

# IN A PERFECT WORLD...

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Modern Day Colonialism in Canada

May 11, 2001



*“Canada’s continued attempts to  
conquer Aboriginal Peoples”*

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The definition of “rape” is, to force another person to submit to sexual acts; to seize and carry off by force; and to plunder, pillage or steal. All of the Aboriginal peoples on Turtle Island have been raped, not just some who attended residential schools. Entire peoples have been raped, not just some individuals, all in the name of conquest. The focus of this paper is on Aboriginal peoples located in that part of Turtle Island known as Canada.

The rape of the Aboriginal peoples has historically been supported by state policy as justified. Current policy reflects the past. The rape can no longer be ignored and tolerated but must be deterred. The Aboriginal peoples are fully human and their rights as people and peoples deserve full respect. The remains of their ancestors plundered from sacred burial grounds equally deserve full respect through repatriation and reburial in the sacred ways.

The theory of the “master white race” dominated historical justification of the rape of Aboriginal peoples: “When Mr. Williams appeared as a witness before the Joint Committee [in Ottawa] on May 2, he stated: ‘There seems to be a theory of a master race over an inferior race which has to be followed. I have heard it said that the Indians cannot think for themselves. Therefore, somebody has got to do their thinking for them. I am sorry to say in practice in a great many instances that is borne out ...’ ”<sup>1</sup>

In the interim, until all the Indians died off, colonists consistently adopted policy such as disclosed in the following: “The struggle for an identity in coastal British Columbia was, in its first phase, a struggle of the colonists to remain true to the British conception of what the dominant population type should be in the area of new settlement. As far as the relations of the British with the native Indians were concerned, the problem of consistence in social organization was easily solved through the isolation of the Indians physically and socially and the establishment of the system of wardship already used in eastern Canada. Since the prevailing assumption was that the Indians would eventually disappear, the consequences of acculturation were of no concern for some time.”<sup>2</sup>

However, the Indians did not all die off and the manifest destiny of the white race has proven to be ill fated. Contrary to expectations, the Aboriginal peoples not only survived but their numbers are thriving.<sup>3</sup> Government and business recognize that the changing demographics must not be ignored. During a conference I spoke at recently<sup>4</sup>, a Cree person shared what his grandfather had told him many times: “There will come a day when the white people will have to come to us and ask us to take care of them.” After viewing the statistics it is easy to suspect that this prophesy could manifest itself in the not too distant future. The senior populations in Canada, being predominantly non-native, and currently taxing existing government support programs, may well have to look to the younger generations, having a very sizable Aboriginal component, for their welfare. The changing demographics should particularly interest the generations of the “baby-boom” and of their children.

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<sup>1</sup> F.E. LaViolette, *The Struggle for Survival Indian Cultures & the protestant Ethic in B.C.*, citing at p. 182 *Minutes*, No. 17, May 2, 1847, p. 831.

<sup>2</sup> *Ibid*, at p. 178.

<sup>3</sup> “According to the B.C. [British Columbia] Vital Statistics Agency, the birth rate for status Indian residents is about 25.1 births for every 1,000 people – more than twice the birth rate for other B.C. residents. More than half of aboriginal people in B.C. are under 25 compared with less than a third of the non-aboriginal population. People 55 and older constitute about 8.5 per cent of aboriginal population, while in the non-native community, seniors account for 21.3 per cent. ... ‘The reality is the workforce is going to be made up of a large percentage of native people, and up until this point, they have been mainly excluded from business and from the economy,’ said Taiaiake Alfred, director of UVic’s indigenous governance program. ... In Saskatchewan, where the aboriginal population is growing even faster than in B.C. and is expected to reach 14 per cent of the province’s population by 2011, business is already adapting.” “Faces of the Future: More than half of B.C.’s aboriginals are under 25 – and they’re ready to make their mark”, *Times Colonist*, February 18, 2001, p. A1.

