

# REVIEW ARTICLE

## SELF-GOVERNMENT FOR CANADA'S ABORIGINAL PEOPLE: A CRITICAL COMPARATIVE ANALYSIS DEALING WITH IT'S INHERENT NATURE

Clark, Bruce: *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada*. Montreal: McGill-Queen's University Press, 1990, xxv + 259 pp. ISBN 0-7735-0767-1, Cloth \$39.95.

Green, L.C.: Claims to Territory in Colonial America, in L.C. Green and Olive P. Dickason: *The Law of Nations and the New World*. Edmonton: University of Alberta Press, 1989, xiii + 295 pp. ISBN 0-88864-129-x, Cloth \$31.95.

### Introduction

Canada's Aboriginal people have certain rights which have been discounted or ignored since European colonization began in the 15th century. Only in the last decade have protests and political lobbying efforts begun to effect changes in how the Canadian public, courts and politicians perceive Aboriginal rights under the Canadian constitution and common law.

The inherent right to self-determination or self-government, as opposed to a delegated right, was one of the issues debated in the latest round of constitutional negotiations. This review article examines and compares the interpretations of the doctrine of Aboriginal self-government expressed by Mr. Bruce Clark and Professor L.C. Green.

### Aboriginal Self-Government as a Delegated Right

In the text *The Law of Nations and the New World*, Professor L.C. Green looks at the legal aspects of Aboriginal rights to land and to sovereignty in his paper entitled "Claims to Territory in Colonial America."

Green argues that the Aboriginal claim to sovereignty and its legal basis in international law should be examined using the principles and customs

that were valid at the time of colonization, and has selected many references from the doctrinal writings and judicial practices of the early 15th and 16th century in order to illustrate the legal and political climate at this time.

Compared to European society, Aboriginal society was thought to be uncivilized and its citizens devoid of any rights comparable to the European's. The uncultivated lands appeared to the Europeans to be unoccupied; it was thus believed to be perfectly legal for European Nations to claim these lands for themselves.

The issues of Aboriginal sovereignty and self-government have been linked to the issue of Aboriginal title to land. Green argues that as colonial governments did not recognize either Aboriginal sovereignty over land or any Aboriginal right to self-government, neither exists today:

...all confirm that whatever title the Indians were acknowledged as having in the land, they certainly did not and do not possess anything similar to sovereignty. Their title is solely that which is acknowledged as remaining with them by the Crown; it amounts to no more than a right to live on and enjoy the use of such lands as have not been granted to settlers or taken into the complete exercise of jurisdiction by the Crown; and this Indian title is subject to the overriding sovereign rights of the Crown as ultimate owner who may, subject to such legal procedures as may be required by the local law, extinguish whatever title remains to the Indians...Moreover international law did not recognize the aboriginal inhabitants...as having any legal rights...(and), such inhabitants become the subjects of the ruler exercising sovereignty over the territory (pp.125-126).

Professor Green does not feel there is a historical legal basis on which to establish an inherent right to Aboriginal self-government and feels that new legal concepts cannot be applied retroactively as this would disturb social stability by destroying rights which have been long established via prescription and usucaption (p.126). (The latter, usucaption, refers to the acquisition of property rights by uninterrupted possession for a period of time; the former, prescription, the acquisition of title by immemorial use.) He goes on to suggest that if Aboriginal people are to achieve self-government, it will be a delegated right resulting from a political decision.

The key issues upon which Green bases his interpretation of the doctrine under review are identified and discussed below.

### Aboriginal People as “Savages” Devoid of any Recognizable Rights

When discussing the right of a nation to occupy lands previously claimed and inhabited by another nation, Green quotes the 1764 writings of Wolff:

...But it is to be noted that we take the name nation with the fixed meaning which we have assigned to it, because of course it denotes a number of men who have united into a civil society, so that therefore no nation can be conceived of without a civil sovereignty. For groups of men dwelling together in certain limits but without civil sovereignty are not nations, except that through carelessness of speech they may be wrongly so called (p.71).

Green also quotes from a 1609 work entitled “A Good Speed to Virginia:”

...it is likely true that these savages have no particular property or parcell of that country, but only a general residence there as wild beasts have in a forest (p.18).

According to this argument, as Aboriginal people had not created permanent settlements based upon agrarian life-styles, they were not seen to be civilized and, in the opinion of the early settlers, they did not have sovereign title to the land.

