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Restless Spirits in the Land: Finding a Place in Canadian Law for Aboriginal Civil Disobedience

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Abstract
This article will argue that Aboriginal use of civil disobedience should be legalised within limited circumstances. Aboriginal peoples have constitutional rights under s. 35(1) of the Constitution Act, 1982. The Supreme Court of Canada decided in *Haida* that if a Canadian government possesses knowledge, real or constructive, that its actions may affect Aboriginal interests that are potentially protected under s. 35(1), that government then has duties towards the Aboriginal peoples concerned. These duties can include giving prior notice of the proposed action, or even interim accommodation of the Aboriginal interests pending final resolution. If the Canadian state undertakes an action that 1) threatens harm to or interference with an Aboriginal interest and 2) in a manner that reflects a failure to uphold its obligations under *Haida* and 3) the action is commenced before the interim hearing contemplated by *Haida* can be initiated, Aboriginal peoples should be allowed to have recourse to civil disobedience to block that action. The idea is that the action reflects a failure by the state to uphold the rule of law with respect to Aboriginal rights and therefore should disentitle the state from enforcing such action through criminal prosecution.

Keywords
Aboriginal rights; constitutional rights; criminal law; rule of law; civil disobedience; social justice; Canada

1. Introduction

This paper will explore the idea of allowing Aboriginal protesters to claim civil disobedience as a legal defence against criminal charges within limited circumstances. Aboriginal protesters have sometimes engaged in acts of civil disobedience in protest against incursions upon their interests, such as their land claims and sacred burial sites. These acts of civil disobedience have typically been answered with criminal prosecutions. Judges have always denied Aboriginal legal arguments based upon civil disobedience as a protest against injustice. One decision recognised that civil disobedience was justified against British rule of India, and during the American Civil Rights Movement, but decided that Aboriginal civil disobedience was not similarly justified.

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This paper will take issue with that assertion. The economic deprivation forced upon Canadian Aboriginal peoples of today is just as grave an injustice as those faced by the Indians and Black Americans. The laws behind Aboriginal social injustice may not be as overt as those enforcing British rule of India or Jim Crow in the American South. There is still, however, a considerable social injustice that stems from failures to respect Aboriginal constitutional rights in Canada. When Aboriginal protesters are prosecuted in relation to state actions that impinge upon their interests, judges should also inquire as to whether the state has upheld the rule of law with respect to Aboriginal rights. If the Canadian state undertakes an action that 1) threatens harm to or interference with an Aboriginal interest and 2) in a manner that reflects a failure to uphold its obligations under *Haida* and 3) the action is commenced before the interim hearing contemplated by *Haida* can be initiated, judges should then stay criminal charges against the Aboriginal protesters who resist through civil disobedience. The discussion will begin with an overview of Canadian judicial treatment of Aboriginal use of civil disobedience.

2. Jurisprudence on Aboriginal Civil Disobedience

In *R.* v. *Drainville*, decided in 1993, members of the Teme-Auguma Anishnabai nation of Ontario blockaded a road that was to be extended over land they claimed for the nation. The Ontario Supreme Court and Ontario Court of Appeal had previously ruled that Anishnabai title to the land in question had been extinguished by a treaty in 1850. Father Dennis Drainville, a Christian minister and member of Ontario's legislature at the time, was charged with mischief under 430(1)(c) of the Criminal Code for participating in the protest.[1] Defence counsel asserted that Rainville was acting in passive resistance and honest belief in the justice of his actions such that he should not be convicted. Judge Fournier acknowledged that Rainville acted in the sincere and honest belief in the rightness of what he was doing, but did not allow civil disobedience as a basis of acquittal. Judge Fournier in his reasons emphasised that civil disobedience reflects an attempt by protesters to 'arrogate' the powers of judicial office to themselves, and represents a dangerous slope towards anarchy. Such is not an acceptable alternative to the rule of law.[2]

In April 1993, the government of New Brunswick revoked tax exemptions that were previously available to members of the Maliseet. Members of the Maliseet

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[1] Criminal Code, R.S.C. 1985, c. 46.

[2] *R.* v. *Drainville*, 1993, Ontario Court of Justice – Provincial Division, Criminal Reports, 5th volume, 4th series, p. 38.

responded by blocking roads that ran through their reserves. Some were charged and ultimately convicted of mischief. In one of the decisions, Judge Harper stressed that Aboriginal rights were not in issue, as the validity of the laws to which the Maliseet protested were presumed valid until declared unconstitutional by a court of law. To hold otherwise would lead to chaos.[3] In *R.* v. *Paul*, decided in 1993, Judge McClellan expressed especially strong disapproval of Aboriginal civil disobedience in this fashion:

> I intend to treat these findings of guilt in the instances of which I have made them as one time events with the very serious warning to the natives at Kingsclear and elsewhere and also any other group of New Brunswickers, be they Indians or non-Indians or French or English or Catholic or Protestant or whatever you have. Any group of anybody who chooses to pursue a line of conduct that amounts to civil disobedience to such a degree as to contravene the *Criminal Code* then let them beware in the future. This is your warning, this is your general deterrence.[4]

At issue in *MacMillan Bloedel Limited* v. *Simpson*, decided in 1994, was the logging of old growth forests in Clayoquot sound. The Nuu-cha-nuulth nation claimed ancestral title over the area in question. The provincial government of British Columbia nonetheless granted MacMillan Bloedel a licence to lumber from the area under the Forestry Act.[5] Protesters, both Aboriginal and non-Aboriginal alike, continued to block the road leading to the area even after being served with court orders informing them of MacMillan Bloedel's apparent right to proceed with the tilling of lumber.[6] Justices McEachern and Cumming of the British Columbia Court of Appeal declared that civil disobedience "has never prevailed as a lawful defence against proven breaches of the law".[7] They also characterised civil disobedience as an assault upon the institution of the judiciary itself, and therefore both a threat to the rule of law and a recipe for anarchy.[8]

Finally there is the 1990 decision of *R.* v. *Pratt*. Aboriginal protesters arrived at a Department of Indian Affairs office to protest federal government cutbacks to funds available for subsidising post-secondary education for Aboriginal students. Many of the protesters made their way to an area that contained confidential files, while others chained themselves to the grate of a freight elevator.

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[3] *R.* v. *Colford*, 1993, New Brunswick Provincial Court, New Brunswick Reports, 2nd series, 40th volume, p. 161.

[4] *R.* v. *Paul*, 1993, New Brunswick Court of Queen's Bench, New Brunswick Reports, 2nd series, 139th volume, p. 346.

[5] Forestry Act, R.S.C. 1985, c. F-30.

[6] *MacMillan Bloedel Limited* v. *Simpson*, 1994, British Columbia Court of Appeal, British Columbia Law Reports, 2nd series, 92nd volume, p. 1. Hereinafter *MacMillan*.

[7] *Ibid.*, p. 5.

[8] *Quoting Everywoman's Health Centre Society (1988)* v. *Bridges*, 1989, British Columbia Supreme Court, Dominion Law Reports, 4th series, 61st volume, p. 154 at p. 158. *Referred to in McMillan, ibid.*, p. 6.

The protesters refused to leave the premises after the 4:30 p.m. closing time. Police arrived and the two accused, Dolly Pratt and Winona Stevenson, were charged and convicted of public mischief. Defence counsel led evidence of oral histories and traditions surrounding Treaty no. 6 to assert that the treaty established a trust relationship between the federal government and the Aboriginal signatories, and that this trust relationship extended to the provision of education to those Aboriginal peoples who were party to Treaty no. 6. Defence counsel also argued that a federal Indian agent had in the past been assigned to each reserve covered by Treaty no. 6 for the purposes of helping the Aboriginal signatories adjust to changes brought about by the treaty. The Department of Indian Affairs office now fulfilled that function, and therefore the accused had a right to occupy it.[9] Judge Nutting declined to decide whether Treaty no. 6 created a trust relationship such as to oblige post-secondary funding to every Aboriginal student under the Treaty on the basis that it was beyond his jurisdiction to do so.[10] What is of particular interest is his Honour's comments with respect to civil disobedience:

> Defence counsel appealed to the court to recognize the justice of aboriginal claims by acquitting these accused persons. In that regard, the court is mindful that civil disobedience is a time-honoured method of drawing public attention to claims of fundamental freedoms and human rights. The shining examples of the Rev. Martin Luther King and Mahatma Ghandi, not to mention the writings of Count Leo Tolstoy, immediately come to mind. However, in my view, it cannot be argued that the mischief section of the *Criminal Code* is an unjust law, nor that its application would be unjust in this case. The adoption of civil disobedience methods in the promotion of a just cause does not transform illegal actions into legal ones. Certainly, the motives and idealism of those who commit an act of civil disobedience are to be weighed in the balance in regard to any penal sanctions; however, no honourable purpose or just cause justifies the breaking of an acceptable and reasonable law.[11]

It is this particular commentary that this article will take issue with.