An April 4, 2001 press release by the Manitoba provincial government referred to statistics that “[c]urrently 10 per cent of Manitoba’s workforce is of Aboriginal descent but this number is expected to dramatically increase over the next ten years. This will mean that by the year 2011, as many as one in four workers will be of Aboriginal descent. ... The fact that the Aboriginal population will increase in the upcoming years also means that the number of Aboriginal consumers will increase,” according to Manitoba Aboriginal and Northern Affairs Minister Eric Robinson.

<sup>4</sup> *Surviving the Past: First International Residential School Conference*, Edmonton, Alberta, February 22-25, 2001.

In 1965, the Supreme Court of Canada viewed favorably the history of the colonization of Aboriginal peoples as presented in the lower court decision in the *White and Bob*<sup>5</sup> case: “The position of the conqueror in relation to the Indians has been well stated by Chief Justice Marshall in delivering the judgment of the Supreme Court of the United States in *Johnson and Graham’s Lessee v. McIntosh* (1823), 8 Wheaton 543, 5 Law Ed. 681 (at pp. 589-90 Wheaton):

‘Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.

When the conquest is complete, the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to perpetual hazard of being massacred.’<sup>6</sup>

“In the same judgment the learned Chief Justice dealt with the nature of aboriginal rights at pp. 572-4, as follows: ‘On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.’<sup>7</sup>

Explaining the history of Imperial Indian policy, the court said, “As the military significance of alliances decreased and demands for settlement increased, the Crown became more receptive to those who petitioned for

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<sup>5</sup> *R. v. White and Bob* (1961), 50 D.L.R. (2<sup>nd</sup>) 613 (B.C.C.A.): “You will no doubt have heard that we disposed of the case of *The Queen v. White and Bob* on the ground that the tribal agreement was in fact a treaty and it was thus unnecessary for us to comment on your very exhaustive reasons for judgment. I thought, however, that I would like to write to tell you how much I enjoyed reading your decision and to congratulate you on the scholarly and highly authoritative way in which you dealt with the matter. Yours sincerely, Roland A. Ritchie”, Judges’ Chambers, Supreme Court of Canada, Ottawa, November 12, 1965.”

<sup>6</sup> *R. v. White and Bob*, *supra* at note 5 at 630-31.

<sup>7</sup> *R. v. White and Bob*, *supra* at note 5 at 632.

the opening of Indian land for settlement purposes. ... The Crown's 'civilization' policy encouraged First Nations to live, farm and *worship like the white man*, in and around permanent sites located on lands reserved for the First Nations."<sup>8</sup> [Emphasis added]

Colonization occurred in the name of Christianity yet ironically, the popular view holds that the development of religious freedom in America is attributable to reaction to the religious intolerance and practices in England. Dickson, J, then of the Supreme Court of Canada held that "belief itself was not amenable to compulsion. Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(a) of our Charter, the single integrated concept of 'freedom of conscience and religion.'"<sup>9</sup>

Many Aboriginal people have relied on the *Royal Proclamation of 1763* in efforts to preserve their rights. They have interpreted it to mean that land is recognized as "our land" and remains their Aboriginal land until it is ceded and sold.<sup>10</sup> To the contrary, the *Royal Proclamation of 1763* asserts full underlying title vests in the Crown, not in the Aboriginal peoples. The interests of the Aboriginal peoples, referred to as common law Aboriginal title and rights, is only viewed as a burden on the underlying, British root title. Furthermore, the only lands out of the Crown's lands that the *Royal Proclamation of 1763* leaves for the Indians to continue to use are those lands that the Crown views as waste and unoccupied lands. What constitutes waste lands changes over time. Whereas in 1763 certain waste and unoccupied Crown lands were left for the Indians to use for hunting and their "traditional occupations", these same lands may now have a use with a meaningful economic component and therefore no longer be made available to Aboriginal peoples by the Crown.<sup>11</sup>

The *Royal Proclamation of 1876* is explained in the *White and Bob*<sup>12</sup> case:

"[In the same judgment of the Supreme Court of the United States in *Johnson and Graham's Lessee v. M'Intosh* the learned Chief Justice Marshall referred] 'to the British position and the *Royal Proclamation of 1763* ... at p.596:

'So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the king had a right to grant, or to reserve for the Indians.'<sup>13</sup>

"In his *A History of the Canadian West to 1870-71* (1939) A.S. Morton has discussed the foregoing matters [the *Royal Proclamation of 1763*] at pp. 257-9 as follows:

'The cession of Canada by France to Great Britain, formally sealed by the Treaty of Paris, 1763, was necessarily followed by the organization of the territory involved. ... *the Proclamation left a strip of no-man's-land*<sup>14</sup> *between. This was reserved as hunting-ground for the Red Men* within which the White Men were not to settle. ... So far from

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<sup>8</sup> *The Chippewas of Sarnia Band, infra* at note 107, at para. 67.

<sup>9</sup> *R. v. Big M Drug Mart* (1985), 18 D.L.R. (4<sup>th</sup>) 321 (S.C.C.) at 361.

<sup>10</sup> I have previous to this two-year research effort been of the view that the *Royal Proclamation of 1763* offered certain protections that I have now come to understand it does not.

<sup>11</sup> The significance of this is understood after a full read of this paper. This is the source of the current harassment Aboriginal people are experiencing when they attempt to do as they have always done. They are encountering increased incidents of seizures of their game, fish and property and facing the filing of charges against them.

<sup>12</sup> *Supra* at note 5.

<sup>13</sup> *R. v. White and Bob, supra* at note 5 at 632-33.

<sup>14</sup> The use of the term "no-man's land" reinforces the prevailing view of the time that the Aboriginal people were not fully human, but rather were "savages" and no better than "beasts of the field". Like the animals, the Aboriginal people were permitted by the Crown to roam these lands.

precluding the manifest destiny of the White race on this continent, [the *Royal Proclamation of 1763*] really provided for an orderly and peaceful expansion.’ ”<sup>15</sup> [Emphasis added]

Further confirming that the intention reflected in the *Royal Proclamation of 1763* was to reserve for the Indians only “no-man’s land” and “wild and waste lands” is the following: “In *Ontario Mining Co. v. Seybold* (1900), 31 O.R. 386, Chancellor Boyd emphasizes the importance of uniformity of administration of Indian Affairs and points out that the *Proclamation of 1763* has been carried forward into s. 91(24) of the *B.N.A. Act, 1867* [now the *Constitution Act, 1867*] and that the provisions in favour of the Indians are to be construed broadly in their favour. At p. 395 he said (referring to *St. Catherine’s Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46):

‘ ... And as to the scope of “lands reserved for Indians,” it is laid down that the phrase is sufficient to include all lands reserved upon any terms or conditions for Indian occupation (p.59). That is to say, the expression is to be traced back to the Royal Proclamation of 1763, is not to be limited to reserves set apart under the provisions of a treaty, but is of larger scope *covering all wild and waste lands in which the Indians continue to enjoy their primitive right of occupancy* even in the most fugitive manner.’ ”<sup>16</sup> [Emphasis added]

The *Delgamu’ukw*<sup>17</sup> decision is absolutely consistent with the expressed, interpreted intention of the Crown in the *Royal Proclamation of 1763*: “In December 1997, the Supreme Court [of Canada] rendered its decision in *Delgamu’ukw* in which it discussed, for the first time, the nature and scope of Aboriginal title and made a number of statements<sup>18</sup> on the scope of Aboriginal title, including the statement that where land was subject to Aboriginal title, unless that title was surrendered, the land could not be put to a use irreconcilable with the uses on which that title was based.”<sup>19</sup>

According to Crown policy, uses of “no-man’s land” and “wild and waste” lands in the manner as previous by the Indians may continue on waste and unoccupied Crown land. Such uses are the basis of the burden of Aboriginal title on Crown root title as recognized under the British/Canadian common law. However should the Indians identify a non-Indian use for these lands, a “civilized” use for these lands such as a shopping center then those lands can no longer be said to be of no use or simply wild and waste lands – they are capable of a non-Indian, “civilized” use. Any such identified or identifiable non-Indian, “civilized” use is considered irreconcilable with the uses on which Aboriginal title was based. Indians must first surrender their common law Aboriginal title before being permitted to pursue “civilized” uses of formerly wild and waste Crown lands.