Vitoria is one of the few writers who disagreed with the common view that Native societies were devoid of any nation or state characteristics. He is quoted as saying

...there is a certain method in their affairs for they have polities which are orderly arranged and they have definite marriages and magistrates, overlords, laws and workshops, and a system of exchange, all of which call for the use of reason: they also have a kind of religion (p.66).

Green takes a positivist law approach to the issue of Aboriginal sovereignty by suggesting that the European *status quo* at the time of colonization should be the basis on which to judge whether a right does or does not exist. But what about the Aboriginal perspective at this time, is it to be disregarded? He gives one or two examples of writings which contradict the *status quo* yet dismisses them, stating

Most writers, however, would not concede this much evidence of polity and tended to deny that these “barbarians” could constitute a state and exercise the competence of civil governance (p.66).

## European Colonization and the Signing of Treaties

Green feels a need to examine other ways by which sovereignty and title to land could be lost if, counter to his opinion, it could be proven to exist. It is pointed out that European colonizers felt it was their duty to civilize the Aboriginal people and convert them to Christianity. If this met with any resistance then the use of force was justified and in essence they became a conquered people. Under international laws of the time, the people conquered in a just or unjust war lost their sovereignty and became subjects of the new ruler.

Wolff is quoted as saying:

when cities and territories are conquered, such sovereignty is acquired over the vanquished as exists in the people ...and...the victor acquires over the vanquished...a complete and supreme sovereignty...[and] can change as he pleases the form which the state had before, the decision [lying] with the victor as to whether he may wish to combine the sovereignty with his own, or to keep it separate... (p.72).

Vattel, who was regarded as a disciple of Wolff's when he wrote in 1758, is also quoted by Green:

It is asked whether a Nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes whose small numbers cannot populate the whole country....these tribes cannot take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions cannot be held as a real and lawful taking of possession; and when the Nations of Europe, ...came upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them (p.74).

Green suggests that in spite of the ways in which the land was acquired by Europeans, Aboriginal people lost any claim to title through the doctrine of usucaption and prescription. The legal naturalist Pufendorf is quoted as saying in 1688

[T]he public interest is injured by those who, it may be, misuse their property, or by merely sitting at ease upon it as it were, in their ownership, allow it by their negligence to be of no service. But if a thing is appropriated by usucaption, it is at least looked after by someone, so that it is of use to the state...

(p.63).

This may be arguable in some cases. For example, it is asserted that part of the City of Vancouver is Aboriginal land, but the concept does not apply to other unceded land or Reserve lands in which Natives can demonstrate both a current and an historical dependence.

British and Canadian Governments had absolute sovereignty over all lands and subjects, suggests Green, but chose to leave the Aboriginal populations to run their own affairs until such time as settlement required the treaties to be signed.

Green notes that the Dutch East Indian Company charter was drawn up about the same time as the Hudson's Bay Company charter, and assumes Judge Huber's interpretation of the 1855 and 1899 treaties in the *Palmas Case* would also apply to British North America. Judge Huber states:

As regards contracts between a State or a Company such as the Dutch East India Company and [N]ative princes or chiefs of peoples not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties (p.94).

However, Judge Huber goes on to suggest these contracts or treaties left the existing Native organisations more or less intact, and described the legal relationship as one of suzerain and vassal (p.94). The *Concise Oxford Dictionary* defines suzerain as "a sovereign or state having some control over another state that is internally autonomous."

Judge Huber does not recognize the treaties as being valid international documents, but his discussion of what the treaties do infer at a national level and his use of the term suzerain suggests, contrary to Green's argument, that Native people were recognized as having some degree of state or sovereign status prior to and following the signing of treaties.

In two instances Green mentions, but chooses not to discuss, recent international tribunal decisions. The first involved a 1975 case dealing with the sovereignty status of the Western Sahara prior to colonization (p.96), while the second involves group rights and the International Covenant on the Rights of Indigenous Peoples, 1981 (p.126).

Native Canadians call for an end to colonialism and point to the fact that Asian and African people have gained independence on their lands. Green counters this argument by insisting group rights under international law may only constitute a basis for self-determination in the case where the colonizing nation is in the minority and denies rights to a local majority

(p.126). These cases may not directly apply to Canada's situation but nevertheless they do reflect how international law is being applied to historic cases today and suggest that it could have a bearing on future Canadian constitutional law concerning Aboriginal rights.