3. Comparisons with Past Civil Disobedience

It is easy to see why Judge Nutting saw the justice involved with the acts of civil disobedience that drove the Civil Rights Movement of the 1960s and the movement for Indian independence from British rule. The target of the Civil Rights Movement during the 1960s was the institution of Jim Crow in the American

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[9] *R.* v. *Pratt*, 1990, Saskatchewan Provincial Court, Canadian Native Law Reporter, volume 3, p. 120.
[10] *Ibid.*, p.122.
[11] *Ibid.*, p. 126.

South, which imposed racial segregation on African Americans in the southern states with the very point of preserving White privilege. Ordinances that granted Whites privileged seating over African Americans were met with a boycott of the buses in Montgomery, Alabama. Laws that restricted African American access to White-owned stores were met with sit-ins that led to the arrests of the protesters, or being forcibly ejected from the stores. Imposed restrictions on voting rights were met with African Americans defiantly lining up for the ballot boxes.[12] Part of the impetus driving the movement was a conviction on the part of the protesters that laws enforcing racial segregation were inconsistent with the American Constitution. Note particularly the Fourteenth Amendment which bars any State from denying anyone "within its jurisdiction the equal protection of the laws". Martin Luther King Jr. said, as part of his "I Have a Dream" speech: "I have a dream that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident: that all men are created equal'".[13]

The objective of Gandhi's use of civil disobedience of course was to liberate India from British colonialism. One such campaign was his Salt March, whereby he made his own salt from the sea without having to pay the mandatory British tax on it, thereby spurring many of his fellow countrymen to do the same. Thomas Weber describes the significance of the Salt March in this way:

> The Salt March, as we have come to know it, is about a battle by a very astute political campaigner to free his country from the yoke of British Imperialism. And this was done by breaking the iniquitous salt laws that meant that even the poorest laborer who sweated under a hot Indian sun could not gather natural salt to supplement the most meager of diets without paying exorbitant taxes.[14]

It is easy for Judge Nutting and the rest of us, with the benefit of hindsight, to praise these uses of civil disobedience as a method of challenging unjust laws. This invites the question of whether Aboriginal use of civil disobedience in the present day can truly be distinguished as unreasonable in comparison with the Civil Rights Movement and the challenge to British rule of India. This paper will take the position that Aboriginal use of civil disobedience should be accommodated as a way to challenge Canadian state action when it is unjust with respect to Aboriginal rights. The starting point is to provide a brief overview of the social context of Aboriginal protest in Canada.

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[12] H. Raines, *My Soul is Rested: Movement Days in the Deep South Remembered* (Putnam, New York, 1977).

[13] Delivered at the Lincoln Memorial in Washington, D.C. on 28 August 1963.

[14] T. Weber, 'Gandhian Nonviolence and the Salt March', 21:2 *Social Alternatives* (2002) pp. 46–47.

4. The Social Context of Aboriginal Civil Disobedience

The starting point of the social context of Aboriginal civil disobedience is the historical fact of colonising what is now Canada at the expense of its Aboriginal inhabitants. A complete history of this process is beyond the scope of this paper.[15] The processes and destructive effects of colonization, however, are summarised by Phillip Lane Jr. as follows:

- diseases (such as influenza, small pox, measles, polio, diphtheria, tuberculosis, and later, diabetes, heart disease, and cancer);
- the destruction of traditional economies through the expropriation of traditional lands and resources;
- the undermining of traditional identity, spirituality, language, and culture through missionization, residential schools, and government day schools;
- the destruction of Indigenous forms of governance, community organization, and community cohesion through the imposition of European governmental forms, such as the Indian agent and the elected chief and council system, which systematically sidelined and disempowered traditional forms of leadership and governance and fractured traditional systems for maintaining community solidarity and cohesion; and
- the breakdown of healthy patterns of individual, family, and community life, manifested in alcohol and drug abuse, family violence, physical and sexual abuse, dysfunctional intimate relationships, neglected children, chronic depression, anger, and rage, and greatly increased personal levels of interpersonal violence and suicide.[16]

The colonisers of Aboriginal peoples in Canada never left, unlike the situation in India. A legacy that colonialism has left behind and which persists to the present day is severe poverty for many Aboriginal people. Research reports have found:

> A report released by the Association for Canadian Studies has found First Nations People in Saskatchewan have the highest rate of poverty in the country ... 42.6% of Aboriginal people in Saskatchewan live below the low-income cut off point (the poverty line) compared with 9.2% of Saskatchewan's non-Aboriginal population. Across Canada, the Aboriginal population had a low-income rate of 31.2%. In Saskatchewan urban centres, the poverty rate went as high as 51.3%. That quote comes from 2004.

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[15] For historical references, *see* O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Oxford University Press, Donna Mills, Ontario, 2002), and J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (University of Toronto Press, Toronto, 2000).

[16] P. Lane *et al.*, 'Mapping the Healing Journey: First Nations Research Project on Healing in Canadian Aboriginal Communities', in W.D. McCaslin (ed.), *Justice Healing: Indigenous Ways* (Living Justice Press, St. Paul, Minnesota, 2005) p. 370.

> Even those who move to cities for economic reasons are way behind their non-Aboriginal counterparts: in 1995, the median income was 40 percent higher among off-reserve Aboriginals compared with those on reserve, but their incomes still were about 60 percent less than those of non-Aboriginals.
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> Along with the poverty go a host of social ills – overcrowded housing, unemployment, substance abuse, poor health, crime.
>
> Researchers found "that the level of poverty among many Aboriginal families has now reached the rock bottom level where even the most basic needs are not being met. Food was cited as the most pressing need".[17]

Canada has entrenched Aboriginal rights into its constitutional structure in the form of s. 35(1) of the Constitution Act, 1982, which reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed".[18] Despite the existence of this provision, there still exists a colonial relationship in that Canadian governments have continued to engage in activities that adversely affect Aboriginal interests that potentially merit protection under s. 35(1). These activities typically contemplate economic benefit to non-Aboriginals, while Aboriginal interests are ignored and the Aboriginal peoples themselves derive little or even no benefits from the activities. In the meantime of course, Aboriginal poverty continues unabated. It is therefore not surprising that Aboriginal peoples have sometimes responded to such activities with civil disobedience. A few examples of Aboriginal civil disobedience will now be described.

In September 2001, members of the Barriere Lake First Nation threatened to occupy Victoria Island in the Ottawa River in Quebec. A tourist site on the Island draws in revenue by offering camping and views of Aboriginal cultures, yet little benefit was provided to the Nation which suffers from poor living conditions such as overcrowding and a lack of electricity. The Nation also claimed the Island as part of their traditional territory. They also wanted nearby logging and other development activities to respect Algonquin traditions. Another reason for the threatened protest was perceived inaction on the part of Ottawa to come up with a suitable land-use plan in that regard.[19] Also, in September 2001, over 60 Aboriginal protesters blockaded a road leading to a sour gas processing plant near Fort John, British Columbia. Aboriginal communities in the area expressed concerns that sour gas wells have been affecting the health of their members, and their rights under Treaty no. 8. Those concerns were apparently magnified by two sour gas well blowouts that occurred that year.[20]

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17) 'Hitting Rock Bottom', *Canada and the World*, 1 January 2006, pp. 4–5.

18) Constitution Act, 1982, being Schedule B to the Canada Act, 1982, (U.K.), c. 11.

19) 'Native protesters occupy island in Ottawa River', *The Cambridge Reporter*, 25 September 2001, p. A8.

