

The following article was added into the Volume 8.1 issue on 19th December 2011 because it was inadvertently omitted from the original version of the issue published on 1st October 2011.

MOHAWK DISPOSSESSION: CROWN PREROGATIVE, TREATY RIGHTS AND SELF DETERMINATION

Zia Akhtar

Grays Inn, 8 South Square, London

The Kanasatake Mohawks live on the borders of Canada on a strip of land which is not covered by the Indian Act 1876 and is not recognized as a federal reserve. They are one of the six tribes of the former Iroquois confederacy that was dissolved in the mid 19th century. The Mohawks live on the territory of Kahnawà:ke that carries no sovereign jurisdiction and cannot count on the protection of the Canadian federal courts. The land devolution is based on the colonial disposition that has set aside a parcel of real estate that disenfranchises the Mohawks. Their status has been undermined by the Intelligence Reform and Terrorism Act 2004 enacted in the US that had the effect of restricting their use of Haudensaunee passports and places restrictions that breach the Treaty of Amity Commerce and Navigation of 1794. The Canadian government can operate the device of Crown lands allowing them to evict Indian tribes as in the case of the Innuits in New foundland . The 1982 Constitution Act Section 35 has been interpreted to have an effect sui generis on the Indians but does not allow protection for the Mohawks to negotiate on the basis of the Treaty of Canandaigua and invoke the Great Law to achieve equal protection. The research shows that the Canadian government has extinguished title by diminishing the land base of the indigenous peoples which accounts for their economic and social disintegration in Canada. The policy of the federal government may be infringing the International Covenant of Civil and Political Rights. The issue for the Mohawks is whether the de facto independence of a Kanasatake haven can lead to its de jure sovereignty based on the correct interpretation of the treaties?

Key words: Territory of Kahnawà:ke; the Iroquois confederacy; Crown lands; Constitution Act 1982 ; Sue Generic rights; Great Law of the Gayanashogown; Extinguishment of aboriginal title; International Covenant of Civil and Political Rights; Right to self determination.

Introduction

The Mohawks in Canada are in legal imbroglio because of the manner in which their dispersal occurred at the end of the American Revolution and their incorporation into the Canadian federation. The 1867 Constitution Act brought them under Canadian control and their enclave was recognized as public lands rather than as a First Nation reserve that excludes protection under the statutory regime applicable to native people in Canada. This impacts on their ability to seek redress in the federal courts or to travel with freedom as the US Intelligence Reform and Terrorism Prevention Act 2004 impinges on their strip of land. Their claim for recognition as a First Nation in Canada meets the objection of Crown lands that is a contentious prerogative of the government. They are excluded by the protection mechanism of the Constitution Act 1982 and continuing breaches of their rights under the Convention of Civil and Political Rights has rekindled the issue of the right to self determination.

The Mohawks are one of the six units of the former Iroquois Confederacy which includes the Oneida, Onondaga, Cayuga, Seneca and Tuscarora tribes. They were once part of the Haudenosaunee nation that lived traditionally in the north east of the continent overlapping the international borders. The issues that the Mohawks face revolves around the treaty that the Iroquois signed with the US on November 11, 1794, known as Treaty of Canandaigua or the Six Nations Treaty. This reinforced the terms of the US-UK Treaty of Amity, Commerce and Friendship of the same year that sought to provide the Native Americans the rights to move across international boundaries.

The Mohawks on the Canadian side of the frontier sided with the French in the subsequent Napoleonic wars by resisting the British forces in Quebec. In 1842 the British dismantled the Iroquois confederacy when Lord Durham, the Governor General produced the report on the Affairs of British North America. On its recommendations the legislative union of Upper Canada, Lower Canada and the outlying Provinces resulted in a confederation in 1867.

Under their present designation the tribe who live within the parameters of the Canadian border are located in the vicinity of Montreal, in the province of Quebec. It is from this group

that the Kahnawake, Kanesatake and Akwesasne Mohawks descend who comprise its territorial remit. There are two separate councils one tribal and one band that function within an established hierarchy of this Mohawk National Council of Kahnawà:ke who supervise the Mohawks in Canada. The MNC is limited in its jurisdiction to the Territory of Kahnawà:ke and their territory has not been accorded reservation status, unlike all other First Nations in Canada who fall under the provisions of the Indian Act 1876.

The rump of the Mohawks who live in the US are the Akwesasne tribal branch who reside over the border on the St Regis Reservation in New York State. This has led to a complex jigsaw of the Mohawks being not only dismembered but living under five separate foreign jurisdictions – Ontario, Quebec, New York State, US and Canada. The identity crises for the Mohawks has arisen because they have until recently been able to utilise their Haudenosaune travel documents to travel abroad but that has been restricted by the surveillance regime of the US Western Hemisphere Travel Initiative. This has brought an embryonic surveillance arrangement between the Department of Home Land Security in the US and the Border Agency of the Department of Public Safety in Canada that has increased security on the border.

In Encyclopedia of Canada's peoples., Multicultural History Society of Ontario, University of Toronto Press (1999) pg 63 Magocsi states :

In their emasculated national territory in Canada the Mohawks question the prescription of rights by the interpretation of the Constitution Act 1982 and raise the issue of their self determination. This Act designates the first nations recognized, as such, by the Indian Act in 1876 as status Indians.

The issue needs analysis because the 1982 Act has allowed the recognition of rights in land as sui generic, but it does not take account of Indian customs and aboriginal title to their lands. The inherent power of dispensing authority over land as a Crown prerogative has not been abolished that gives the federal government the right of eviction which it has recently exercised over the Innu people in Newfoundland Labrador.

It is the Mohawks' alienation from the Canadian federation that will determine the cause and effect of their claim. In order to be accorded the right to self determination the breach of their rights under international law by the federal government has to be evaluated. There is authority that states that the Canadian government has not respected the tribal laws in entering into treaties, they are construed insufficiently bilaterally and the instrument of treaty in Canada has extinguished the tribal title in return for providing rights by the operation of this device.

This article will explore the Mohawk's demand that their land, known as *Enniskó:wa* be declared sovereign. The issue is how that can be achieved when the Mohawks are dismembered and the framework of the Treaty of Canandaigua has not been respected that guaranteed them protection under their Great Law. The conclusion will take account of the breaches of Kahnawà:ke territory; the lack of redress against federal abuses; prerogative power of Crown lands; the Constitution Act 1982; the Crown in honour; and the treaty making powers of the government. It is in the context of the international rights that protect indigenous people which the Canadian government has infringed that the basis for their self determination will be argued.

Colonial disposition of land

The Mohawks were granted real estate for their use by the provision of the s. 91(24) of the North American Constitution Act, 1867. Their status is an anomaly because Canada has never accepted that Kanesatake lands are covered by this provision that laid the foundation of Canada as a confederation. The Canadian government has argued that as "Lands reserved for the Indians," they are designated under federal jurisdiction as "public property" under subsection 91 (1A) of that Constitution. As a result, the Mohawks, unlike other First Nations, have not had access to the land-related provisions of the Indian Act and they have been living as an entity whose legal status has been suspended since the foundation of Canada.

The division of land originates to pre confederation times when in 1717 there was a grant to the *Seigneurie du Lac des Deux-Montagnes (the Seigneurie)*, a religious order of the French

Crown.¹ The Sulpicians as the French order was known sold strips of land to private developers who constructed their own buildings on the landscape where the Mohawks lived cheek to jowl with the settlers in the province that was to be demarked as Quebec. The tribe was disgruntled by the continuing sale of the land to the descendants of the French settlers who had been sold title to the property by the pre-Confederation administrations.