### **The Royal Proclamation of 1763**

The following passage from the *Royal Proclamation of 1763* is often quoted in support of Aboriginal title and self-government:

And whereas it is Just and Reasonable and Essential to Our Interests and the Security of Our Colonies that the several Nations or Tribes of Indians with whom We are connected and who live under Our Protection should not be molested or disturbed in the Possession of such Parts of Our Dominion and Territories, as, not having been ceded to or purchased by Us, are reserved to them or any of them as their Hunting Grounds (p.100).

Green's opinion is that the *Royal Proclamation of 1763* does not infer that Aboriginal people have absolute title to unceded lands. He refers to a decision by Chief Justice Marshall of the United States Supreme Court, in the case *Johnson v. McIntosh* [8 Wheat. 543 (1828)], to support his case:

They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. While the different nations of Europe respected the rights of natives as occupants, they asserted the ultimate dominion to be in themselves: and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives (p.106)... An absolute title to lands cannot exist, at the same time, in different persons, or in different governments....All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right (p.108).

The Canadian courts have also been asked to determine the meaning of the *Royal Proclamation of 1763*. The case *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 AC 146, is reviewed by Green. This

case found that

the crown owns the soil of all the unpatented lands, the Indians possessing only the right of occupancy, and the crown possessing the legal title subject to that occupancy, with the absolute exclusive right to extinguish the Indian title either by conquest or purchase (p.114).

This case defined the Aboriginal right to land as a personal usufructuary right. Justice Gwynne's reasoning in the case suggested that, with the *Royal Proclamation of 1763* the Indians had a better legal position than they had under French rule. He suggested that the lands reserved for Indians following the signing of the treaty were unchanged, and remained under Native control, and therefore precluded the Provincial government from interfering with them in any way. Green argues that Justice Gwynne should recognize the fact that if the King gave Natives additional rights under the *Royal Proclamation of 1763*, they could just as easily be taken away by passing new legislation (p.122). Natives can only cede land to the federal Crown; Green sees this as a significant limitation to their sovereign rights and suggests that the absolute title to Reserve lands is federal (p.122).

Green goes on to state that

it is clear that the agreements made with indigenous peoples purporting to convey sovereignty in return for the protection of rights lacked any legal significance and in no way encumbered the sovereignty which the European states had acquired (p.99).

Green does not agree that the *Royal Proclamation of 1763* is an "Indian Bill of Rights." He sees it as a purely internal document issued by the Crown which has no significance in international law:

it regulates the relations between Indians and private individuals, and is not concerned with any rights which the Indians might claim against the Crown itself (p.100).

On the surface the *Royal Proclamation of 1763* implies that the Natives have a title to the land which is good against the Crown, but Green suggests that the overall character of the *Royal Proclamation of 1763* makes it clear that the Native right to land is a reference to

the common law right of citizens holding lands not to be expropriated by the Crown without proper compensation—in this case, ...either sale or an act of cession... (p.102).

He also suggests that the Government would have had equal right to secure

the Indian lands by force or executive expropriation (p.104).

The case *Guerin v. The Queen* [(1984) 2 SCR 335] has since suggested that Aboriginal title is better described as a "*sui generis*" (defies definition) concept which carries with it certain fiduciary duties when surrendered to the Crown. Green does not mention this case, yet it has significant implications for the interpretation of Aboriginal title and possibly for self-government.

In commenting upon section 35 in Canada's *Constitution Act, 1982*, Green recognizes the fact that these rights have not yet been defined by the courts and suggests that neither federal or provincial governments would accept any argument that these rights include the dissolution of Canadian sovereignty over any land which might have an existing Aboriginal title (p.124).

### **Legal Understanding of Aboriginal Rights: International Context**

Green quotes a French lawyer discussing the legal status of land occupied by Natives with Champlain at Port Royal:

there is no question of applying the law of Nations, by which it would not be permissible to claim the territory of another. This being so, we must possess it and preserve its natural inhabitants (p.18).

Chief Justice Marshall is quoted again from a leading case in American Aboriginal rights common law, *Worcester v. Georgia*, [6 Peters 515 (1832)]:

Not well acquainted with the meaning of words, nor supposing it to be material whether they were called the subjects, or the children of their father in Europe; lavish in profession of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched, and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country... (p.112).