20) 'New native blockade adds to uncertainty in northeast B.C. energy development', *Canadian Press Newswire*, 10 September 2001, p. S 10'01.

In November 2005, Fortune Minerals Ltd. developed plans to open a coalmine on the traditional territory of the Tahltan nation in British Columbia. Fortune Minerals obtained an injunction against a road blockade by opponents of the project. Opponents in the community indicated that the project would defile the headwaters of the Stikine, Skeena and Nass rivers, which are of spiritual significance to the nation. They have also occupied band council offices in protest.[21]

In September 2001, nine members of the Neskonlith First Nation were arrested for blockading a road leading to a ski resort near Kamloops, British Columbia. Community members claim that a CAD 70 million proposed expansion of the ski resort threatened encroachment upon their traditional territories.[22] In December of that same year, another eight were also arrested in a continuation of the same protest.[23] In July 2006 activists blockaded a bridge 75 km northwest of Kenora, Ontario. The blockade was to deny logging companies access to the Whiskey Jack Forest, considered the traditional land of the Grassy Narrows First Nation. Community member Chrissy Swain declared that the people of the Nation "have suffered from mercury contamination, forced relocation and the deforestation of their traditional lands, and it was time to stop".[24]

Iroquois protesters have occupied the Douglas Creek Estates construction site in Caledonia, Ontario. The provincial government of Ontario purchased the land in question in order to build residential units. The protesters, however, claim that the land was taken illegally from their ancestors over 200 years ago. The occupation has occasionally resulted in the protesters and prospective residents of the Estates hurling objects at each other from across a distance.[25] In October 2006, Ontario police had to block over 500 non-Aboriginals from entering the protest site in order to prevent a violent confrontation with the Aboriginal protesters.[26] What is interesting for our purposes is how judges have dealt with this situation. Justice David Marshall of the Ontario Superior Court of Justice issued an injunction prohibiting further negotiations with the protesters until they removed themselves from the site. A three-member panel of the Ontario Court of Appeal ruled that the protesters could remain. They also stated tersely that the province

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21) 'First Nation opposes bid to end its blockade', *Fort McMurray Today*, 15 November 2005, p. A6.

22) 'Aboriginals who blocked road into ski resort turn themselves into RCMP', *Canada Press Newswire*, 4 September 2001, p. S 4'01.

23) 'Aboriginal protesters arrested blocking road to Kamloops ski resort', *Canada Press Newswire*, 28 December 2001, p. D 28'01.

24) 'Protesters hit bridge: aim to block logging traffic', *Winnipeg Sun*, 27 July 2006, p. 18.

25) 'Ontario launches legal battle to continue talks in Aboriginal standoff', *Stratford Beacon Herald*, 10 August 2006, p. 5; 'Rocks, golf balls fly as Ontario Native blockade flares up again', *Portage Daily Graphic*, 8 August 2006, p. 9.

26) 'OPP stare down members; Police make five arrests as about 500 people protest in Caledonia', *London Free Press*, 16 October 2006, p. A1.

owns the site, with the qualification that the protest was legal because the Ontario government acquiesced in the occupation of its own legally purchased property by the Aboriginal protesters.[27] This entire episode is marked by the judiciary presuming beyond rebuttal that the government of Ontario holds legal title to the site. It is to be conceded that declaring that the removal of the land from the Iroquois was carried out illegally such as to give rise to entitlement, compensation or another legal redress would require evidence. However, at no point during these proceedings did the judges ever give serious attention to the possibility that the Aboriginal protesters just *might* have a legal interest in the site that requires consideration.

Is there anything that truly distinguishes the social context of Aboriginal civil disobedience from the social contexts of the Civil Rights Movement and the movement for Indian independence? Canadian law may not overtly assign racist privileges that Aboriginal peoples do not enjoy. That does not, however, make the situation in Canada any less unjust than Jim Crow in the American South. The Aboriginal peoples of Canada were subjected to a cruel and inhumane process of colonisation. Colonialism is still a fact of life for Aboriginal peoples, for which the same could not be said of India. Aboriginal interests, despite meriting potential protection under s. 35(1), are still subject to expropriation or other activities that adversely impact them. The activities often benefit non-Aboriginal peoples while offering little or no benefit to the Aboriginal peoples themselves. The injustices arise from a failure by the Canadian state to meet its legal obligations under s. 35(1) to accord respect and accommodation for Aboriginal rights while Aboriginal poverty persists as a colonial legacy. The legal details of this position will now be flushed out, starting with a general explanation of the rule of law in Canada.

5. The Rule of Law

The judicial commentary on Aboriginal civil disobedience often emphasises that disallowing civil disobedience is necessary to preserve the rule of law. The rule of law, however, does not impose obligations only on citizens. It is also a source of obligation and restraint on the state. The first explicit statement on the rule of law

[27] 'Appeal Court overturns rulings on Caledonia: Says negotiations should not have been suspended due to the ongoing standoff', *The Globe and Mail*, 15 December 2006, p. 27; 'Appeal Court says natives can legally continue Caledonia occupation: Decision sets a double standard, Mayor says', *Simcoe Reformer*, 16 December 2006, p. 1; For Justice Marshall's decision to issue an injunction *see Henco Industries Ltd.* v. *Haudenosaunee Six Nations Confederacy et al.*, 2006, Ontario Superior Court of Justice, Ontario Reports, 3rd series, 82nd volume, p. 347; For the Court of Appeal's judgment, *see Henco Industries Ltd.* v. *Haudenosaunee Six Nations Confederacy et al.*, 2006, Ontario Court of Appeal, Ontario Reports, 3rd series, 83rd volume, p. 338.

by the Supreme Court of Canada was provided in 1959 in *Roncarelli* v. *Duplessis*. The background of this case was attempts at mass proselytising by Jehovah's Witnesses in predominantly Roman Catholic Quebec. Quebec authorities attempted to quell this movement by arresting many of the Witnesses for peddling wares without a license. The Witnesses invariably posted bail with a view towards challenging the expected fines. Frank Roncarelli, both a Witness himself and the owner of a successful restaurant, posted bail in at least 380 such cases. Quebec Premier Maurice Duplessis instructed the head of the provincial liquor commission to revoke Roncarelli's license and to never grant another one with a view towards crippling Roncarelli's restaurant business. This revocation had nothing to do with any purposes related to the regulation of liquor in the province, and was intended solely to punish Roncarelli for his assistance to the Witnesses. Justice Rand condemned the Premier's actions in this fashion:

> The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province. Whatever may be the immunity of the Commission or its member from an action for damages, there is none in the respondent. He was under no duty in relation to the appellant and his act was an intrusion upon the functions of a statutory body. ... That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure. An administration of licences on the highest level of fair and impartial treatment to all may be forced to follow the practice of "first come, first served", which makes the strictest observance of equal responsibility to all of even greater importance; at this stage of developing government it would be a danger of high consequence to tolerate such a departure from good faith in executing the legislative purpose.[28]

The fundamental lesson of *Roncarelli* v. *Duplessis* is that state officials cannot use their power in an entirely arbitrary fashion. Their power must be exercised only for purposes relevant to existing law, constitutional or statutory.

In the *Patriation Reference*, handed out in 1981, the Court added: "The 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of *executive accountability to legal authority*".[29] The concept of the rule of law has since been explicitly entrenched

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[28] *Roncarelli* v. *Duplessis*, 1959, Supreme Court of Canada, Supreme Court Reports 1959, pp. 141–142.

[29] *Manitoba (A.G.)* v. *Canada (A.G.)*; *Canada (A.G.)* v. *Newfoundland (A.G.)*; *Quebec (A.G.)* v. *Canada (A.G.)*, 1981, Supreme Court of Canada, Supreme Court Reports 1981, volume 1, pp. 805–806. Emphasis added.

into the Canadian constitutional order. The preamble to the Constitution Act, 1982 states: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law ... "

Lastly, the Court examined the rule of law in 1998 in *Reference re Secession of Quebec*, which considered whether Quebec had the legal right to unilaterally separate from Canada.[30] The Court held that the rule of law was a fundamental feature of Canada's overall constitutional structure. The Court also stated:

> Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch.[31]

The next step is to provide an overview of judicial interpretation of s. 35(1) that deals with when Aboriginal rights exist and when Aboriginal peoples are to be consulted and/or accommodated with respect to their rights. This is done with a view towards tying in the rule of law with obligations to respect Aboriginal rights.