However, the federal government in 1945 sought to resolve the conflict by agreeing to purchase the remaining Sulpician lands and by assuming the denomination's outstanding obligations toward the Mohawks. The Kanasatake Mohawks were allowed to live on the federal Crown lands when that year the government set aside an enclave for them which does not meet the criteria of an Indian Reserve designated for the First Nations. There are no legislative means to provide for local control and administration of these lands.²

The tribe were not consulted about this decision and did not consider it a final settlement of their claims. There was a conveyance in a 1945 transaction that created layers of privately owned properties and Mohawk residential districts within the suburb of Oka, and subsequent purchases by the federal government in the 1960s and early 1980s contributed further to the patchwork of properties in the same area.

This staggered environment mitigated against the Mohawk holdings unlike the *Indian Act* protected reserves which have a clearly defined boundary. The source of the modern dispute originated when in 1975, the Mohawks presented a comprehensive land claim, asserting Aboriginal title to lands that included the Seigneurie. The claim was rejected on the bases that the Mohawks had not possessed the land continuously since time immemorial,

¹ Conditions of the grant included the establishment of a mission within the Seigneurie for the indigenous population in the region; the settlement, created in 1721, included Iroquois (Mohawks) among the Aboriginal inhabitants, which is a source of frequent conflict between the Sulpicians and the Mohawks over ownership of Seigneurie lands, beginning in 1763. The title to land had been determined by the Quebec governor in early 18th century when he sold it to a Catholic seminary. The Mohawks claimed that this grant was intended for the seminary to hold the land in trust and that the Church had usurped it to grant themselves sole ownership rights. The Mohawk chief had petitioned for the Church to return this land and there had been armed confrontations, when in 1936 the seminary sold the remaining territory and vacated the area.
forums.canadiancontent.net/quebec/56761-expropriation.html

² In Canada, an Indian reserve is specified by the Indian Act 1876 as a "tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band." www.duhaime.org/LegalDictionary/R/Reserve.aspx

and that any Aboriginal title had been extinguished. Then two years later the tribe filed another land claim, but that too, was rejected in 1986 as not meeting specific claim criteria.

In 1990 there was a confrontation that drew international headlines between the Mohawks and the Canadian government, which happened when the town council in Oka planned to develop a golf course next to Kanesatake burial land. This was deemed as a trespass by the tribe and they mobilised a strong protest movement. The construction had begun in 1961 by the local authority on a portion of land over which they had assumed control and then started building a golf course adjacent to the Indian cemetery.

The Mohawk claim was rejected by the federal Office of Native Claims regarding their objection in 1988 and work began without consultation with the Mohawks. This was a trigger for conflict that gave cause for the Surete du Quebec (SQ) and the Royal Canadian Mounted Police (RCMP) to engage in a stand off with the Mohawks to dismantle the barricades that had been raised.

The siege came to an end in August 29, when negotiations led to the ending of the protest at the south shore of the St. Lawrence River, west of Montreal. However, while it compromised with the demand to freeze the construction the provincial government in Quebec rejected all further negotiations with the Kanesatake Tribal Council.³ After the crises was over there was an inquiry by the Committee in 1991 that recommended mediation in land use conflicts between municipalities and the Mohawk National Tribal Council. The federal government acknowledged long-standing problems over land utilisation by the Department of Indian Affairs who have stated an intention to negotiate the purchase of additional parcels of land in the immediate post-Oka period.

³ The Mohawks Warrior Society who led the siege in Oka has been defined in the Canadian Forces' counter-insurgency manual identified the Mohawk Warrior Society as an example of a domestic group that could use terror tactics to further its cause, largely because of its involvement in the Oka Crisis. Stewart Phillip, Grand Chief of the Union of British Columbia Indian Chiefs, denounced the inclusion of the group in the manual as an attack on natives' right to protest. "Forces' terror manual lists natives with Hezbollah." <http://www.theglobeandmail.com/servlet/story/LAC.20070331.TERROR31/TPStory/National> The Globe & Mail, 31 March 2007

However, the land purchases occurred without prior consultation with the Kanesatake community despite a Canada-Kanesatake Memorandum of Understanding in effect since 1994, stipulating that subsequent land purchases would occur after consultation. The Canadian government effectively declared that the Kanesatake Mohawks had no proprietary rights outside of federally purchased lands by promulgating the Kanesatake Interim Land Base Governance Act on 27 March 2001. This aimed to resolve the land claim but it merely created friction as the Tribal Council objected that parcels of land were still being sold out to private buyers by the Canadian government that was against the terms of the Memorandum of Understanding.

There is an agreement with respect to Kanesatake self governance that is encoded in the Interim Land Base transitional arrangement and it provides the Tribal Council a recognized land base and governance jurisdiction that is approximate to those available to other First Nation communities. However, the Agreement specifies that it is not a treaty or land claim agreement under the section 35 of the Constitution Act 1982. The Kanesatake community ratified the Agreement on 14 October 2000, but as less than half the people voted the Interim Land Base Act has not been implemented on their territory, because the Kanesatake community do not accept their diminished land entitlement under the 1867 Act.⁴

Encroachment on Freedom of Movement

The status quo has led to disputes over jurisdiction and the right to enforce sanctions over the infringements by Canada over the Mohawks land. The source of discontent has several strands and they have been aggravated since the new security regime under the Intelligence Reform and Terrorism Act 2004 initiated by the US became effective. This has impacted on the Mohawks and the Native Americans generally who claim that it has breached the terms of the Treaty of Amity, Commerce and Navigation 1794 that designated a porous border for the Indians.

⁴ This has been described in Daniel R, *A History of Native Claims Processes in Canada, 1867-1979*,(1980) Research Branch, Department of Indian Affairs and Northern Development.

Article 3 states:

It is agreed that it shall at all times be free . . . to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America . . . and freely to carry on trade and commerce with each other. . . . [N]or shall the Indians passing or repassing with their own proper goods and effect of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, *unusual among* Indians, shall not be considered as goods belonging bona fide to Indians.

The war between the US and Britain in 1812 led to the signing of the Treaty of Ghent two years later with the US. This caused the later to reject the creation of a buffer zone in North America by the proposition that the Jay Treaty was still valid. It was on the basis of the presumption that the rights of the tribal nations could be restored by Article 5 in terms of “all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities”. There was a consolidated of the treaty of 1794 and manifested itself in the statutory law of the US but not Canada.⁵

The Canadian government have never incorporated the Jay Treaty into permanent statutory law, and instead, Canadian courts have been implementing the treaty provisions through the “aboriginal rights” doctrine that has suffered from the restrictive treatment of the Mohawks enclave. In order to claim the bridge to Canada, a U.S. Indian has to demonstrate a cultural or historical “nexus” to the specific area in Canada that they want to visit and this “nexus” requirement has been applied to Canadian Indians reentering Canada. It has disallowed the Jay Treaty privileges where a Canadian Indian did not cross in an area that their tribal group did not historically transverse.

