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## Albexit/Wexit/Albwexit and the Rights of Indigenous Peoples

**By:** Robert Hamilton and David V. Wright

**Matter Commented On:** Secession by Alberta or Western Provinces

Talk of western alienation has been on the rise over the past year, reaching a point where notions of secession by one or more western provinces is a daily focus of headlines (see e.g. [here](#) and [here](#)) and social media threads. Most recently, this is visible in the #wexit [hashtag](#) that has been circulating since the re-election of the Liberal government. While the specifics around secession are thin, a reasonably representative version can be found in an [op-ed](#) penned by Dr. Jack Mintz in the Financial Post late last year. His version of Alberta separatism is a decent starting point for analysis of the matter, though we note that his focus was on “Albexit” as opposed to “Wexit”. Dr. Mintz was riding the prevailing winds at that time, which have only seemed to intensify. His argument, put briefly, is this: Alberta would benefit significantly from secession and, while Alberta leaving the federation may seem unlikely, so too did Britain leaving the EU until it voted to do so. If it happened there (in principle), he reasoned, what’s to say it can’t happen here. We ask, then, is this a tenable argument? Setting aside [complications](#) apparent in the final Brexit steps, does the Wexit or Albexit idea withstand scrutiny?

In recent days, several commentators have pointed to the constitutional challenges of provincial secession (see e.g. [here](#) and [here](#)). Indeed, while the Supreme Court has held that a clear vote in favour of secession by one or more provinces would require the other partners in confederation to enter into good faith negotiations toward that end, a host of practical considerations make it incredibly difficult for secession to move forward on that basis. In our view, however, most discussions about Albexit and Wexit, including the views of Dr. Mintz, have completely and inappropriately omitted a fundamentally important dimension that significantly compounds the challenges associated with any proposed secession: the role of Indigenous peoples. As evidenced in these strong views expressed on social media, Indigenous peoples are well aware of the issue (see e.g. tweets [here](#) and [here](#)).

While this omission is troubling and problematic (and emblematic?) for several reasons, in our view, it is important to clarify that, from a *legal* perspective, any discussion of separation must contemplate the rights of Indigenous peoples and their role in the process.

The reasons for this are clear.

In Alberta, there are 45 First Nations in three treaty regions, 140 reserves, and approximately 812,771 hectares of reserve land (see “[First Nations in Alberta](#)”, Indigenous and Northern Affairs Canada). It is a similar situation in [Saskatchewan](#), which seems to be incorporated in most Wexit conceptualizations, where there are 70 First Nations across 7 treaty areas. From a

legal perspective, reserves are held by the Crown for the benefit of the First Nations. While Indigenous peoples hold a full beneficial interest in reserve lands, the underlying title is held by the Crown. Further, Indian reserves, like national parks and military lands, [are considered](#) federal Crown lands. While it is of course open to the federal government to negotiate a transfer of such lands to a province, this would be immeasurably more complex in respect of Indian reserve lands. This would not be a simple bilateral federal-provincial transaction; rather, it would involve the rights and interests of third party – i.e. the Indigenous peoples of Canada and their constitutionally protected rights - to whom the Crown owes a fiduciary obligation. Would the federal government cede the lands to a breakaway province or provinces? Perhaps more importantly, could the federal government do so without the consent of the Indigenous peoples concerned? Almost certainly not.

The federal government has a constitutionally entrenched authority to administer Indian reserve lands. While this authority has a problematic colonial legacy and continues to impose paternalistic federal oversight of Indigenous governance, any modification of this arrangement would require the consent of the Indigenous peoples concerned. Given the number of reserves at issue in any proposed version of Wexit, the practical challenges significant.

While we recognize that the Alberta Court of Appeal has held that the *Natural Resources Transfer Agreement* of 1930 transferred the underlying title in reserve lands to the Crown in right of the province ([Reference re: Constitutional Questions Act, 1981 ABCA 316](#)), the text of the NRTA [does not clearly support this interpretation](#) (as critiqued in detail by [Richard Bartlett in the Alberta Law Review](#), at 254) and the court's opinion was provided in a non-binding reference case (and to our knowledge no courts in other western provinces have addressed the issue). Regardless of who holds underlying title, however, there is no ambiguity that the federal government holds administrative authority under the Constitution. Section 10 of the NRTA states:

“All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada”

Further, the same section of the NRTA states that:

“the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.”