6. Aboriginal Rights

There are two categories of rights under s. 35(1). One is treaty rights, which will be examined later. The other is inherent Aboriginal rights, for which an overview is now provided.

6.1. Inherent Rights

The first Supreme Court case to consider inherent Aboriginal rights under s. 35 was *R.* v. *Sparrow*, released in 1990.[32] Ronald Sparrow was charged with fishing with a larger net than was permitted by regulations in force in British Columbia. Sparrow argued that his Musqueam Indian band had traditionally fished for food and ceremonial purposes in the area in question. As the practice was now elevated to a constitutional right, he should be allowed to do it without the restrictions imposed by the regulations.[33]

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[30] *Reference re Secession of Quebec*, 1998, Supreme Court of Canada, Supreme Court Reports 1998, volume 2, p. 385.
[31] *Ibid.*, para. 72.
[32] *R.* v. *Sparrow*, 1990, Supreme Court of Canada, Supreme Court Reports 1990, p. 385.
[33] *Ibid.*, pp. 1088–1091.

The Court expounded a number of principles concerning s. 35. Section 35 protects Aboriginal rights which were in existence when the Constitution Act, 1982 came into effect. Contrary to arguments made by the Attorney General of British Columbia, the Court concluded that Aboriginal rights are not frozen in the form in which they were limited by law when the Constitution Act, 1982 came into force. In other words, Aboriginal rights can be revived against laws and regulations which have limited them. This includes allowing Aboriginals to exercise their rights in their "preferred manner".[34] In this case, the Court would recognise Mr. Sparrow's right to fish with a larger net than permitted by the regulations. The Court also mandated that Aboriginal rights were to be interpreted in a generous and flexible fashion, taking into account the perspective of the Aboriginal peoples themselves.[35] The Court also suggested a threshold for what is protected as an inherent right under s. 35(1), by stating: "The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture".[36]

In 1996 the next landmark case on inherent rights would pick up on this theme of "intregral part of their distinctive culture", but in ways that would restrict the scope for recognition of inherent rights. *R.* v. *Van der Peet*,[37] along with two other companion cases, *R.* v. *Gladstone*[38] and *R.* v. *N.T.C. Smokehouse*,[39] saw claims to Aboriginal rights to fish for commercial purposes. It was in this trio that the Supreme Court articulated a series of strict tests governing what are protected as Aboriginal rights under s. 35.

The first stage involves how the right is to be characterised. Chief Justice Lamer wrote in *Van der Peet*: "To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action done pursuant to an Aboriginal right, the nature of the governmental regulation, statute or action impugned, and the tradition, custom or right relied upon to establish the right".[40] Also, the very practice itself which is claimed as a right must be phrased in specific, as opposed to general, terms and cognizable to a non-Aboriginal legal

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[34] *Ibid.*, pp. 1091–1093.
[35] *Ibid.*, pp. 1099, 1112–1113.
[36] *Ibid.*, pp. 1099.
[37] *R.* v. *Van der Peet*, 1996, Supreme Court of Canada, Supreme Court Reports 1996, volume 2, p. 507.
[38] *R.* v. *Gladstone*, 1996, Supreme Court of Canada, Supreme Court Reports 1996, volume 2, p. 723.
[39] *R.* v. *N.T.C. Smokehouse*, 1996, Supreme Court of Canada, Supreme Court Reports 1996, volume 2, p. 672.
[40] *R.* v. *Van der Peet*, para. 53.

system.[41] It would not be enough to show that Aboriginal peoples in general engaged in a practice alleged to be the historical foundation of a modern constitutional right.[42] For example, a right to a separate criminal justice system would be unacceptable. What may instead be acceptable is claiming rights to individual practices within that separate justice system. An example includes the right to banish an offender permanently from the community. Another example could be a right to inflict corporal punishment for repeated theft.

Once the practice is properly characterised, the next test determines whether that practice merits constitutional protection as an inherent Aboriginal right. Only practices, traditions, and customs which were integral to distinctive Aboriginal societies before contact with Europeans are protected under s. 35(1).[43] It is not enough for the practice to have been significant to an Aboriginal society before contact. It had to have been "integral" to that society before contact, "it was one of the things that truly made the culture what it was".[44] Practices which developed solely in response to contact with Europeans are excluded.[45] The test is a restrictive one. As such, Chief Justice Lamer took care to say this: "In assessing a claim for the existence of an Aboriginal right, a court must take into account the perspective of the Aboriginal people claiming the right... It must also be recognized, however, that the perspective must be framed in terms cognizable to the Canadian legal and constitutional structure".[46] Chief Justice Lamer also stated that conclusive evidence of the practices would not be required in order to establish a successful claim. The evidence only needs to demonstrate which practices originated before contact.[47]

The practice need not be distinct to one particular Aboriginal society alone. The inquiry is whether it is integral to a "distinctive" as opposed to "distinct" Aboriginal society. Distinct means unique. Distinctive means "different in kind or quality; unlike".[48]

The test also requires that there be continuity between the practice before contact and the practice as it exists today. There need not be an unbroken chain of continuity. The practice may have ceased for a period of time, then resumed, without offending the requirement for continuity. The test will also permit some

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41) *Ibid.* The "requirement for specificity" is at paras. 52 and 69. The "requirement of being cognizable to a non-Aboriginal legal system" is at para. 46.
42) *Ibid.*, para. 56.
43) *Ibid.*, paras. 60–61.
44) *Ibid.*, para. 55.
45) *Ibid.*, para. 73.
46) *Ibid.*, para. 49.
47) *Ibid.*, para. 62.
48) *Ibid.*, para. 71. Chief Justice Lamer quoted the Oxford Dictionary for the meaning of distinctive.

modification of the practice, so that it can be exercised in a contemporary manner.[49]

Delgamuukw v. *British Columbia*[50] is a 1998 landmark case dealing with a sub-species of inherent rights, land title. It sets out a test for whether an Aboriginal group holds title to a parcel of land. All three of the following questions must be answered in the affirmative: (i) Did the Aboriginal group occupy the land prior to sovereignty? (ii) Is there continuity between present occupation and pre-sovereignty occupation? (iii) Was the Aboriginal group in exclusive occupation of the land at sovereignty?[51] If these criteria are met, then the Aboriginal group possesses a "bundle" of rights with respect to that land. Chief Justice Lamer describes the "bundle" this way:

> that Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices, customs and traditions which are integral to distinctive Aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.[52]

Alienation of the land to a private actor, and strip mining which destroys the value of the land as a hunting ground when the Aboriginal group traditionally hunted on that land, were the examples of irreconcilable uses provided by Chief Justice Lamer.[53]

The Supreme Court has since provided an additional gloss on the *Delgamuukw* tests in the 2005 decision of *R. Bernard; R.* v. *Marshall.* The Court has made the test for exclusive occupation a strict one by emphasising that exclusive occupation means actual physical occupation by the Aboriginal claimants' forebears. Land on which physical dwelling units like tipis, lodges or cabins were constructed would qualify as land subject to Aboriginal land title. Land that was enclosed for cultivation or otherwise subject to regular year-round hunting, fishing or other methods of resource exploitation also qualifies for Aboriginal land title.[54] Seasonal fishing or hunting rights will not found Aboriginal land title, but can instead found inherent Aboriginal rights separate from title.[55] The other broad category of s. 35 rights are treaty rights, for which an overview is now provided.

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[49] *Ibid.*, para. 64.
[50] *Delgamuukw* v. *British Columbia*, 1997, Supreme Court of Canada, Supreme Court Reports 1998, volume 3, p. 1010.
[51] *Ibid.*, para. 143.
[52] *Ibid.*, para. 117.
[53] *Ibid.*, para. 128.
[54] *R.* v. *Bernard; R.* v. *Marshall*, 2005, Supreme Court of Canada, Supreme Court Reports 2005, volume 2, p. 220, paras. 55–56.
[55] *Ibid.*, para. 57.