⁵ In the U.S., the Jay Treaty provisions were incorporated into Section 289 of the Immigration and Naturalization Act (INA). 1952. It states: “Nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race. muse.jhu.edu/journals/new_centennial_review/v006/6.1saito.html

In their own enclave the Kahnawà:ke Mohawks have been subject to trespass by the Canadian authorities since the WHTI become effective on 14 June, 2008. There have been border patrols on the US-Canadian border in which the Mohawks have alleged physical mistreatment by the Canadian Border Services Agency (CBSA). The victims who have been assaulted have tried to bring charges but their locus standi excludes their ability to gain legal redress.

In Kahentinetha et al v. The Queen (2008) FCC T-1309-08 two elderly Mohawk women were allegedly attacked on Kawenoke Island, which is demarked as the tribe's land and left with serious injuries by the security forces, including the CBSA, Canadian Mounted Police department. They then appealed to the Office of Public Prosecutions in the Federal Court in Canada but the case was rejected for want of jurisdiction by the judge Madam Prothonotary Mireille Tabib who ordered the two women pay for Canada's costs by depositing \$19,460.00 with the Court plus all subsequent costs as they lived in Akwesasne and Kahnawake land "and are not ordinarily resident of Canada".⁶

The submission by the plaintiffs in Kahentinetha et al v. The Queen (2009) FCC 288-09 that these two districts on which the incidents happened was in the province of "Quebec" which is part of Canadian jurisdiction was rejected. The Court refused to accept the evidence of injuries and rejected the appeal filed under Section 48 of the Federal Court Act 2003, that included a Statement of Claim that there was "a reckless disregard for the safety and security of indigenous people at the Canadian border".

The Court dismissed the petition on April 7, 2009 on the same grounds that the women live outside the jurisdiction of Canada. The elderly Mohawk women's request that the Crown must fulfil their request to investigate the violence against them by the border guards was refused on the premises that the costs levied on them for trespassing by the previous court had not been met. Instead the victim Kahententinata was made to appear before the court on an assault charge arising from this incident. However, at the hearing the judge gave her an absolute discharge.⁷

⁶ Indigenist.blogspot.com/2009_09_01_archive.html

⁷ On January 21, 2011, Kahentinetha Horn pleaded guilty to charges of assaulting police officers

As the promulgation of the WHTI has caused the border controls to become more stringent the Canadian government has obstructed the Mohawks from availing the identity documents that they utilise as passports. The WHTI is the implementation plan for Section 7209 of the Intelligence Reform and Terrorist Protection Act of 2004. It requires generally that all travellers into the US must be documented with a passport or other WHTI designated document. The Mohawk Nation delegates who recently travelled in April 2010 to La Paz to attend the Alternative Climate Change conference were left stranded on their inbound leg of their journey. This was because Canada refused them permission to board the return flight without a valid Canadian passport that had not been necessary on the outbound leg of the journey.⁸

The Mohawk group had to circumnavigate their journey by flying via El Salvador, which allowed them transit while they negotiated their return. The Canadian position was that the three Mohawk delegates would not be allowed back into Canada until they procured an “emergency travel document”, by which they meant a passport issued by the embassy in the disembarked country. They were subjected to the process of applying to the Canadian counsellor department at the country of their transition to be able to return home.⁹

However, the Haudensaunee passport is a valid document that is accepted by the US – Canadian authorities. The Grand Council of the Haudensaunee had on 3rd March '08 approved it with their Documentation Committee as a travel document in accordance with the WHTI. This was accepted by the US Department of Homeland Security (DHS) and the Embassy of Canada as the new national identification card and passport. It seemed to the Mohawks to be a signal for stricter control of their movements and official interference in their affairs.

and obstructing justice. Her lawyer, Phil Schneider, and the crown attorney at Cornwall Court agreed that if she pleaded guilty to the obstruction, the assault charge would be withdrawn. This ensured she came out of the case in which she had alleged the assault and suffered a heart attack later without a criminal record. <http://www.mohawknationnews.com/wordpress/?m=201101Bsnorrell.blogspot.com2010./CanadapreventsMohawksfromreturninghome.html>

⁸

⁹ In July 2010 the British government refused to issue visas to the Iroquois athletics to come to the UK and participate in the World Lacrosse Championship. This echoed the demands of the Canadian government. It was deemed that they were to be allowed only with the necessary documentation of either the US or Canada issued passports. www.buffalonews.com/editorial-page/buffalo.../article90318.ece

Inherent powers of the Canadian government

The Mohawks face obstacles in exerting self determination on their land because the designated area belongs to the Crown, which is the equivalent of an entailed estate that is in the gift of the monarch and cannot be alienated. According to the constitutional convention, the estate cannot be sold unilaterally by the Queen, instead passing on to the next sovereign unless advised otherwise by the ministers of the Crown.

Though the monarch owns all Crown Land in the country, paralleling the "division" amongst the federal and provincial governments the land is sub divided, so that some lands come within the province and are administered by the provincial Crown, whereas others are under the federal Crown. About 89% of Canada's land area (8,886,356 km²) is Crown Land, which may either be federal (41%) or provincial (48%); and the remaining 11% is privately-owned.¹⁰

In Canadian law the right to land is still the domain of the Crown available to the indigenous people as a grant with the assumption that before the conquest of the Americas all land was terra nullius, a concept which accepts no prior legal owner and gives the colonial power a claim to its legal ownership. This precludes the indigenous people from stating that they have a pre-existing right to the land that should prevent them being dispossessed when the right is exercised by the Crown.

In Edouard Vollant et al v Sa Majeste et al (2008)¹¹ the Canadian government argued that the 100 Innu families who received eviction notices from the provincial government of Newfoundland Labrador did not have a prior right in land. There was a challenge in the Federal court in Montreal where the Innu representatives stated that their traditional homeland is owned by them under aboriginal title, and relied on the expert evidence from historians, archaeologists, and anthropologists to prove that this land belonged to indigenous people.

¹⁰ www.websters-dictionary-online.com/definition/crown%20land

¹¹ As reported in the Montreal Gazette newspaper on 11.6.2008

The Removal Notices directed Innu families to "remove all structures from Crown land and restore the site to its original conditions within 60 days of notice ". It stated that failure to do so will result in the Crown Lands Division demolishing their homes and charging the costs of demolition to the Innu families. If they did not comply with the notice, Innu people would be liable for fines of not less than \$1,000, imprisonment up to three months if they failed to dismantle their homes and other structures, such as ceremonial sweat lodges. The government also threatened to fine families \$25 for each day the structures remain on "Crown land."

They argued that the eviction notices amounted to serious violations of international human rights law and for them to be declared invalid. The submission by Innu attorney Armand MacKenzie who based on the following argument.

No one has the right to evict us. We were here long before Newfoundland Labrador was ever formed. It is a total disgrace in the international community for the provincial government to attempt to bully us into giving up our land so they can construct hydroelectric dams and make money off our resources. The threat of eviction puts a lot of stress on our elders, our children and our families. Where will they go? This is our homeland. We have sacred sites here, places where we pray and gather traditional medicines, places where we hunt, have ceremonies and bury our relatives. We're closely connected to our land, and it's important that we are able to live without fear of government agents harassing us." ¹²

In an article reflecting on the judgment S Newcombe (2008) in 'Northern Discovery, The Meaning of Crown Lands', Indian Country Today 27/6/08 contends that the Newfoundland Labrador government's assertion that these are Crown lands is comparable to the historical displacement of the First Nations and their ownership by Britain. He argues on the basis of how the original concept of Crown lands first came to the fore as a Canadian legal concept.