There is, in other words, a constitutional basis for the federal government to require prairie provinces to transfer provincial Crown lands to federal administration in order to ensure that treaty rights may be effectively exercised.

This brings us to the broader legal context of a potential secession, a context which implicates domestic, international, and Indigenous law.

Domestically, the Supreme Court has repeatedly held that the Crown has a duty to act honourably and with integrity with respect to Indigenous peoples (see e.g. *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005 SCC 69](#), at para 33). The Crown's centuries' old obligations to Indigenous peoples, given formal constitutional recognition in 1982, place constraints on how secession might unfold. When 'Aboriginal and Treaty rights' were 'recognized and affirmed' in 1982, the Crown could no longer extinguish the rights of the 'Aboriginal peoples of Canada'. While Canadian courts have determined that these rights may be infringed, extinguishment is off the table. If Alberta (and other provinces or portions or provinces) were to become a sovereign state, the Canadian government would have no jurisdiction within its borders. It would therefore be unable to uphold its obligations to Indigenous peoples in the separated territory. Aboriginal rights in Alberta would, at least vis-à-vis the federal government, be extinguished. The only way Canada would be able to legally agree to secession, then, would be if there were guarantees in place ensuring that Alberta would respect the rights of Indigenous peoples to the same extent as they are at Canadian law (we set aside for the moment critiques on the adequacy of such) and if Indigenous peoples agreed to this modification in the relationship. The Crown cannot unilaterally decide to divest itself of its obligations or transfer them to another government.

The Supreme Court of Canada made clear in the Quebec [Secession Reference](#) (1998 CanLII 793 (SCC)) that unilateral secession would be unconstitutional. Rather, there is an obligation on all parties to confederation to negotiate if one party expresses a democratic will to modify the constitutional arrangements in which they co-exist. While the Court, speaking in a context that is now 20 years past, problematically construed Indigenous peoples as 'cultural minorities' rather than 'peoples', in today's legal context it is hard to see how such negotiations could exclude Indigenous Peoples. The federal [Clarity Act \(SC 2000, c 26\)](#), which sought to outline how secession might occur on the basis of the Court's decision, requires that Indigenous peoples have a voice in the process (s 1(5)) and that the "rights, interests and territorial claims of the Aboriginal peoples of Canada" be addressed in the negotiations (s 3(2)). More broadly, concerns of Indigenous communities would be important in determining, for example, whether a referendum evidenced "a clear expression of the will of the population of a province that the province cease to be part of Canada." Beyond requirements set out in the *Clarity Act*, the duty to consult and accommodate would also need to be discharged by the Crown. Given the well-documented complexities of the Crown fulfilling its consultation and fiduciary obligations in circumstances involving major projects and multiple First Nations, the nation-to-nation Crown-Indigenous engagement on an issue of this magnitude is daunting indeed.

International law would also play an important role. First, any proposed secession would, if the Quebec *Secession Reference* is correct, be determined by international rules governing state secession. Second, the international rights of Indigenous peoples would have to be considered. The right of self-determination, recognized in the [United Nation Declaration on the Rights of Indigenous Peoples](#), for example, would be highly relevant. The Canadian government has committed to [full implementation](#) of UNDRIP, a commitment which may soon have a legislated basis, assuming that Trudeau follows through on his [election commitment](#) (which might build on

the architecture in [Bill C-262](#) or in the recently tabled [British Columbia UNDRIP implementation bill](#)). Notably, UNDRIP states:

#### Article 3

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

#### Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders. (emphasis added)

Each of these provisions would complicate any attempt to secede without the agreement of Indigenous peoples.