6.2. *Treaty Rights*

If a treaty is reached between an Aboriginal group and Canada, the rights enjoyed by the Aboriginal group under the terms of that treaty replace their inherent rights under s. 35(1). The principles of treaty interpretation can be summarised as follows:

1. [A] treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred.[56]
2. [R]elations with Indian tribes fell somewhere between the kinds of relations conducted between sovereign states and the relations that such states had with their own citizens ... [A]n Indian treaty is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.[57]
3. The treaties "should be given a fair, large and liberal generous constructions in favour of the Indians".[58] This in turn requires that ambiguities and uncertainties be resolved in favour of the Indigenous signatories.[59]
4. Treaties "must ... be construed, not according to the technical meaning of [their] words ... but in the sense in which they would naturally be understood by the Indians".[60]
5. Treaties should be "interpreted in a flexible way that is sensitive the evolution of changes".[61]
6. It is implicit that treaty rights include those activities which are "reasonably incidental" to those expressly mentioned in a treaty.[62]
7. [T]he honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfill its promises. No appearance of "sharp dealing" will be sanctioned.[63]

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[56] *R.* v. *Sioui*,1990, Supreme Court of Canada, Canadian Native Law Reporter 1990, volume 3, p. 152.
[57] *Ibid.*, para. 135.
[58] *R.* v. *Simon*, 1985, Supreme Court of Canada, Supreme Court Reports 1985, volume 2, p. 402.
[59] *Sioui*, *supra* note 56, p. 134; *R.* v. *Horseman*, 1990, Supreme Court of Canada, Supreme Court Reports 1990, volume 1, p. 901.
[60] *Jones* v. *Meehan*, 1899, United States Supreme Court, United States Reports, volume 175, p. 1175; cited in *R.* v. *Nowegijick*, 1983, Supreme Court of Canada, Supreme Court Reports 1983, volume 1, p. 29, and in *R.* v. *Simon*, *supra* note 58, p. 402.
[61] *R.* v. *Simon*, *supra* note 58, p. 402.
[62] *Ibid.*, p. 403.
[63] *R.* v. *Badger*, 1996, Supreme Court of Canada, Supreme Court Reports 1996, volume 1, p. 771 at para. 45.

8. The Court's obligation is to "choose from among the various possible interpretations of the *common* intention [and at the time the treaty was made] the one which best reconciles" the Mi'kmaq interests and those of the British Crown.[64]
9. Regulations that do no more than reasonably define a treaty right do not *prima facie* infringe a treaty right.[65]

Some additional facets of s. 35 jurisprudence, which include duties of the Crown to consult with Aboriginal peoples, will now be explained.

6.3. Crown Duties and Justifiable Infringement

Section 35 is not part of the Charter, but is in another part of the Constitution Act, 1982. The rights in s. 35 are therefore not subject to s. 1 of the Charter, which allows for justified limitations of Charter rights. Nonetheless, the Court noted that the words "recognized and affirmed" in s. 35 mean that Aboriginal rights are not absolute. They are still subject to justifiable limitation.[66] Treaty rights are also subject to the same tests for justifiable limitation, which will be described below.[67]

The first stage of the limitation test is whether there is a *prima facie* infringement of the Aboriginal right. Chief Justice Dickson stated:

> To determine whether the fishing rights have been interfered with such as to constitute a prima facie infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?[68]

The next stage is deciding whether there is valid legislative objective for infringing the Aboriginal right. "The public interest" is too broad and vague to qualify as a valid objective.[69] Conservation of natural resources and preventing the exercise of Aboriginal rights in a way that would cause harm to the general population or Aboriginal people themselves were mentioned by the Court as examples of valid objectives.[70]

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[64] *R.* v. *Marshall*, 1999, Supreme Court of Canada, Supreme Court Reports 1999, volume 3, p. 456 at para. 14. Hereinafter *Marshall no. 1.*
[65] *R.* v. *Marshall*, 1999, Supreme Court of Canada, Supreme Court Reports 1999, volume 3, p. 533 at para. 37. Hereinafter *Marshall no. 2.*
[66] *Sparrow*, *supra* note 32, p. 1109.
[67] *Badger*, *supra* note 63, paras. 74–82. Justice Cory reasoned that as both inherent and treaty rights are included in s. 32, a common approach to legislative infringement should be used for both types of rights.
[68] *Sparrow*, *supra* note 32, p. 1112.
[69] *Ibid.*, p. 1112.
[70] *Ibid.*, p. 1113.

The next stage is whether the infringement is justified. Deciding whether an infringement is justified is influenced by the 1984 decision of *Guerin* v. *The Queen*.[71] In that case, the Supreme Court found that government, federal or provincial, owes fiduciary duties to Aboriginal peoples.[72] Chief Justice Dickson incorporates the notion of fiduciary obligation first introduced in *Guerin* into the *Sparrow* justification test: "the honour of the Crown is at stake in dealings with Aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis Aboriginals must be the first consideration in determining whether the legislation or action in question can be justified".[73] He also has more to say on the test of justification:

> Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented.[74]

In fact, obligations under s. 35(1) are extensive enough to require consultation with Aboriginal peoples when Canadian governments are or should be aware that their actions will infringe upon Aboriginal rights that potentially exist. The issue of when Crown duties towards Aboriginal issues are triggered came up in 2004 in *Haida Nation* v. *British Columbia*.[75] The Haida people reside in the Queen Charlotte Islands off the coast of British Columbia, which are rich in timber including old-growth forests. The government of British Columbia issued licenses to harvest timber on the islands four times in 1961, 1981, 1995 and the latest one in 2004 involving a transfer of the license to Weyerhauser Company Limited. These decisions had proceeded without consulting the Haida and often over their objections at least since 1994. The Haida pursued the remedy of setting aside the licenses on the basis of their asserted land title, which had yet to be recognised by any court at the time. The Crown of British Columbia argued that it held legal title over the land in question, and unless and until the Haida formally proved their land title claim, the forest-harvesting license could proceed unilaterally and unencumbered.[76] The Court decided that the Crown's fidicuary duty to act in the

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71) *Guerin* v. *The Queen*, 1984, Supreme Court of Canada, Supreme Court Reports 1984, volume 2, 335.

72) In *Guerin*, *ibid.*, paras. 365 and 375–376, the fiduciary obligation arose in the context of negotiating a lease of reserve land on behalf of the band.

73) *R.* v. *Sparrow*, *supra* note 32, p. 1114.

74) *Ibid.*, p. 1119.

75) *Haida* v. *British Columbia (Minister of Forests)*, 2004, Supreme Court of Canada, Supreme Court Reports 2004, volume 3, p. 511. (hereinafter *Haida*); *see also Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, 2004, Supreme Court of Canada, Surpeme Court Reports, volume 3, p. 550.

76) *Haida*, *ibid.*, paras. 1–8.

best interests of Aboriginal peoples does not encompass every single aspect of the relationship between the Crown and Aboriginal peoples. In other words, the duty does not exist at large but only in relation to specifically identifiable Aboriginal interests. An asserted although unproven claim to land title is therefore not specific enough to trigger the fiduciary obligation.[77]

At the same time, the Court recognised that the Crown cannot "cavalierly run roughshod over Aboriginal interests" that Aboriginal peoples may be seriously endeavoured to pursue through negotiation or proof during litigation.[78] Therefore, even when the fiduciary obligation is not triggered, the Crown may still have to observe duties of accommodation and consultation. Chief Justice MacLachlin states:

> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it ...[79]

MacLachlin adds: "The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties".[80] These stringent duties may include accommodating the Aboriginal interest until a claim is resolved.[81] Though the requirements of the duty may vary with the circumstances, they must at a minimum "be consistent with the honour of the Crown".[82] The duty is broad enough to encompass the potential, although as yet unproven, interests of Indigenous peoples. These Crown duties also apply when the Crown acts in a manner as to affect treaty rights.[83] Third parties, like private companies, do not have legal duties of consultation and accommodation, nor can the Crown delegate its honour to third parties.[84] Third parties can, however, be liable in appropriate circumstances, such as where they act negligently when a duty of care is owed to Aboriginal peoples, or when they breach a contract.[85] Crown duties bind provincial governments as well as the federal government.[86] Now it is time to make a connection between the rule of law and Aboriginal rights.