Newcomb states :

¹² <http://www.indianlaw.org/node/301/27/4/10>

The resulting conflict helps us to focus on the question of how title to sovereignty and title to land get constructed or created. "How was the category "Crown land" created, by whom was it created, and by what "right" was that category assigned to Innu or other indigenous lands?"

The concept of "Crown land" is a product of the European mind and, therefore, of the European imagination. Who created this concept in the place known today as Canada or Newfoundland Labrador? Clearly, it was those who claimed to have "discovered" North America in the 15th, 16th and 17th centuries, and who were authorized by the English monarchy in royal charters to represent the Crown on their voyages.

Thus, the contest between the Innu people and those who represent the political or governmental entity called "Newfoundland Labrador," such as Newfoundland Premier Danny Williams, is a struggle between opposing worldviews. On one side are those indigenous peoples who were originally living free in connection with their lands long before Europeans from England (or France) ever arrived to North America. On the other are those latecomers who used the power of the human mind, the power of categorization, to project their ideas onto indigenous lands by calling them "Crown land." Behind the projection of those mental categories lies the historical presumption that those lands belonged to the English or French monarchy, by right of Christian discovery, sovereignty and dominion.

As human beings, we typically use ideas whereby a part of something will stand for the whole thing. A "crown" is a symbol of the bestowal of royal authority, and therefore the part that stands for the whole monarchy or, for example, the constitutional system inclusive of the "Monarchy of Canada."

Granting of Suit Generis rights

The Canadian government promulgated the 1982 Constitution Act that has been called the Magna Carta, or the Charter of Fundamental Rights for the Indians. In order to evaluate if

the Act has any bearing on the issue of land entitlement for the Mohawks its two most important provisions have to be considered. Section 25 offers protection to 'status Indians' i.e. those recognised as such by the first Indian Act 1875. ⁶ This section merely reaffirms that the existing treaty rights of the Indians have not been adversely affected.

The Charter affirms the "aboriginal rights" under section 35 and in subsection 3 (1) it sets out "treaty rights" as including rights that now exist by way of land claims agreements, or may be so acquired. This leaves it open for the development of rights by expansion of the doctrine of rights in land. However, this section does not define the term "aboriginal rights" and whether they are inherent rights that the Canadian government has allowed in its capacity as the successor to the British government with plenary powers over the tribes.

This section has been applied by the Supreme Court of Canada that conceded aboriginal treaty rights as well as the constitutional responsibilities of the Crown towards indigenous peoples in recent case law. In a series of decisions that began after the Constitution Act came into force the courts have held that the rights in land exist for the tribe. The doctrine developed which leads to the ratio that the estate comes under the tribe's jurisdiction as long as they are exercising possessory rights on them.

The Charter affirms the "aboriginal rights" under section 35 and in subsection 3 (1) it sets out "treaty rights" as including rights that now exist by way of land claims agreements, or may be so acquired. This leaves it open for the development of rights by expansion of a sui generis doctrine of rights. However, this section does not define the term "aboriginal rights" and whether they are inherent rights that the Canadian government has allowed in its capacity as the successor to the British government with plenary powers over the tribes.

In interpreting this section the court held in R v Sparrow (1990) 1 S.C.R. 1075 that there is an exercise of an "inherent" aboriginal right, which existed before the legislation guaranteed and protected it by s 35. By "existing" is meant "interpreting flexibly, so as to permit their evolution over time". These were rights that were not "extinguished" prior to the introduction of the 1982 Constitution and could only be rebutted through an act that showed "clear and plain intention" on the part of the government to deny them.

J Dickson held in Sparrow at para 44 that Section 35 terms "recognized and affirmed" deemed to incorporate the government's fiduciary duty to the Aboriginal people which requires it to exercise restraint when applying its power of interference with aboriginal rights. It is implicit that the aboriginal rights are not absolute and can be encroached upon given sufficient cause by the government.

The effect of the decision is that the word "existing" in s 35(1) has created the need for the Supreme Court to define what Aboriginal rights "exist" and the ruling has fixed that before s 35 was entrenched into the Act these rights existed by virtue of the common law, and that they could be overridden by legislation. Prior to the 1982 Act the federal Parliament could extinguish aboriginal rights, whereas now it can no longer if that right still existed in 1982.

The principle of legal rights in land can be asserted as sui generic for the tribe which could be pleaded as fundamental rights under Section 35. In Delgamuukw v. British Columbia (1997) SCR 1010 the First Nations of Gitsan and the Wet'suwet commenced an action in 1984. It asserted ownership over 133 territories that spanned nearly 60,000 sq kilo of northwestern British Columbia. The BC provincial government defended this claim by stating that the First Nations lands were terminated.

The Supreme Court held they were not ended by the pre confederation government in Canada and that the aboriginal title claim can be differentiated by ordinary usage rights, because communal land ownership is a constitutional right of the tribe. It was deemed to connect them to indigenous culture, and, therefore was "sui generis". The judgment stated that the title could be alienated to the Crown and not to the private purchasers of land without notice on the same principle as the Royal Proclamation in 1763 was first instituted.

Chief Justice Lamer on paras 83, 87 in his ruling held that the exclusive right to the use and occupation of land for the aboriginal people means "the exclusion of both non-aboriginals and members of other aboriginal nations". According to aboriginal law, the tenure is an "exclusive" right that is capable of being shared with other aboriginal nations; but it is not controlled by the common law principles of exclusivity, as it is not individually parcelled out to exist as a bundle of rights in the land itself.

The *Delgamuukw* guidelines recognize aboriginal title as a generated system of land tenure that is protected by s. 35(1) of the CA ' 82; the meaning of sui generis tenure is broadly defined to include not only the physical possession of the land, but also the languages, laws, and customs that the tribe follows. However, this form of tenure does not borrow meanings from European, British or Canadian law or practice, and exists independently of any common law source of ownership by deeds.

Borrows et al in The Sui Generis Nature of Aboriginal Rights. Does it make a difference. Alta Law Journal Review, 1997, 9 at pg 12 state

Sui generic rights is a right of autonomy or self government that places a strong emphasis on the tribe's physical survival. That is implicit in the treaty making and that there are certain factors that the courts must observe in determining the sui generic rights. Therefore, in making sui generis determinations of Aboriginal rights, courts must look to notions of collective physical and cultural survival, as well as specific Aboriginal laws, customs and practices. Reading both these elements into the jurisprudence would serve as an more appropriate interpretive prism through which the courts may find resolutions to Aboriginal rights disputes.

The inherent meaning of aboriginal tenure (or title) was acknowledged by the Constitution Act 1982 in the ruling and it is not defined by any particular activity on land but in the property itself. In *Delgamuukw* the title is defined as a right of the tribe in land in British Columbia. Despite the decision the Crown prerogative is not abolished and the presumption in *Edouard Vollant* that the sovereign can evict is still protected on the basis that the tribe can only be a vendor to the government and not to a private purchaser. This is in real terms does not amount to granting land claims in perpetuity to aboriginal people as the title holders. The terra nullius doctrine is still the key tenet of aboriginal rights theory that restricts their underlying status as wards of the Canadian government.

Operation of a code of honour by the Crown

There is an obligation on the part of the government that has been highlighted in case law in Indian claims in the courts of Canada. This is a principle that predates the 1982 Act and is defined by the government's duty to consult with aboriginal peoples and accommodate their interests ranging from the assertion of sovereignty, the implementation of treaties and the resolution of outstanding claims. It takes into account the fiduciary duties that the state needs to discharge when it is acting in a discretionary manner.