In reference to the above passage, Green states:

...it is clear that the Chief Justice has in mind matters of internal concern and organization only, and is in no way using the term [independence] in the sense in which it is employed in international law (p.113).

Wheaton, writing in the middle of the 19th century suggested that most European countries were consistent in their dealings with the Aboriginal

people of the New World and they believed they acted in accordance with existing law. He stated that

In the various wars, treaties, and negotiations, to which the conflicting pretensions of the different States of Christendom to territory on the American continents have given rise, the primitive title of the Indians has been entirely overlooked, or left to be disposed of by the States within whose limits they happen to fall, by the stipulations of the treaties between the different European powers. Their title has been almost entirely extinguished by force of arms, or by voluntary compact, as the progress of civilization gradually compelled the savage tenant of the forest to yield to the superior power and skill of his civilized invader (p.80).

It was Wheaton who, in his work *Elements of International Law*, coined the term “domestic dependent nation” when describing the status of Aboriginal people in the United States. R.H. Dana was editor of the work and in his note emphasized that the courts have found that Aboriginal groups are not

foreign states within the meaning of the Constitution, and that while they may at least within their tribal areas be outside the scope of State jurisdiction, they are nevertheless within the authority of the federal government (p.80).

Green seems to present Dana's note as a qualification to Wheaton's use of the term “domestic dependent nation.” By doing so Green down plays the importance a reader may attach to this phrase and reinforces his view that Native society does not have nation status in either the United States or Canada.

A 1926 case reviewed by an International tribunal dealt with a treaty between the Cayuga Nation and New York State. Green quotes from the reasons for judgement:

The obligee was the “Cayuga Nation” or Indian tribe. Such a tribe is not a legal unit of international law. The American Indians have never been so regarded...So far as the Indian tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign nation within whose territory the tribe occupies the land, and so far only as that law recognizes it. [T]he Cayuga Nation has no international status...[I]t existed as a legal unit only by New York law. It was a “de facto” unit, but “de jure” was only what Great Britain chose to recognize as to the Cayuga in New York...They could not determine what should be the

nation, nor even whether there should be a nation, legally. New York continued to deal with the New York Cayuga as a "nation". Great Britain dealt with the Canadian Cayuga as individuals... (pp.84-85).

The English Court of Appeal found in 1982 that Natives have at present no rights against the English Crown under the *Royal Proclamation of 1763* or the treaties. All rights based on these agreements are held against Canada, and are subject to interpretation by the Canadian Courts (pp.123-124).

In essence Green feels that if Aboriginal people do not have absolute title to land, then their rights under the *Royal Proclamation of 1763* are only delegated rights, and as sovereignty is dependent upon absolute title, Aboriginal people have no inherent right to self-government on or off Reserve land.

## **Aboriginal Self-Government as an Inherent Right**

Bruce Clark takes a different approach to the doctrine of Aboriginal self-government in his work *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada*.

Mr. Clark is a lawyer who has specialized in Canadian Native law (Raphals, 1991). Self-government is defined by Clark as the legal right to govern civil affairs in unceded territory, including Reserves, by: "making one's own laws that can have precedence over the laws of outside lawmakers when the laws conflict" (p.6). He maintains that constitutional documents, beginning with the *Royal Proclamation of 1763*, have confirmed the inherent right to self-government for Canada's Native people and, as a result of the incorporation of Imperial legislation, that right is entrenched as an existing right under section 35 of Canada's *Constitution Act, 1982*.

The fact that federal and provincial governments have never recognized the existing law does not invalidate it. Clark also maintains that since the Imperial legislation that created and confirmed Aboriginal rights has never been repealed, the idea that the Aboriginal right has been superseded by federal and provincial actions is legally impossible. Clark fears that negotiations to include the Aboriginal right to self-government in the constitution places the existing right at risk and the result may be a weaker version of a right that is at present unlimited.

Clark only considers relevant Canadian and American case law and legislation when examining the basis for Aboriginal self-government. Unlike Green he does not examine the writings at the time of colonization and does not use international law to support his interpretation.