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77) *Ibid.*, para. 18.
78) *Ibid.*, para. 27.
79) *Ibid.*, para. 35.
80) *Ibid.*, para. 37.
81) *Ibid.*, para. 38.
82) *Ibid.*, para. 38.
83) *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, 2005, Supreme Court of Canada, Supreme Court Reports 2005, volume 3, p. 388.
84) *Haida*, *surpa* note 75, paras. 53–55.
85) *Ibid.*, para. 56.
86) *Ibid.*, para. 57–59.

7. The Rule of Law and Aboriginal Rights

As previously mentioned, the preamble to the Constitution Act, 1982 asserts that the rule of law is a fundamental feature of Canada's constitutional structure. Within that same document is the Aboriginal rights provision, s. 35(1). The logical connection is that respect for Aboriginal rights on the part of Canadian governments is required by the rule of law. Brian Slattery states:

> Since the time of Justice Rand, we have seen the gradual emergence of the view that the relationship between the Crown and aboriginal peoples is governed by the rule of law, not simply that of politics. As such, the rights of aboriginal peoples are protected by the courts and cannot be superseded by the arbitrary actions of public officers.[87]

Slattery was speaking mainly with reference to *Sparrow* and *Delgamuukw*, and prior to *Haida*. But it is not hard to see the connection between the rule of law and *Haida*.

Under *Haida*, the Crown's duty towards an Aboriginal community is triggered when the Crown has real or constructive knowledge of a potential inherent right, treaty right or land title of that community, and contemplates action that may adversely affect that right or title. The Crown must behave honourably once that duty is triggered. Prior notice is required at a bare minimum. For stronger claims to rights or title, the rule of law may require the Crown to accommodate Aboriginal interests until those claims are finally resolved. Failure to observe the requirements of *Haida* constitutes a breach of law. "Executive accountability to legal authority" requires no less. And as we will now see failures to uphold the rule of law can also disentitle the Crown to criminal conviction against an accused.

8. The Rule of Law and the Criminal Process

There is also recognition in Canadian law that failure by the state to observe the rule of law can disentitle the state from obtaining criminal conviction. James Stribopoulos, speaking with reference to the right against arbitrary detention by police officers under s. 9 of the Canadian Charter of Rights and Freedoms, explains:

> The Anglo-Canadian common law constitution has long required that any interference with individual liberty be based on lawful authority. This proposition, known as the "principle of validity", requires that "every official act must be justified by law". Dicey has characterized this concept as central to the "rule of law". For him the antithesis of this "fundamental principle of the constitution" is the exercise of "arbitrary power". Of specific interest, given our interpretive

[87] B. Slattery, 'Some thoughts on Aboriginal Land Title', 49 *University of New Brunswick Law Journal* (1999) p. 20.

> task, is one of the ways in which Dicey has illustrated this point in his text, noting that the English constitution forbids "arbitrary arrest". This evidences a long history of equating illegality with arbitrariness.[88]

A finding that a police officer arbitrarily detained a citizen in violation of s. 9 can lead to significant remedies under the Charter. It could possibly lead to an exclusion of evidence under s. 24(2) of the Charter, and this in turn could lead to the prosecution not having enough evidence to make a case. Section 24(1), the general remedial provision of the Charter, may also be available.[89] If the violation of s. 9 was serious enough, it could even lead to damages awarded to the detainee[90] or a judicial stay of proceedings.[91]

There is also recognition in some of the Supreme Court's decisions on Aboriginal rights that the state can be disentitled to seek conviction against an Aboriginal person when that person disobeys laws that negatively impact his or her rights under s. 35(1). In *Sparrow*, the Court acknowledged that acquittal was a potential and lawful remedy available to Mr. Sparrow if it could be established on evidence that the regulations infringed his rights under s. 35(1) and did so without sufficient justification. It declined to make such a ruling itself though, preferring that Ronald's case be heard again in a new trial in accordance with their newly articulated tests for Aboriginal rights.[92] Likewise in *Marshall (no. 1)*, Donald Marshall was arrested and charged for selling eel in contravention of Nova Scotia regulations. Marshall argued successfully that the regulations infringed his rights under treaties concluded from 1760 to 1761 between the Mi'kmaq and the British, and without sufficient justification. Marshall was acquitted of all charges.[93] Failure to respect Aboriginal rights either in legislation or executive action as required by the rule of law can lead to acquittal. Now it is time to tie this all together.

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[88] J. Stribopoulos, 'Unchecked Power: The Constitutional Regulation of Arrest Reconsidered' 48 *McGill Law Journal* (2003) p. 269; Stribopoulos is referring to A.V. Dicey, *Introduction to the Study of the Constitution*, 10th ed. (Macmillan, New York, 1965) pp. 193, 196, 202, 207–208.

[89] As one example, evidence, even when not excluded under s. 24(2), can be excluded under s. 24(1) if it would prejudice the accused's right to a fair trial; *R.* v. *White*, 1999, Supreme Court of Canada, Supreme Court Reports 1999, volume 2, p. 417.

[90] This is possible at least in theory. *See Mackin* v. *New Brunswick (Minister of Justice)*, 2002, Supreme Court of Canada, Supreme Court Reports 2002, volume 1, p. 405. *See also* an instance of legal costs being awarded against the Crown where the right to disclosure was violated in *Ontario* v. *974649 Ontario Inc.*, 2001, Supreme Court of Canada, Supreme Court Reports 2001, volume 3, p. 575.

[91] This is also in theory. A judicial stay of proceedings is for example the standard remedy when the right to be tried within a reasonable time under s. 11(d) has been violated. *See R.* v. *Askov*, 1990, Supreme Court of Canada, Supreme Court Reports 1990, volume 2, p. 1199.

[92] *R. v. Sparrow*, *supra* note 32, pp. 1120–1121.

[93] *Marshall (no. 1)*, *supra* note 64, para. 67.

9. A Proposal for Legally Recognising Aboriginal Civil Disobedience

The previous summaries on Aboriginal rights jurisprudence should make it apparent that judicial interpretation on s. 35 is not without problems from the perspective of Aboriginal peoples themselves. Aboriginal scholars have for example frequently criticised the *Van der Peet* tests for going too far in narrowing the scope for when Aboriginal rights will be recognised.[94] The paper will avoid critiquing the ways in which the judiciary has interpreted s. 35(1) and instead focus on one aspect of that jurisprudence, the duty to accommodate potential Aboriginal interests as required by *Haida*. The position is that an Aboriginal protester should be entitled to have criminal charges arising from an act of non-violent civil disobedience judicially stayed when three requirements are fulfilled. First, the Crown must undertake action that threatens harm to or interference with an Aboriginal interest that is potentially protected under s. 35(1). Second, that action must be carried out in a fashion that reflects a failure of the Crown to uphold its duties under *Haida*. If the Canadian state commences action that threatens immediate harm to Aboriginal interests that are potentially protected by s. 35(1) without giving prior notice, or without any effort at accommodation when there is a strong s. 35(1) claim, these are circumstances in which the second criteria can be said to have been fulfilled.

Thirdly, there may often be an element of urgency involved with the use of civil disobedience by Aboriginal protesters. *Haida* contemplates seeking interim remedies, such as a consultation process or even interim accommodation of Aboriginal interests, through the courts pending final resolution either through negotiation or litigation.[95] There may, however, be situations where this is also not enough. The third requirement therefore is that the Crown action must be initiated or set in motion before the concerned Aboriginal peoples can commence the interim hearing contemplated by *Haida*. There is indeed recognition within *Haida* itself that government actions can cause immediate and severe damage to Aboriginal interests, and therefore duties of consultation and accommodation can become correspondingly more stringent. Chief Justice McLachlin:

> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the

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[94] For two scholarly works that contain frequent criticisms of Van der Peet and s. 35(1) jurisprudence in general, *see* P. Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Fernwood Press, Halifax, 1999), and J. Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, Toronto, 2002).

[95] *Haida*, *supra* note 75, para. 60.

> opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.[96]

And again:

> Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.[97]

It is conceivable that there may be situations where government action can cause severe damage to Aboriginal interests even before the interim hearing contemplated by *Haida* can be arranged for. One such situation could be where loggers show up ready to cut down old growth forests that are potentially subject to Aboriginal title. In such situations, it can then be argued that the Aboriginal peoples with a stake are left with no recourse but to take matters into their own hands and directly block government action, action that disregards the rule of law. The immediacy of such a situation merits a judicial stay of proceedings against the Aboriginal protesters.

To not allow a staying of charges in such circumstances is unjust because it holds only one side to the rule of law. Judges have been quick to condemn Aboriginal civil disobedience as a threat to the rule of law. The rule of law does not bind the actions of only individuals though. It also binds the actions of Canadian governments. That same rule of law requires Canadian governments to uphold their obligations under *Haida*. If a judge holds only Aboriginal protesters to the rule of law, but makes no inquiry as to whether *Haida* was upheld when a Canadian government commenced actions that threatened Aboriginal interests potentially meriting protection under s. 35(1), it amounts to a double standard. It is a double standard made worse by the fact that it is Aboriginal peoples who have and continue to suffer in dire poverty through continued colonialism while non-Aboriginal interests continue to benefit from the colonial relationship. Christopher Moore imputes a double standard to Justice Marshall issuing the injunction during the situation in Caledonia in this fashion:

> [T]he principle of the rule of law makes its own demands on those who invoke it. If we insist on the rule of law even at the point of a bayonet, it is essential that we commit to the rule of all the laws and to the rule of law for all.

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96) *Ibid.*, para. 44.
97) *Ibid.*, para. 47.

> It should be impossible for any fair-minded person to contemplate the history of the Six Nations of the Grand River without recognizing that the Six Nations have been shockingly plundered of both lands and entitlements. Canada has always ignored most of the treaty obligations we accepted. Six Nations lands in vast quantities have been appropriated on the flimsiest of pretexts. Six Nations monies have been squandered by those who appointed themselves its trustees.
>
> The Crown once acknowledged Six Nations' control of some 385,000 hectares, "which them and their posterity are to enjoy forever." Today the Six Nations' lands cover barely 19.000 hectares and it takes a strong stomach to examine the history of what happened to the other 366,000. ...
>
> We are told there is a land-claims process going on and a self-governance one too. It is suggested there are venues for these disputes to be heard and settled.
>
> But should we expect any conclusions before, say, the 23rd century? Meanwhile, the exploitation of the disputed lands goes on apace. Why does it always take the courts barely 24 hours to grant the injunctions that will send in the tactical squads, when they never over generations take judicial notice of how complicit our courts have been in the very injustices that caused the confrontation in the first place.[98]

Justice Lambert, who dissented in *McMillan*, made a finding of fact in favour of the Aboriginal protesters and tied it in with the rule of law as follows:

> The fourth point is that it is important to ask to what extent the authority of the courts may be thought to be depreciated by these acts of protest in an overall context where the courts find that some protestors have been prosecuted and not others, in particular not Mr. Robinson, and in an overall context where the courts find themselves the instruments for upholding the Clayoquot Sound Land Use Decision which, according to the Provincial Ombudsman, was made without consulting the Nuu-chah-nulth peoples whose constitutionally guaranteed aboriginal rights may be deeply affected by the Decision and who may themselves have been denied the protection of the rule of law as it relates to administrative fairness.[99]

When cases of Aboriginal civil disobedience come before Canadian courts, the courts should not be holding only the Aboriginal protesters to the rule of law. They should also inquire as to whether the case involves Aboriginal interests that potentially merit protection under s. 35 such as to give the Crown real or constructive knowledge. If there are such interests, the judges should then inquire as to whether the Crown has discharged its obligations under *Haida*. Failure to do so should entitle the Aboriginal protesters to having charges stayed. This idea does not hinge so much on the moral innocence of the Aboriginal protesters even though they may well believe in the justness of their actions. It is more that by failing to uphold the rule of law with respect to Aboriginal rights, the Canadian state should be disentitled to use its powers of criminal prosecution to enforce actions that adversely affect interests protected by s. 35.

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[98] C. Moore, 'When courts undermine the rule of law', *Law Times*, 28 August 2006, p. 7.

[99] *MacMillan*, *supra* note 6, p. 33.

There remain questions of to whom the burden of proof should be allocated, and the procedures that are to be used in cases where Aboriginal protesters are tried for civil disobedience. However, *Haida* provides the standards that the Crown is to be held to. Consider this passage from *Haida*: "The question is whether the Province had knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplated conduct that might adversely affect them".[100] It is certainly open to the Aboriginal protesters to call evidence demonstrating that real or constructive knowledge on the part of the Crown. Once a court is satisfied that the Crown possessed the requisite knowledge, then evidence can be called concerning the Crown's actions so that the court can assess whether the Crown has upheld its obligations under *Haida*, whether it involved providing sufficient notice for a weak or dubious claim, or accommodating Aboriginal interests where there is a strong claim. Of course, there remains the problem that evidence of Crown knowledge or actions may often be beyond the immediate possession or reach of the Aboriginal protesters. One answer can be found in that Aboriginal protesters, as criminal accuseds, would have a right to disclosure of the Crown's case under the Charter. This right to disclosure also requires that evidence that could be used in support of a legal defence also be provided to the accused.[101] This could be used by counsel for the Aboriginal protesters to apply for disclosure of Crown documents that demonstrate knowledge of Aboriginal interests, or actions or policy decisions that adversely affected Aboriginal interests. The subpoena provisions of the Criminal Code could also be used to procure the testimony of individuals, perhaps from within a Canadian government, possessing relevant knowledge.[102]

Finally, the acts of disobedience should be of such a nature as to not threaten the bodily integrity of another person. This is admittedly an arbitrary and subjective call upon the part of the author. Consider, however, that civil disobedience in

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[100] *Haida*, *supra* note 75, para. 64.

[101] *R.* v. *Stinchcombe*, 1995, Supreme Court of Canada, Supreme Court Reports 1995, volume 1, p. 754.

[102] *Consider* section 698 of the Criminal Code, which reads in part:

(1) Where a person is likely to give material evidence in a proceeding to which this Act applies, a subpoena may be issued in accordance with this Part requiring that person to attend to give evidence.

The Criminal Code also seems to contemplate service on a governmental organization. Consider section 703.2, which reads:

Where any summons, notice or other process is required to be or may be served on an organization, and no other method of service is provided, service may be effected by delivery

(a) in the case of a municipality, to the mayor, warden, reeve or other chief officer of the municipality, or to the secretary, treasurer or clerk of the municipality; and
(b) in the case of any other organization, to the manager, secretary or other senior officer of the organization or one of its branches.

India and the American South gained moral and political legitimacy precisely because they emphasised non-violent protest. Violent acts of disobedience by contrast are more likely to lead to the Aboriginal protesters being condemned as radicals, extremist or even terrorist, especially in the wake of 9/11. Violent acts of protest would hardly encourage judges to provide any recognition for Aboriginal civil disobedience within Canadian law. There is, however, an objection that needs to be dealt with.

10. Making the Illegal Legal

Civil disobedience by its very nature involves the deliberate and knowing disobedience to a law, and implicitly also an acceptance of the penalties that follow. One could say that there is something conceptually and legally questionable in suddenly providing legal protection to an activity that involves resolute defiance of the law. The reply to this is that civil disobedience can involve a challenge to laws and governmental actions that are not only unjust but are themselves illegal. The objective is sometimes not only to make the legal system more just but also more in line with the demands of a higher law.

This can be seen in the American Civil Rights Movement. Martin Luther King's speech intimated that the movement was driven by a perception that America was not abiding by one of its founding principles as expressed in the Declaration of Independence, "that all men are created equal". The movement also involved protests against laws that were seen as violating Section 1 of the Fourteenth Amendment of the United States Constitution, which reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The United States Supreme Court had interpreted this as permitting racial segregation so long as equivalent facilities were provided to both Blacks and Whites in *Plessy* v. *Ferguson*.[103] The Court subsequently abandoned the "separate but equal" doctrine and interpreted the Fourteenth Amendment as requiring public schools to provide equal access to both Black and White students in *Brown* v. *Board of Education*.[104] The catch was that states were ordered to comply with

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[103] *Plessy* v. *Ferguson*, 1896, United States Supreme Court, United States Reports, volume 163, p. 537.