Since lands identified as being useful or as having a potential use cannot form any part of lands reserved for the Indians pursuant to Imperial policy as evidenced by the *Royal Proclamation of 1763*, effort is made to identify uses for Crown land so as to defeat any Aboriginal peoples’ attempt to prove Aboriginal title to those lands. Once uses are identified for Crown lands, they are no longer considered unoccupied Crown lands and common law Aboriginal title no longer burdens those lands. “Unoccupied Crown land is land that is ‘not put to use’, ‘idle’ or ‘not appropriated’ ”.<sup>20</sup>

<sup>15</sup> *R. v. White and Bob*, *supra* at note 5 at 636-37.

<sup>16</sup> *R. v. White and Bob*, *supra* at note 5 at 638.

<sup>17</sup> *Delgamu’ukw v. British Columbia*, [1991] 3 W.W.R. 97, 79 D.L.R. (4<sup>th</sup>) 185 (B.C.S.C.), varied [1993] 5 W.W.R. 97, 104 D.L.R. (4<sup>th</sup>) 470, 30 B.C.A.C. 1, 49 W.A.C. 1, [1993] 5 C.N.L.R. 1 (B.C.C.A.), reversed in part 153 D.L.R. (4<sup>th</sup>) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010, [1998] 1 C.N.L.R. 14 (S.C.C.).

<sup>18</sup> Note that the term “statements” is used to refer to what the Supreme Court of Canada did. The Supreme Court did *not* render judgment or in fact decide such to be the law of Canada. These “statements” are *obiter dicta*, not law. The only thing that the Supreme Court of Canada decided was to send the whole *Delgamu’ukw* matter back to trial at the Supreme Court of British Columbia and to start the whole process over again. Thereby buying a lot of time and hoping the Aboriginal peoples will not be able to run more lengthy litigation. It also prevented the next step to the International arena, as the domestic options have not been exhausted, but rather have to be pursued all over again.

<sup>19</sup> “Canada’s Approach for Dealing with Section 35 Rights”, leaked and Internet posted purported Cabinet submission by Minister of Indian Affairs and Northern Development Robert Nault, recommendations to Cabinet November 24, 2000 at pg. 12, para 13, Analysis.

<sup>20</sup> *R. v. Smith*, [1935] 2 W.W.R. 433, [1935] 3 D.L.R. 703, 64 C.C.C. 131 (Sask. C.A.).

At the same time that the province of British Columbia was gearing up for the BC Treaty process in 1992, a process under the Comprehensive Land Claims policy for which the British Columbia Treaty Commission (BCTC) was set up to oversee,<sup>21</sup> the province put into high gear its efforts to set out and identify uses for as much Crown land as possible. I have always maintained that the BC Treaty process was a no-fail scenario for the Crown. Either the Crown would achieve surrender of Aboriginal title through settlement agreements governed by the Comprehensive Land Claims policy or sufficient time would elapse to enable the planning processes to be completed so as to defeat claims to Aboriginal title under British/Canadian common law should they proceed to domestic Canadian courts.