In his tract The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples J. Timothy S. McCabe, Q.C. Butterworths (2009) states that the honour of the Crown is a central doctrine of Aboriginal law as it has been articulated by the Supreme Court and further shaped by other courts. His treatise considers the Section 91.24 of the *Constitution Act, 1867* and the rulings of the federal and provincial courts in relation to the honour of the Crown and its fiduciary duties to Aboriginal peoples. He ties them to the S 35 of the Constitution Act 1982 in terms of the civil liability and proceedings about land and other Aboriginal interests, including the measure of the Crown's conduct, variation of a trust arising from an earlier surrender, remedies for breach, and defences.

McCabe contends that "the fundamental objective of the modern law concerning Aboriginal peoples in Canada is reconciliation and that recent jurisprudence of the Supreme Court of Canada has identified the honour of the Crown and its fiduciary duties as legal concepts at the heart of the reconciliation imperative". This notion in the context of accommodation of Aboriginal interests has the potential for development as a consensus builder.

The foregoing view suggests that the Crown's fiduciary relationship with and ensuing obligations toward Aboriginal peoples have implications for the conduct of government policy in matters that engage Aboriginal interests. However, there is an indication that the scope of the obligations, and policy implications will be varied with the individual circumstances at issue.

In Wewaykum Indian Band v. Canada (2002)4 S.C.R. 245 the dispute was not based on section 35 of the CA and the Supreme Court clarified certain aspects of the Crown-Aboriginal fiduciary relationship. It set out the scope of obligations arising under the post-*Guerin* "fiduciary duty claims" that would not open a floodgate of litigation from a cross section of

complainants. The ruling declared the fiduciary obligations that the Canadian government was required to discharge that were not restricted to section 35 rights or to existing reserves.

They existed to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples and the fiduciary duty did not exist at large. There was an obligation and no general indemnity and the Crown's fiduciary duty varied and the interests of all the parties had to be considered and not just the Aboriginal litigants.

This decision suggests that the general principles of the honour of the Crown do not finally determine the precise scope of fiduciary obligations that may be owed to the Native Americans. The rulings that the Canadian courts make will be based upon a case-specific basis within the general directions set down by the Courts. This imprecise nature of the concept has been criticised in a recent case.

In R v Lefthand (2007) ABCA 206 the limitations of the concept were expressed by Justice Slatter of the Alberta Court of Appeal who stated that "the term honour of the Crown especially when used as an absolute, moralistic and inflexible connotation, does not accommodate the type of balancing and evolution of ideas, rights and concepts that is required in constitutional jurisprudence. The phrase can lead to conclusionary reasoning and results orientated jurisprudence if applied directly to legal issues".

The Mohawks in negotiating with the Canadian government cannot rely on the fiduciary relationship as Canada has not recognized their reserve under the Indian Acts. The Constitution Act does respect treaty rights but the Kahnawà:ke territory does not come under the jurisdiction with Canada. The need for Canada is to show that they are conducting their negotiations in the spirit of the treaty that they have signed with the Kanasatake Mohawks and then apply the rules that will provide a general indemnity to them vesting in them the rights of a sovereign nation.

Comparison with the doctrine of Australian aboriginal rights

It is worth noting that in Australia also invokes the prerogative of Crown lands but has developed the law of aboriginal land claims that takes it a step further in repudiating the terra nullius doctrine. The High Court of Australia in Mabo v Queensland (2) (1992) 175 CLR 1 gave a landmark ruling on the doctrine of aboriginal rights that overruled this notion. The implications of the constitutional treatment of the aboriginal peoples was considered in the context of the trust that was declared to arise in the favour of the Torres Strait Islanders. The Court held that the Islanders had a strong sense of relationship to the inlets and regarded the land as theirs to own in perpetuity.

Lord Brennan stated at (para 64) that the indigenous population had “a pre-existing claim in law, which remains in force except where specifically modified or extinguished by legislative or executive action.” He repudiated the concept that on the acquisition of sovereignty, absolute beneficial ownership of all the lands inhabited by native Australians vested in the Crown. Therefore, upon acquisition of sovereignty, he reasoned, the Crown “acquired not an absolute but a qualified title, that would be subject to native title rights where those rights had not been validly extinguished”.

The Court accepted that the common law land rights could co-exist with the law of native tribes which was a product of customary laws and traditions, though where there had been a valid grant of fee simple by the Crown the aboriginal title would be extinguished. In response to the *Mabo (2)* judgment Australian Federal Parliament enacted the Native Title Act 1993. This established a statutory definition of native title based on the assumption that native title has its origin and is given its content by the traditional laws acknowledged by and the customs observed by the indigenous inhabitants of a territory.

The Australian legislature determined that the courts could ascertain and define the legal position of landholders, and the processes that must be followed for native title to be claimed, protected and recognised through the courts. In a land rights claim indigenous people can seek a grant of title to land from the Commonwealth, state or territory governments. That grant may protect those interests by giving indigenous people legal ownership of that land.

The sequence of the cases reveal that the Canadian Constitution Act does not impact on the Tribal Council of the Mohawks, as it does not fall into the definition of a Reserve. The Mohawks are not covered by the provisions of the legislation that refers only to those tribes who reside inside Canada proper. Therefore, the notion of a sui generis right is not pertinent to them and they are not able to plead the non grant of a title to land as a breach of fundamental rights.

Mohawk Challenges under their Great law

The Mohawks are dependent upon the recognition by Canada of its international obligation of governing over a people who are not its inhabitants. This means that they are precluded from the protection mechanisms of the CCA, but also there is the issue of the extinguishment of title that the Canadian government enforces for providing the benefits of a treaty to Indian nations. This refers to Section 35 of the '82 Act that grants 'aboriginal rights' after the title has been abolished and the Indian lands are designated as reserves.

It means in effect that the condition of receiving treaty protection is the forfeiture of title by the Indian nations. This has a bearing on the Mohawks as former members of the Iroquois Confederacy who pay obedience to the tribal framework through the abstract legal world of the Great Law of the Peace of the Haudenosaunee. The *Gayanashogown* is viewed as their Constitution and fundamental law that is augmented by the Two Wampum Treaty, or *Guswhenta*, a covenant that is grounded in the Mohawks' first encounter with the Europeans. The significant provisions of the Great law are the following:

Article 74:

When any alien nation or individual is admitted into the Five Nations the admission shall be understood only to be a temporary one. Should the person or nation create loss, do wrong or cause suffering of any kind to endanger the peace of the Confederacy, the Confederate Lords shall order one of their war chiefs to reprimand him or them and if a similar offence is again committed

the offending party or parties shall be expelled from the territory of the Five (Six) United Nations.

Article 76:

No body of alien people who have been adopted temporarily shall have a vote in the council of the Lords of the Confederacy, for only they who have been invested with Lordship titles may vote in the Council. Aliens have nothing by blood to make claim to a vote and should they have it, not knowing all the traditions of the Confederacy, might go against its Great Peace. In this manner the Great Peace would be endangered and perhaps be destroyed.

The Two Row Wampum Treaty came into effect between the delegates of the Iroquois and representatives of the Dutch government in 1613, Covenant Chain Treaty in 1677 and Treaty of Canandaigua signed with the British in 1794. It is considered by the tribes of the Haudensaunee as the governing documents is their Great Law.