[104] *Brown* v. *Board of Education*, 1954, United States Supreme Court, United States Reports, volume 347, p. 483.

the requirement with "all deliberate speed".[105] Suffice to say that southern states resisted compliance through a variety of measures including stalling, economic reprisals and threats of violence. The school system in the South remained segregated well into the 1960s.[106] The failure of *Brown* to bring about desegregation was indeed an important catalyst to many of the protests and acts of civil disobedience that followed. End results of the movement included the Civil Rights Act of 1964[107] which prohibited discrimination by employers and public accommodations, the Voting Rights Act of 1965[108] which prohibits voting discrimination, and the Civil Rights Act of 1968[109] which prohibits discrimination in the sale or rental of housing. The fruits of the movement included legislative guarantees of "equal protection of the laws" and against abridging the privileges of American citizens, African Americans included.

On a certain level, the proposal does contemplate defiance of Canadian laws. It must be remembered, though, that the proposal envisions permissible disobedience to laws or executive actions that are themselves illegal. They are illegal because they do not abide by the rule of law. They do not abide by constitutional requirements under s. 35(1). The proposal, similar to the American Civil Rights Movement, strives to hold Canadian law and executive action to a higher law. There is, however, an alternative to the proposal that must now be considered.

11. Defence of Necessity

A common law defence that is available to criminal accuseds under Canadian law is that of necessity. This defence has three essential elements:

1) The accused must be faced with imminent peril or danger;
2) The accused did not have any lawful course of action that provided a reasonable alternative to the accused having broken the law;
3) There must be proportionality between the harm the accused inflicted and the harm that was avoided by breaking the law.[110]

It could be said that this provides an available avenue to Aboriginal protesters such that Canadian law need not explicitly condone civil disobedience. The jurisprudential contours that surround the defence of necessity, as we will see, make

[105] *Ibid.*, p. 495.
[106] C. J. Ogletree, *All Deliberate Speed: Reflections on the First Half Century of Brown v. Board of Education* (W.W. Norton, New York, 2004).
[107] Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, July 2, 1964.
[108] Voting Rights Act of 1965, 42 U.S.C. §1973–1973aa-6.
[109] Civil Rights Act of 1968, 42 U.S.C. §3601–§3639.
[110] *R.* v. *Latimer*, 2001, Supreme Court of Canada, Supreme Court Reports 2001, volume 1, 3.

it clear that the defence is unlikely to be of any meaningful assistance to Aboriginal protesters who are charged following their disobedience.

The imminent peril or danger contemplated by the defence is broad enough to encompass damage to property, and therefore can include threatened peril to Aboriginal interests such as land title. The problem, however, is that actions that threaten Aboriginal interests are themselves frequently authorised by Canadian governments. This can render Aboriginal protesters unable to satisfy the first test because government authorised actions create perils that have the veneer of legality and are therefore perils that cannot be resisted by virtue of necessity. This excerpt from *MacMillan* demonstrates the problem:

> ... I do not believe the defence of necessity can ever operate to avoid a peril that is lawfully authorized by the law. M. & B. had the legal right to log in the areas in question, and the defence cannot operate in such circumstances.
>
> *Code* s. 27 only justifies the use of force to prevent anything being done that, on reasonable grounds, is believed likely to cause immediate and serious injury to person or property. In my judgment, s. 27 does not contemplate the justification of force (if passively obstructing a road is the use of force) or other conduct which the court has already specifically enjoined.[111]

The problem with this approach is that actions authorising perils to Aboriginal interests are irrebuttably presumed lawful. This is an assumption that the previous discussions on Aboriginal rights and the rule of law demonstrate should not be made off hand. The test of necessity is inadequate because it does not contemplate an inquiry into whether the Canadian state has observed the rule of law. Staying prosecutions for failure to uphold the rule of law aspires to overcome this shortcoming.

There is also a problem that is unique to the third test. That test will require proportionality between the harm caused by Aboriginal civil disobedience and the harm sought to be averted by civil disobedience. The problem stems from the fact that the test will invite judges to assign priority to either Aboriginal interests or non-Aboriginal interests, with the latter typically involving economic development. There is reason to believe that an expected, even constant, result of applying this test will be that Aboriginal protesters cannot satisfy the proportionality test. This conclusion is borne out by witnessing how Aboriginal interests have fared under the application of a similar doctrine. Aboriginal peoples have frequently applied for interim injunctions in order to protect their interests against non-Aboriginal business development. One of the legal tests for granting an interim injunction is whether the balance of convenience, an inquiry into which party would suffer greater harm, favours the granting of the injunction. Aboriginal applicants have frequently failed to satisfy this test precisely because courts

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[111] *MacMillan*, *supra* note 6, p. 234.

perceived that greater harm would result by halting economic activities planned by non-Aboriginal business interests.[112] Similar analyses can be expected to play out where the necessity defence is asserted. The benefit behind the proposed remedy of staying charges is that the inquiry is focused squarely on the lawfulness of the actions of the Canadian state *vis-à-vis Haida.*

The necessity defence could of course remain available to Aboriginal protesters in the right cases. The necessity defence and an application to stay prosecution for failure to comply with *Haida* could conceivably both be available to an Aboriginal protester. This is all the more since the jurisprudence surrounding necessity and an application to stay prosecution as articulated here are conceptually different. Necessity is grounded in the moral involuntariness of the accused. An application to stay inquires as to whether the Canadian state has failed to uphold the rule of law with respect to *Haida* and therefore be disentitled to prosecute Aboriginal protesters who are left with no recourse but to engage in civil disobedience.

12. Conclusion

In the end, it is impossible to distinguish the social context of Aboriginal use of civil disobedience from the social context of the Indian struggle for independence and the Black Civil Rights Movement. Aboriginal peoples in Canada were subjected to a cruel and inhumane process of colonisation. A relationship of colonialism still persists whereby Canadian governments undertake actions that adversely affect Aboriginal interests that potentially merit constitutional protection, and frequently to the benefit of non-Aboriginals. Aboriginal peoples in the meantime are still left in severe poverty as a legacy of colonialism. The rule of law requires Canadian governments to ground their actions in legal authority, and this includes obligations to respect Aboriginal rights under the Constitution. If the Canadian state acts in such a way that it fails to uphold the law with respect to Aboriginal rights as required by *Haida*, and threatens Aboriginal rights before Aboriginal peoples can initiate the interim hearing contemplated by *Haida*, then

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[112] *Lubicon Lake Indian Band* v. *Norcen Energy Resources Ltd.*, 1985, Alberta Court of Appeal, Alberta Law Reports, 2nd series, 36th volume, p. 137; *Chingee* v. *British Columbia*, 1989, British Columbia Supreme Court, Canadian Native Law Reporter, volume 4, p. 83; *Wiigyet* v. *Kispiox Forest District*, 1990, British Columbia Supreme Court, British Columbia Law Reports, 2nd series, 51st volume, p. 73; *Derickson* v. *British Columbia*, 1997, British Columbia Supreme Court, Canadian Native Law Reporter, volume 2, p. 221; *Kitkatla Band* v. *British Columbia (Minister of Small Business, Tourism, and Culture)*, 1999, British Columbia Court of Appeal, Western Appeal Cases, volume 192, p. 144; *Yellow Quill First Nation* v. *Saskatchewan (Minister of Environment and Resource Management)*, 1999, Saskatchewan Court of Queen's Bench, Saskatchewan Law Reports, volume 186, p. 281; *West Fraser Mills Ltd.* v. *Kw'Alaams Indian Band*, 2004, British Columbia Supreme Court, Vancouver Registry No. S043161.

the state should be disentitled from using its power of criminal prosecution to enforce such action. The acts of civil disobedience should also be non-violent; otherwise it will never gain any legitimacy and could not possibly hope to receive any recognition under Canadian law. Finally, the common law defence of necessity is inadequate for two reasons. One reason is that business activities authorised by the Canadian state will be presumed lawful, not subject to an inquiry as to whether they observe the rule of law, and therefore leave Aboriginal protesters unable to satisfy the imminent peril test. The second reason is that the proportionality of harm test is likely to favour non-Aboriginal business interests that threaten Aboriginal interests.