“Eighty per cent of the province of British Columbia now has strategic land use plans completed or underway. 768 designated provincial parks, recreation areas, ecological reserves and protected areas now exist in total. In nine years, we have doubled our parks and protected areas, saving more of our land than had been previously set aside in the entire history of the province. ... Today, more than 11.7 million hectares of our magnificent land – representing a diverse range of landscape and habitats – have been protected for all time ... a strategic land use planning process was initiated in 1992. Through the land use planning process, needs are identified, land use zones are defined, objectives are set, and strategies for managing resources in those zones are developed.”<sup>22</sup>

In March 2001 it was revealed<sup>23</sup> that the British Columbia provincial government plans to “turn over between a quarter and a half of the entire province to the forest industry, beyond the reach of public control, overseen by a weird sort of junta known as the Land Reserve Commission.” The article explains, “[t]he idea is that forest companies want ‘certainty’ and investment security, and because we’ve preserved 12 percent of British Columbia in parks and wilderness areas, most of what’s left should be left to the forest companies, whose forests should be protected by a ‘no net loss’ policy. ... depending on how you read the ministry’s stated intentions, [the forest land reserve initiative] will hive off either 23 million hectares or 43 million hectares – either a quarter or a half of the entire British Columbia landmass – to the benefit of a handful of forest-tenure holders. All of this land would then come under the jurisdiction of the Forest Land Reserve, an agency the Mike Harcourt government established in 1994 ... The expanded forest land reserve would be overseen by a commission beyond the control of the legislature. The commission would be empowered to specifically prohibit local, democratically elected governments from taking any action that would have the effect of ‘restricting, directly or indirectly, a forest management activity relating to timber production or harvesting’ ”.

On April 18, 2001 very shortly before the provincial election call, British Columbia Premier Ujjal Dosanjh announced a one-million-hectare land-use plan in the Lillooet region including 14 proposed new parks. The largest proposed park is the 71,4000-hectare Southern Chilcotin Mountains lands around Spruce Lake, an area equivalent to 178 Stanley Parks.<sup>24</sup> The land use plan was prepared during the past five years.<sup>25</sup> “ ‘The South Chilcotin Mountains is one of those special places.’ ”<sup>26</sup>

“ ‘Land-use planning addresses economic and environmental issues and lays the groundwork for continued co-operation among resource users,’ said Dosanjh. ‘The government is now working to establish a new land-use planning process for the North Coast to make sure local voices will be heard.’

Local residents representing the broadest possible range of interests will be invited to participate in the North Coast planning table. The next few months will be dedicated to preparing for planning by identifying participants, gathering information, confirming boundaries and finalizing draft terms of reference.

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<sup>21</sup> “Following the release of the tripartite B.C. Claims Task Force Report in 1991, the BCTC was established in 1992 to facilitate and monitor negotiations.” Comprehensive Claims Policy and Status of Claims, April 2, 2001.

<sup>22</sup> Land Use Coordination Office, Province of British Columbia, newspaper insert, 2001.

<sup>23</sup> *The Georgia Straight* newspaper, Vancouver, March 15-22, 2001 issue at p. 13.

<sup>24</sup> Glenn Bohn, “South Chilcotin park endorsed in principle by NDP cabinet”, *The Vancouver Sun*, April 18, 2001, pg. A8.

<sup>25</sup> Coincidentally, I note that the start of this period appears timed with the release of my paper in 1996, “Trick or Treaty: The British Columbia Treaty Process”.

<sup>26</sup> Glenn Bohn, “South Chilcotin park endorsed in principle by NDP cabinet”, *The Vancouver Sun*, April 18, 2001, pg. A8 quoting Bill Wareham, executive Director, The Sierra Club of British Columbia.

More than three-quarters of the province [of British Columbia] is now covered by land-use plans that are completed or in progress. The following land-use plans have been completed: Mackenzies, Cassiar Iskut-Stikine, Lakes District, Dawson Creek, Fort St. James, Prince-George, Robson valley, Kamloops, Kispiox, Vanderhoof, Bulkley, Vancouver Island, Caribou-Chilcotin, Kootenay-Boundary, Fort St. John and Fort Nelson. Protected areas planning is also completed for the Lower Mainland.”<sup>27</sup>