Lack of bilateral treaty rights

The device of a treaty as a proper means of determining the intention of the parties and of transferring Indian lands into federal jurisdiction has been evaluated in Mainville S (2007) 'Treaty Councils and Mutual Reconciliation Under Section 35', Indigenous Law Journal Vol. 6, 2007, University of Toronto Press pages 142-178. The author considered the instrument for expropriating Indian lands by examination of the Treaty between the British Queen and the Anishin (Ojibway) tribe of the north western Ontario by focusing on the balancing of the legality and legitimacy of the Anishin socio- political order.

This, she asserts in her introduction to Section 35 is an improper instrument for altering the framework of bands and invokes *Minna goziwin* ie sacred authority to provide a view of the Canadian government's lack of acknowledgment of tribal sovereignty.

Mainville states:

The object of Section 35 is the reconciliation of inherent Aboriginal and treaty rights. What cannot be forgotten is that during treaty making these inherent rights had been reconciled or given protection in an altered form under the new treaty order. (142)

She further argues that the treaty right has be viewed in the context of the suppression by the federal government of the tribe.

In our own historical context the treaty right to self government must be examined in light of over 133 years of oppression by the Canadian constitutional order. This is important as members of the judiciary are now better equipped to deal with the legal history of Aboriginal and treaty rights. (Ibid 158)

Section 35 in transforming native people into special rights bearing Canadian communities does not address the fundamental issue of tackling those tribes who are interested in exercising self government and do not restrict themselves to colonial era judicial interpretation. Mainville contends:

This must be restricted legally by deleting the Section 91 (24) and she considers this provision and the Indian Act as both “ illegitimate orders to the tribe” because she considers for the “ Indians its is the sacred bundle that is our constitution; it is our reason for being where we are and existing together as a people. (Ibid 171)

Her treatise’s main conclusion is that Section 35 does not respect the framework of a treaty and that the device has been used for the purpose of extinguishing aboriginal rights. This is in return for the protections offered by the Canadian government to the Indian nations based upon the terms of the treaty. She states

The tribal institutions of government that will take us towards this goal of the governance of ourselves or our territory in the right way and that it is the sacred laws that form the basis of all of our relations. (Ibid 178)

This leads to the assumption that there must be a broad framework of bilateral negotiations between the treaty councils and the authority of the federal government. It will achieve an agreement with the Mohawks that will respect rights that are civil, political and cultural. This can be done without the surrender of the aboriginal rights that guarantee the tribe its autonomy and precludes Canadian patronage.

Breach of International Conventions

The Canadian government in its trespass of Mohawks territory; imposition of travel restrictions and denial of redress in its courts seems to be in breach of its obligations under the International Covenant of Civil and Political Rights 1966. This legal instrument was ratified by Canada in 1976. Its preamble states:

The Covenant sets out a legal obligation on the parties to the Convention by its provisions under Part 1, Article 1 that states:

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

The Canadian government by forcing the expatriate Mohawks to procure a Canadian passport was acting in a manner that derogates from the ICCPR, and the para military attack on unarmed civilians on Kawenoke Island is an infringement of the Geneva Conventions. The absence of redress in the Federal Court is a breach of an essential human right. The land they live upon comes under the jurisdiction of the authorities in Canada, as it has mandate over the Mohawks whose Tribal Council is not recognised as sovereign.

Therefore, in adopting its position the Canadian government may be in breach of the Universal Declaration of Human Rights 1948. Article 2 states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

There may be a further disregard of Article 8 which provides for a legal remedy which breach the basic rights prima facie in any jurisdiction. This provision states that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

The scarce land base of the Mohawks is a leads to a lack of economic infrastructure and ability to purchase more land. The Canadian government in denying them due process rights and in procuring travel documents is condoning a policy of discrimination of Native Americans in Canada. The Canadian government has also been censured by its own governmental commission that it set up to investigate the disenfranchisement of the Native communities in Canada. This is discernable in the findings of the Canadian Federal Royal Commission on Aboriginal Peoples (1996) as set out in the article People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples. <http://www.ainc-inac.gc.ca/ap/pubs/rpt/rpt-eng.aspits>

It confirmed in its conclusions the following:

The Aboriginal people (in Canada) need much more territory to become economically, culturally and politically self sufficient. If they cannot obtain a greater share of the lands and resources in their country, their institutions of self government will fail. Without adequate lands and resources, Aboriginal will be unable to build their communities and structure the employment necessary to

achieve self sufficiency. Currently, on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction.

The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of aboriginal nations”.

This shows that the diminished land base of the Mohawk community in Kanesatake limits the development of their economic infrastructure in Canada. The government wants to enter into contract with commercial complexes owned by non Indians in their enclave and rather than dispense land to the Mohawks in the post Interim Land Base Act period the government has sold lands to the non Native people. The Kanesatake community has not been informed of all the developments that the Canadian government has entered into with all the parties.

Right to self determination

In proclaiming their right to an independent nationhood the Kahnawà:ke Mohawks may assert that the right to self-determination is a fundamental principle of international human rights law. This obligation is a prominent feature of the UN Charter, and appears in both the Preamble and in Article 1 and it can be transposed as an individual and collective right to "freely determine . . . political status and [to] freely pursue . . . economic, social and cultural development."

It must also be asserted that the principle of self-determination is generally linked to the decolonization process that took place after the promulgation of the United Nations Charter of 1945 and in the Mohawk case can be retrospectively applied to take effect since their incorporation into Canada in 1867. The Mohawks enclave of Kahnawà:ke may have a claim to statehood under the criteria in Article 1 of the Montevideo Convention of 1933. It has a permanent population, a defined territory, a government, and the capacity to enter into relations with other states. This principle has been asserted in the treaties that the Iroquois

Confederacy has signed with the foreign powers who have occupied the lands adjacent to their territories.¹³

The right to self-determination is regarded as a norm of jus cogens, which is the highest rules of international law and they must be strictly respected at all times. The International Court of Justice and the Inter-American Commission on Human Rights of the Organization of American States (OAS) have set a precedent that supports the principle that self-determination carries the legal status of erga omnes which by definition are obligations of a State that are owed to the international community as a whole and is considered a binding requirement.

In the opinion of the Chairperson of the UN Working Group on Indigenous Populations Mme. Erica-Irene Daes quoted by Ted Moses's *Invoking International Law* (1997) <http://www.gcc.ca/archive/article.php?id=65> she designates certain people as indigenous for the purposes of exercising self determination. These are based on the following criteria:

They are descendants of groups which were in the territory of the country at the time when other groups of different cultures or ethnic origins arrived there. Their isolation from other segments of the country's population they have preserved almost intact the customs and traditions of their ancestors which are similar to those characterised as indigenous; and they are, even if only formally, placed under a State structure which incorporates national, social and cultural characteristics alien to theirs.

In a research paper by Parker, K. (2000) [Understanding Self-Determination: The Basics](http://guidetoaction.org/parker/selfdet.html) the author defines the outcome of the de-colonization mandate as giving rise to two types of situations. These were the "perfect de-colonization" and the "imperfect de-colonization". She defines the principle of self-determination that arises in the de-colonization process that is perfect when under a colonial regime the people of the area are not control of their own governance.

¹³ The Right to Self-determination, U.N Doc. E/CN.4/Sub.2/404/Rev. 1, U.N Sales No. E.80.XIV.3 U.N Doc. E/CN.4/Sub.2/405/Rev.1, U.N. Sales No. E.79.XIV.5 (1980).