Clark does make a connection between title to land and the right to self-government: "Government is normally understood to have a territorial extension. The Aboriginal right of self-government is no different. It is the right of a race to govern itself with reference to territory" (p.7). It is important to note that he does not indicate a need for this territory to be held by absolute title. However, if the right to self-government is recognized as being inherent, but dependent on title to land, Aboriginal people without a land base will be denied this right. Clark does not address this important point, perhaps because it is an implementation issue not related to the sovereignty discussion.

Key points in Clark's interpretation of the doctrine of Aboriginal self-government will be discussed below.

### **Domestic Common Law vs Constitutional Common Law**

Clark has split common law into two parts, domestic common law (law affecting private law in society), and constitutional common law (a judicial decision that concerns some point of public law such as the division of powers between levels of government). Constitutional common law can be created by judges if the constitutional legislation does not clearly settle a particular point (p.11).

Clark identifies only four points on which an argument could be made for a right on the basis of domestic common law. The first is a 1773 Privy Council decision concerning the *Mohegan v. Connecticut* case which recognized "that the Mohegan Indians were `juristically regarded as sovereign'" (p.28). This decision has since not been judicially recognized in the Canadian domestic law context, although it is the same viewpoint held by Chief Justice Marshall in the leading American case *Worcester v. Georgia* (p.28).

The second is an 1895 arbitration comment which is not capable of constituting a precedent in law. In this instance Boyd, the Chancellor of the Ontario Court of Chancery, adopted the reasoning in the Mohegan ruling instead of the reasoning endorsed in leading Canadian cases:

Now in these [treaty] transactions with the aborigines from the earliest colonial times in North America, the Government has assumed the status of the Indian tribes to be that of distinct political communities (pp.29-30).

The third is a statement made in 1886 by Ontario Justice of Appeal Patterson:

[the Indians] were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of

it and to use it according to their own discretion. In a certain sense they were permitted to exercise rights of sovereignty over it (p.30).

Finally, Clark identifies several Canadian domestic law cases which have rejected the American “enclave theory” which recognizes territories (Reserves) within which Native people could govern themselves (pp.23-24). These cases include *Sheldon v. Ramsay* [(1852), 9 UCR 105], *Sero v. Gault* [(1921), 50 OLR 27], *Cardinal v. A.G. Alberta* [(1974) 1 SCR 695], and *Four B. Manufacturing Ltd. v. United Garment Workers of America* [(1979), 30 NR 421].

Clark concludes that unlike in the United States

there is but a thin argument in favour of identifying an existing “precedent” to ground a Canadian [A]boriginal right of self-government at domestic common law.

and

...that even if the common law right [to Aboriginal self-government] were established in domestic law, it could not survive long enough to take a second breath (pp.32-33).

It has been and could be, superseded by domestic legislation, according to the doctrine of the supremacy of parliament.

Concerning Canadian federal or constitutional common law, Hogg observes that: “Canadians and Australians have tended not to think in terms of a distinct federal common law nevertheless ‘enclaves’ of federal common law exist” (p.54). He suggests one of these enclaves is the law of Aboriginal title (p.54). Clark goes on to point out that sections 35 and 52 of the *Constitution Act, 1982*, may have created a federal constitutional common law which can only be altered by constitutional amendment.

### **Imperial Legislation and Treaties**

Clark's premise is that legal protection and reservation of tribal sovereignty follow from legal protection and reservation of tribal land. The British Crown historically reserved all unceded North American land, and enacted that upon such land the Native nations or tribes should not be molested or disturbed. The argument is that by not molesting or disturbing Aboriginal society, you essentially leave them to govern themselves (p.9).

It has been argued that Aboriginal title to land and the right to self-government have been superseded by government actions. Clark argues that this is not legally possible, because these rights have been established via Imperial legislation and colonial law that cannot be superseded by federal or provincial statutes (p.9).

Clark sees the recognition and affirmation of the self-government right by American domestic common law as an aid in interpreting Canadian constitutional legislation, since both are based on the same natural law and the *Royal Proclamation of 1763* (p.36). He also suggests that each individual treaty must be examined in isolation from others. In some cases the right to self-government may in fact have been left intact while in others all that is left is that found under the *Indian Act* (p.8).

Clark argues that the colonial government had no inherent sovereign power to interfere with the Natives pre-existing power to govern themselves.