At both domestic and international law, then, Indigenous consent would likely be required as a firm precondition to Albertan or Western secession. That is not to say that Indigenous peoples would not agree to it, and it's certainly not our place to contribute views on that front. To be sure, there is no reason to suppose Indigenous peoples have, or should have, a particular loyalty or attachment to Canada. But we can be sure that they would demand rights recognition at least on par with what is recognized in Canada now. Further, Indigenous peoples would presumably want assurances that their own internal legal systems would be respected (if not further revived) in any transition. Indeed, their decisions regarding secession would be guided by those legal traditions, including their understanding of the treaties with the Crown.

For all these reasons, it is reasonable to think that Indigenous peoples would expect to be full negotiating partners in any movement toward Albertan or Western secession. Given these legal realities, it is remarkable that public figures discussing secession haven't acknowledged this fundamentally important dimension in any meaningful way.

Of course, there is more to the separatism picture, including on economic and political fronts, as well as other legal dimensions. We will not dive deeply into these aspects here, but several thoughtful reactions to the Albexit and Wexit proposals stand out, all of which counter an apparent central assumption of those promoting Wexit - that it would be a beneficial move and relatively simple to achieve. Constitutional law scholar Eric Adams, for example, pointed to domestic jurisprudence regarding secession, [calling separation "next to impossible"](#), and suggesting it would require complex "constitutional unwinding" that would introduce "certain amount of chaos". On the political and public discourse front, Jen Gerson weighed in with a helpful [parsing of the complicated misunderstandings](#) between Alberta and Ottawa and issued a level-headed call for everyone to "cool our jets". And from an economics perspective, just this past week Trevor Tombe [characterized separation](#) as an "empty threat" and offered several suggestions focused on enlarging federal health and social transfers and adjusting the fiscal

stabilization programs as a way to steer focus away from frustrated talk of separation and equalization payments.

There's also the small matter of Alberta's landlocked status and North American energy market realities, as covered in Markham Hislop's [Energinews column](#). There seems to be little to support for the idea that Alberta-the-country would have more success getting pipelines built than Alberta the province.

None of these issues, though, are as intractable or challenging from legal or practical perspectives as the question of Indigenous peoples' role. This is why it is so surprising to see minimal mention of the matter in today's discourse (if we can call it discourse). From the tone of most discussions, one would surmise that any outstanding issues could be easily resolved. As we've tried to outline briefly here, the legal and political complexities of Alberta's secession from Canada would rival those of anywhere else in the world once the role of Indigenous peoples and the federal government's constitutional obligations are taken into account. Ignoring that reality while touting perceived benefits of secession in the current tinderbox political context does little to constructively advance the discussion (let alone soothe today's oft-cited concerns of [investor certainty](#)). It also does little to inspire confidence that important policy discussions can be had without reviving counterproductive - and destructive - colonial tendencies.

In a 1929 decision, Justice Patterson of the Nova Scotia County Court had the opportunity to discuss the French cession of the Maritime Provinces to the British in the 1713. In considering the nature of the treaties signed between the Mi'kmaq and the Crown, he held:

“the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.” (emphasis added)

Thankfully, jurisprudence in Canada has come a long way since and continues to evolve. But implicit in suggestions of Wexit and Albexit that do not account for the central role of Indigenous peoples is a denial of Indigenous peoples' political agency and their rights of self-determination. The only way to begin a conversation about the secession of a Canadian province without considering the role of Indigenous peoples is to ignore their place in the constitutional order. As Peter Hutchins [wrote](#) in 1995 in relation to the proposition of Quebec secession, “There are disquieting assumptions in some quarters that the peoples who comprise the Aboriginal peoples of Canada and their territories are to some extent chattels belonging to the Crown as sovereign to be exchanged, bargained away or even unilaterally seized with impunity.” To assume that Alberta could leave Canada and take Indigenous lands and resources with it without their consent is to hearken back to Justice Patterson's reasoning. Surely, this is not what is being put forward in today's conversation. Surely, everyone would be better off by taking a measured and informed approach. But that will take reasonable, constructive proposals and dialogue that includes Indigenous peoples and does not leap to secession pipedreams.

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