In these situations she states:

There is another sovereign, and illegitimate one, exercising control. De-colonization, then, is a remedy to address the legal need to remove that illegitimate power and once that is achieved there are no more issues left towards the devolution of power when the former colonial power vacates the territory.

However, there are circumstances when an imperfect decolonisation occurs. These are in four types situations which are, firstly, when separate States conquered by a colonial power were amalgamated into what the colonial powers frequently referred to as a "unitary" state. Secondly, these different segments of the population may agree to continue as a unitary State, but with a framework agreement. The third scenario is when the State may forcibly annex a former colonial people, but the effected peoples, the international community or both do not recognize this as a legal annexation.

In the final set of circumstances which apply in the situation of the Mohawks the international community may have even mandated certain procedures, as yet unrealized, by which the effected people are to indicate their choice regarding self-termination rights. Parker states that in this situation there is a small component part of a colonially-created "unitary" state that agreed to continue the unitary State but with no particular "op-out" agreements signed. There were either verbal or negotiated, written agreements about how the rights of the smaller (or in some situations weaker) group would be protected in the combined State. However, the smaller or weaker group then experiences severe curtailments of their rights over a long period of time by the dominant group and may lose the ability to protect its rights by negotiated means.

Parker then places this argument into context by stating:

“The sad fact is, that due to a legal principle usually referred to as "impossibility" - the European people were not obliged to cede land and power back to the American Indian and Oceanic peoples. Impossibility is those situations was in part related to the sheer numbers of colonizers”.

However, the impossibility argument can be refuted in the Mohawk case because they are on a strip of land that they designate as *Enniskó:wa* and they have their own National Tribal Council. Their rights have been recognised by treaty which they signed in accordance with their Great Law, with the colonial powers and that must have the force of international law. In that regard their exercise of self determination may be supported by the fact that they are one of six tribes of the former Iroquois Confederacy that was dispersed by pre confederation Canada and should now be granted this inalienable right.

Right for Quebec to succeed from Canada

The province of Quebec has an anomalous position in Canada where there is a French speaking majority and its right to succeed has often surfaced redefining the Mohawks pieces on the chessboard on the question of sovereignty. The legality of the Quebec's claim was dealt with by a sequence which began in an election victory of the Parti Quebecois whose representatives gained 41.37% of the vote in the 1976 provincial elections and formed a government. They held a referendum in 1980 to enquire if the government of Quebec should seek a mandate to negotiate autonomy in a framework of a confederation with Canada.

The referendum resulted in the defeat of the sovereignty option by a margin of 60% to 40%. The PQ was subsequently re-elected in 1981 promising not to hold a referendum but in 1982 the federal government with the agreement of all provinces except Quebec petitioned the Parliament in London to amend Canada's constitution for the purpose of changing the procedure by which the Parliament of Canada and the provincial legislatures could be altered by UK statutes.

In their findings Malcolmson P et al (2009) The Canadian Regime: An Introduction to Parliamentary Government in Canada, University of Toronto Press, pg 29 reveal that the enactment of the CCA '82 was opposed by the Quebec legislature but the federal government made two efforts to co opt the Quebec government to amend the Canadian constitution in 1987-1990 and in 1992. The PQ was re-elected in 1994 with an agenda for a second referendum and the National Assembly of Quebec adopted a bill relating to plans for

succession in the event of a victory. This prompted several legal actions by the opponents of the independence of Quebec who questioned the legality of secession. In 1996 when the PQ announced that they would hold another referendum it led to the Canadian Prime Minister Jean Chretien to seek a reference on the legality of a UDI for a Canadian province.

In Reference re Secession of Quebec [1998] 2 S.C.R. 217 the Governor in Council of Canada submitted the request for an advisory opinion to the Supreme Court of Canada to respond to the four specific questions. These were whether under the Canadian constitution the province of Quebec could effect its secession unilaterally; if international law gave the National Assembly, legislature, or government of Quebec the right to effect such a secession; if there is a right to self-determination under international law that would grant Quebec the right to effect the secession from Canada; and finally if there was a conflict between domestic and international law on the right of succession of Quebec unilaterally which law would take precedence?

The federal government argued that there had to be a constitutional amendment before a province could succeed under CCA section 45. If there was an attempt to succeed unilaterally it would violate the rule of law by ignoring the constitution and secondly it would violate Canadian Federalism through the ultra vires exercise of powers allocated to provinces. The Quebec government did not attend the hearing but the court appointed an amicus curiae to act on its behalf.

The Court heard Monsieur André Jolicoeur argue that succession was a political question and, therefore, outside the authority of the Supreme Court. He stated that the inhabitants of Quebec had a right to self-determination under the UN Charter. Their primary contention was the doctrine of affectivity that was part of the constitutional convention through its practice in other parts of the commonwealth and that recognition by other countries would validate their right to an independence statehood.

The court in its ruling stated that under the Canadian Constitution unilateral secession was not legal, but if the referendum result was affirmative then Canada would have to accept the succession of Quebec. It would have to be framed by incorporating the four fundamental tenets of the Canadian constitution which were Democracy, Constitutionalism and The Rule

of Law, Federalism, and Protection for Minorities. The Court rejected the international dimension by stating that international law "does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their 'parent' state."

It stated that under international law, the right to secede was meant for peoples under a colonial occupation and as long as a people had a purposeful existence, then the exercise of its right to self-determination within the framework of an existing nation state did not provide it with a right of succession. The Court supported its contention by recourse to the various international documents that support the existence of a people's right to self-determination that also contain parallel statements supporting the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states.

This must be read in the light of the opposition of the Mohawk National Council to the referendum and their clear intention not to support the independence of Quebec. This was expressed by the Kanasatake Mohawks who invoked the principles of the Two-Row Wampum treaty and showed their dissent by refusing to participate in the Referendum vote.

The Mohawks maintained their own right to self determination that is not contingent upon the Quebec government exercising its vote for succession. This was expressed by the Mohawk NC who stated the day after the referendum...

The agenda and priorities of the Mohawks of Kahnawake have not changed. Kahnawake Mohawks will continue to exercise our inherent right to self-determination in the areas of political, economic, territorial and cultural jurisdiction.¹⁴

The Mohawks protest was focused on the key document underpinning the PQ which is the called the A Bill Respecting the Future of Quebec ("Bill 1").¹⁵ There are two articles which were objectionable from their angle which were Articles 8 and 21. Article 8 effectively excludes the full-Indian ownership of any lands which reaffirms the federal position towards

¹⁴ *Distinct Peoples: First Nations* in Quebec. <http://www.kahonwes.com/iroquois/sokolyk.html>

¹⁵ An Act representing the future of Quebec www.sfu.ca/~aheard/bill1.html

the Mohawks. The second issue with the same provision is that there is no confirmation that the Native right to self-government is an inherent right rather than a delegated right. The principle of inherency has been accepted and confirmed by the federal government.

The objections towards Article 21 were that it seemingly is an oversimplification of a complex problem in the form that Quebec is assuming it can unilaterally take over all treaty obligations concluded with Canada. This will not be sufficient because the unilateral assertion of the province if it gained independence would not absolve Canada of its fiduciary duties and its treaty obligations. These guarantees will no longer exist to underwrite the ties with the Native peoples.