Since no *explicit* power was granted by the imperial government to the colonial government allowing them to change the imperial policy respecting [A]boriginal rights, the necessary consequence of this limitation upon colonial government power is the continuity of the [N]atives' right not to be "molested or disturbed" by these colonial governments (emphasis in the original) (p.38).

For example, in 1803 and 1821 legislation enacted by the Imperial parliament, not the colonial government, took powers dealing with criminal offenses away from the Natives, leaving them with civil powers only on unceded lands (pp.8, 124). Clark claims that no subsequent legislation has been passed by either the Imperial or Canadian parliament that would further limit the rights held by Canadian Aboriginal people under the *Royal Proclamation of 1763* (Raphals, 1991).

Prior to this legislation it was questionable as to whether both criminal and civil laws applied to Natives on unceded lands. Clark quotes Major General Thomas Gage instructing Guy Johnson in 1774:

I imagine there must be some mistake in what you mention respecting the Indians of Canada being subject for the future in all things to the laws of England, Indians are commonly left to their own usages and customs in most things; *perhaps* they may have been informed that in cases of murder, or robbery they would be tried agreeable to English law (emphasis in the original) (p.125).

Clark uses the 1773 *Mohegan* case, mentioned previously, as the first leading Canadian constitutional common law case in support of the Aboriginal right to self-government.

The second is *Campbell v. Hall* [(1774), 98 ER 848]. It dealt with Article 5 of the Capitulation of Grenada which provided that local laws in force at the time of conquest would remain in force until the Crown changed them

(p.46). There is a parallel here with Article 40 of the Capitulation of Canada which states

the savages or Indians, allies of His Most Christian Majesty will be maintained on the lands that they inhabit, if they wish to remain there, they will not be disturbed under any pretext whatsoever for having taken up arms and serving His Most Christian Majesty (pp.46-47).

The case also decided the *Royal Proclamation of 1763* was binding upon the King in Council and therefore upon the colonial governments as subordinates to the King (p.47). Clark concludes that:

In Canada the Aboriginal right was conceded under both the capitulation and the proclamation. Only a subsequent act of the imperial parliament therefore could have changed the rules once the Aboriginal right had been so confirmed, and no such act of Parliament exists (p.48).

*Cameron v. Kyte* [(1835), 12 ER 679], dealt with the constitutional issue that colonial governments were not sovereign and therefore had no power to enact laws which reduced Aboriginal rights:

the power of colonial governments to interfere with the “natives” right of self-government would have to have been expressed in the great seal instruments constituting the colonial government. The power could not be implied (p.50).

A fourth case that affirms the existence of Aboriginal rights is that of *Attorney-General for Canada v. Attorney-General for Ontario*, [(1897) AC 199], otherwise known as the Indian Annuities case. The Privy Council stated

On the other hand, “an interest other than that of the province in the same” appears to them [their Lordships] to denote some right or interest in a third party [Aboriginal], independent of and capable of being vindicated in competition with the beneficial interest of the old province (p.51).

Clark suggests this is a crucial passage that: 1) confirms the independent nature of the Aboriginal claim to land, in effect stating that it is more than a privilege, and 2) confirms that this independent interest is constitutionally protected under both sections 91(24) and 109 of the *Constitution Act, 1867* (p.51).

The case *Wewayakum Indian Band v. Canada* [(1989), 92 NR 241], could also be relevant. It involved one Indian Band suing both another Band and the federal government to determine which Band had the right to

possess a specific Reserve (p.52). Generally suits of this nature are brought in Provincial court; this one, however, was tried in the Federal Court of Canada. The court observed that “the law of aboriginal title is federal common law, derived from the Indians historic occupation and possession of their tribal lands” and that “aboriginal title pre-dated colonization by the British and survived British claims to sovereignty” (p.55). Clark quotes from Madame Justice Wilson’s findings:

In *Calder v. AG British Columbia*, [1973] 4 WWR 1, this court recognized aboriginal title as a legal right derived from the Indians’ historic occupation and possession of their tribal lands. As Dickson, J. (as he then was), pointed out in *Guerin v. The Queen* (1984) 2 SCR 335, aboriginal title predated colonization by the British and survived British claims of sovereignty. The Indians’ right of occupation and possession continued as a “burden on the radical or final title of the Sovereign”

He (Clark) concludes that this reasoning may also be applied to the right to self-government as Aboriginal title has possessory and governmental aspects (p.31).

