboriginal “peoples” with an accompanying right of self-determination. The form that the right of self-determination should take has been evaluated, ultimately demonstrating that *internal* forms of self-determination are largely workable *within* nation states. This does not preclude the right of *external* self-determination for peoples under certain circumstances, but this issue was beyond the scope of this paper.

This article has also discussed various approaches to defining “peoples” under international law, with an eye to determining whether Indigenous groups qualify as “peoples” entitled to the right of self-determination. Various assertions have been made supporting the claim that Indigenous groups are indeed “peoples” with a right of *internal* self-determination. International law has gradually started to define Indigenous peoples as constituting “peoples,” and therefore, as entitled to a right of self-determination. However, this gradual acceptance is by no means formal. It is still developing, and there is still a great deal of debate surrounding the issue.

Progress has also occurred in the Canadian context, but legal recognition of Aboriginal groups as constituting “peoples” has not yet occurred, whether through statute law or common law. At the same time, while the Government of Canada has recognised an internal right of self-determination for Aboriginal peoples, it has not taken a formal stance on Aboriginal peoples as constituting “peoples,” and it has not been determined *which* groups constitute “peoples.” The Supreme Court of Canada has provided some insight into who constitutes “peoples,” but it has not yet defined which Aboriginal peoples might constitute “peoples.” Further, the *RCAP* Report has provided additional insight into these issues; it recognises the status of Aboriginal peoples as constituting “peoples” with the right of internal self-determination. In light of all of these claims, it is argued here that Aboriginal peoples in Canada do indeed constitute “peoples,” entitled to the right of self-determination within the context of the Canadian state.