For its part the Canadian government has preempted the exercise of any further referendums by enacting the Advisory Opinion into law in the form of the Clarity Act 2000. The Act states in its preamble that if there is a vote for succession then there will have to be a constitutional amendment. It's laid down in rule 3(1) as follows:

It is recognized that there is no right under the Constitution of Canada to effect the secession of a province from Canada unilaterally and that, therefore, an amendment to the Constitution of Canada would be required for any province to secede from Canada, which in turn would require negotiations involving at least the governments of all of the provinces and the Government of Canada.

The Quebec legislature have responded by adopting its Order in Council 684-2010, (2010) 142 G.O. 2 (French), 3753 An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State, R.S.Q., chapter E-20.2. This provincial ordinance emphasizes the right to self determination in accordance with established principle of public international law. It proclaims the territorial integrity of Quebec and the right to determine its own future and if there are 50% valid votes cast in its favour.

Article 13 states: No other Parliament, or government may reduce the powers, authority, sovereignty or legitimacy of the National Assembly, or impose constraint on the democratic

will of the Québec people to determine its own future. However, the legal effect of such an action would be invalidated by the Supreme Courts' advisory opinion as the reference clearly purports to uphold the constitution as the supreme source of law in Canada. Moreover, the Native tribes and particularly the Mohawks who view their treaty relationship with the Canadian government would not be party to the succession of Quebec from Canada.

Conclusions

The enclave of the Kanesatake Mohawks on the strip of land in Canada does not confer on them the protection of a federal reserve. They are outside the remit of the Indian Act 1876 and self governed by National Tribal Council which deprives them of the benefits provided to other First Nations. Their position is determined by the North American Act 1867 that has proclaims that they come under federal jurisdiction, although Canada regards their territory as 'public land'. It has brought about a clash of jurisdiction by the various layers of authority that exist superimposed upon another. However, as the US inspired WHTI's effect is to render the borders non porous against the guarantees of the Treaty of Amity and Friendship of 1794 this disputes have re surfaced the discontent and denial of the Mohawks.

The Mohawk territory of *Enniskó:wa* is not inviolable and the Canadian government has never signed the provisions of the Jay Treaty into statutory law. This is much to the disadvantage of the Mohawks who have brethren on the other side of the American border residing on the St Regis Reservation. As the border patrols have increased there has been friction and led to assault charges but it is the Mohawks who have been punished and the security patrols have escaped indictments.

The cause and effect is the lack of jurisdiction of the Mohawks and their grievances have been aggravated by the denial of their identity documents which served as passports to access travel to other countries by Canada. This has led to the cancellation of journey for Mohawks athletics to the UK and could be termed as a breach of the International Covenant of Civil and Political Rights which the Canadian government has ratified.

The colonial devolution of land that resulted from the conquest of Quebec and then its division by British has had profound effect on the residence of the Kanasatake Mohawks. Their status is an anomaly because Canada has never accepted that their lands are covered by the Constitution Act 1867, and therefore, the provisions of the Indian Act which governed the relations between the federal government and the First Nations have not been applied to the Mohawks.

There needs to be an appraisal of the Crown lands theory in Canada which is part of the monarch's prerogative power to declare the lands occupied by the Indians as a grant then as a right. They can usurp the title holders in land as the *Edouard Volland et al* case illustrates which has caused the Innu people to be vacated from their ancestral homes in New Labrador. Their argument that they have lived since time immemorial or since before the pre confederation times has not been accepted.

In order mitigate its effects there is the Honour of the Crown doctrine in Canada which has been developed by the courts to fuse the processes of treaty making and treaty interpretation. This is discretionary and its interpretation seems to reflect a case specific approach. It has served as a tool for negotiation and for the Crown to show reasonableness and fiduciary principles in discharging its obligations towards the Indians.

The Constitution Act 1982 that is deemed as the Charter of Fundamental Rights for the Indians provides the dispensation of benefits to tribes from section 35. This provision confirms the ancient rights by treaty and those rights have been recognised by the Supreme Court as *sui generis*. The issue with this provision is that while it confers rights in land it is of limited application as the Mohawks are outside the remit of this Act by being excluded for the purposes of protection by the Indian Act 1874.

However, as an instrument of affirming treaty rights Section 35 has not accorded the Indians respect as equal parties under their own laws. It has been deemed as a prescription for the forfeiture of treaty rights. Mainville findings show that the provision is not the ideal framework for according the treaties of the Indians as they are governed by customs that respect lineage and sacred rights. The Royal Commission on Aboriginal Peoples has

determined that the consequence have been the disenfranchisement of the Native Americans in Canada. It has conveyed a derogation of power to the Canadian government as the lands the First Nations reside may be deemed Crown lands and treaties have served to deny them title.

The Mohawks do not have the exclusive jurisdiction over their Kanesatake haven and have to defer to the Canadian government. In trying to change the judicial status quo the Mohawks can seek the protection of treaty rights under international law and raise the issue of self determination as an emergent nation- state. They have rejected the option of living in Quebec if the province were to succeed from Canada. They value their inherent rights under the Great Law and the treaties that they have signed with the Crown. They deserve to be accorded the right of deciding their own future as a former Confederacy, which was once united than as a tribal entity who are cornered in their own homeland.

References

Borrows J and Rottman L, The Sui Generis Nature of Aboriginal Rights. Does it make a difference. *Alta Law Journal Review*, 1997, 9 at pg 12

Canadian Federal Royal Commission on Aboriginal Peoples (1996) as set out in the article People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples. (1996) <http://www.ainc-inac.gc.ca/ap/pubs/rpt/rpt-eng.aspits>

Daniel R, A History of Native Claims Processes in Canada, 1867-1979,(1980) Research Branch, Department of Indian Affairs and Northern Development.

Delgamuukw v. British Columbia (1997) SCR 1010

Edouard Vollant et al v Sa Majeste et al (2008) Montreal Gazette

Kahentinetha et al v. The Queen (2008) Federal Court of Canada file no T-1309-08 www.mohawknationnews.com/.../singlenews.php?en...

Kahentinetha et al v. The Queen (2009) Federal Court File no T-288-09 www.canadianaboriginal.ca/index.php?option=com...task...

R v Lefthand (2007) ABCA 206

Mabo v Queensland (2) (1992) 175 CLR 1

P Malcolmson and R Meyers The Canadian Regime. An Introduction to Parliamentary Government in Canada. . Page 27. University of Toronto Press 2009

Magocsi, P R (1999) Encyclopedia of Canada's peoples., Multicultural History Society of Ontario, pg 63. University of Toronto Press.

Mainville S (2007) 'Treaty Councils and Mutual Reconciliation Under Section 35', Indigenous Law Journal Vol. 6, 2007, pages 142-178, University of Toronto Press.

J. Timothy S. McCabe (2009) The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples, Butterworths

Moses T (1997) Invoking International Law, Ted Moses
<http://www.gcc.ca/archive/article.php?id=65>

Newcombe S (2008) 'Northern Discovery, The Meaning of Crown Lands', Indian Country Today 27/6/08

Order in Council 684-2010 dated 18 August 2010, (2010) 142 G.O. 2 (French), 3753.

Parker, K. (2000) Understanding Self-Determination: The Basics.
guidetoaction.org/parker/selfdet.html

R v Sparrow (1990) 1 S.C.R. 1075

Reference re Secession of Quebec [1998] 2 S.C.R. 217

Royal Commission of Aboriginal Peoples. (1996) Treaty Making in the Spirit of Co-Existence. Chapter. 'An Alternative to Extinguishment'.

Wewaykum Indian Band v. Canada (2002) 4 S.C.R. 245