The *Wewayakum* case is compared to the leading American case *Worcester v. Georgia*, but Clark notes that a significant difference exists in that the American case is not binding on the American federal government as it is not included in their constitution (p.56).

### **Constitutional Amendment**

Clark identifies two requirements necessary for the achievement of Aboriginal self-government; 1) a constitutional amendment to clarify what is meant by existing rights, thereby acknowledging the distinction of Native society, and 2) a will on the part of all levels of government to sit down and seriously consider what is necessary to fulfil these existing rights (p.57).

He also issues this warning:

The irony or paradox of the ongoing constitutional negotiations in Canada, where the Natives are seeking to have the Aboriginal right of self-government expressly identified in the constitution, is that it is already there implicitly. The risk is that by specifying a new right, the revised constitution could tacitly repeal the old right....A new lamp is being exchanged for the old one. The genius of the old is that the power of it’s genie is inherent and full. It seems unlikely that any new right in substitution will be so expansive (p.57).

## Comparison

Green places more emphasis on historical, international law concerning Aboriginal rights while Clark concentrates on more recent British and Canadian constitutional law.

Clark calls for the restoration of rights and compensation for past wrongs based upon respect for the rule of law, whereas Green suggests that, for the sake of social and legal order, you cannot retroactively apply new laws based on a change in social morality.

The *Royal Proclamation of 1763* has been interpreted differently by Clark and Green. Clark believes it applies equally to government as to any other party, whereas Green believes it was intended to apply only to private individuals. Also, Clark believes the *Royal Proclamation of 1763* recognizes inherent rights for Aboriginal people while Green sees it as creating a delegated right.

In order to justify self-government, Green feels there needs to be a proven and absolute title to land. Clark on the other hand recognizes that absolute title is not necessarily required. The description of Aboriginal title found in *Guerin* does not eliminate the right to self-government, as Aboriginal title has two complimentary aspects, possessory and governmental. Native people may have lost absolute title to their lands but they did not lose the right to self-government following colonization and the signing of treaties.

## Conclusion

Rather than true self-government, a recent trend has been to establish municipal style governments, with powers for self-management or co-management delegated by the federal and/or provincial governments, such as, for example, the *Sechelt Indian Band Self-Government Act, 1986*, and the *Cree-Naskapi (of Quebec) Act, 1984*, as well as several co-management models set up in recent comprehensive claims settlements in the Northwest Territories. Not all Native leaders have been happy with this arrangement; many are striving to be recognized as a third level of government with powers in certain areas that are equal to those of the federal and provincial governments.

Professor Green believes that the federal and provincial governments would not give up sovereignty over lands which are subject to Aboriginal title. However, by recognizing an inherent right to self-government in the Canadian Constitution, they would be doing just that (Anonymous, 1992). Absolute title to land may remain with the Crown, but that does not preclude

the re-establishment of Aboriginal government by the people occupying this land.

Prime Minister Jean Chretien's Liberal government has recognized that an Aboriginal right to self-government exists within the present constitution, and the development of a Canadian model seems to have begun. However, there is some opposition to this by members of the Aboriginal community who want their inherent right to self-government guaranteed by explicitly stating this in Canada's constitution. Also, many Aboriginal women's groups want to protect their rights by ensuring the *Canadian Charter of Rights and Freedoms* applies to any new Aboriginal governments.

Recognizing the inherent right is only the first step. The difficulty will be in determining how to implement it, what form it will take and how people with no connection to a land base will be able to exercise this right.

If, in the future, constitutional changes are made, the final wording of section 35 of the *Constitution Act, 1982* will determine whether Mr. Clark's warnings of a reduction of existing power will be born out. It might be possible to define existing rights as including the inherent right to self-government, in which case the constitutional statutes and common law precedents discussed by Clark will continue to be put forward as leading cases in Native rights law.

Margaret A. Treble  
189 Lake Village Road  
Winnipeg, Manitoba  
Canada, R3T 4M7

## References

Anonymous

1992 Unity Report Spells Out Plan for New Federation. *The Globe and Mail*, Monday March 2, 1992, pp. A1,A6.

Raphals, Philip

1991 Nations in Waiting: A Crusading Lawyer Asserts that Native Sovereignty was Granted in 1763 and has been Blocked by the Legal System ever Since. *Canadian Forum* 64(799):10-14.