On March 16, 2001 a press release was issued on the continuing work to establish a massive land use plan for British Columbia’s Central Coast region. Chief Dallas Smith of the Tlowitsis Nation is quoted as saying, “It’s about time that people put aside their differences and talked about their common interests in the land that supports all of us. *We also are reassured that our Aboriginal rights and claimed lands will be protected.*” [Emphasis added]

The Tlowitsis claimed lands may well be protected, but they will also be immune from assertion of common law Aboriginal title by the Tlowitsis and others. Reassurance is not enough in this game. Specific without prejudice commitments of the other parties is required. The BC Central Coast region will no longer be unoccupied Crown land. The Aboriginal peoples agreeing to this land use plan without a treaty or settlement in hand, are in fact giving up a significant part of their playing hand. They will no longer be able to assert Aboriginal title to these lands. Consultation will have been proven and any infringement of Aboriginal rights can be justified as long as the object of the infringement fits with the land use plan agreed to or as later amended for a use having a meaningful economic component.

Occupied Crown land includes parkland, any land where special status has been conferred, protected areas and preserves. Since the start of the BC Treaty process, most of Crown lands in British Columbia are now occupied by such methods. “[A]ny Crown land that has been designated as an area for a specific use has been held to be occupied.”<sup>28</sup>

Land used for hunting used to be part of Crown “wild and waste lands”. However, where a trophy ram can fetch \$250,000, sport hunting has a meaningful economic component. Land where such a meaningful economic measure can be gained is no longer viewed as Crown “wild and waste lands”. Such a use of Crown land can now render it occupied Crown land and can justified infringement of Aboriginal rights under section 35 of the *Constitution Act, 1982*.<sup>29</sup> Indeed, the *Isaac*<sup>30</sup> case held that hunting is a use of land.

The pressures of competition for land use will promise to increase in the future: “The most striking of the 23 new maps uses pictures taken from a NASA satellite to show that cities, towns and arable farms now cover 24 per cent of the Earth’s land mass. Another 26 per cent is taken up by pasture, meaning that humans have transformed half the available land. ... As in the days of the British Empire, much of the world is coloured pink, the colour assigned to urban and arable land.”<sup>31</sup>

The right to use land and to benefit from the resources of the land is essential to the survival of Aboriginal peoples. The Aboriginal peoples protected by their sacred treaties and other Aboriginal peoples, all of whom have not been conquered by the British Empire, its antecedents, or its now self-governing dominions, can no longer be treated as only having the right to the unwanted scraps from Her Majesty’s table.

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<sup>27</sup> “BC surpasses target of protecting land”, Kahtou, February 2001, p. 3.

<sup>28</sup> *R. v. Smith*, *supra* at note 20.

<sup>29</sup> Larry Pynn, “U.S. man bags B.C. sheep for \$250,000”, *The Vancouver Sun*, November 24, 2000, p. A1. The Supreme Court of Canada has identified as a valid object, which can justify infringement of Aboriginal title and rights, as that which has a “meaningful economic measure”.

<sup>30</sup> *R. v. Isaac* (1975), 13 N.S.R. (2d) 460, 9 A.P.R. 460 (N.S.C.A.).

<sup>31</sup> Mark Henderson, “Atlas exposes man’s ‘ecological footprint’ ”, *The Vancouver Sun*, February 17, 2001 p. A18.

In my defence of Aboriginal people faced with state efforts to conquer them, I have received the following response to my arguments and assertions of law from senior judges: “Yes, Ms. Switlo, I agree, (pause) in a perfect world. But it’s not a perfect world.” The first time I heard this I was stunned. Nothing in law school had prepared me to deal with such a response. Our Canadian judicial system was supposed to advance our laws based on persuasive presentation of the law and where our law should be heading, specifically, so as to approach more closely that perfect world. If my arguments made sense from the points of view of existing law, reason, fairness and humanity, a judge exercising proper authority would ensure their reception into the fold. In a liberal democracy, to deny their inclusion would require a well-reasoned response, not some off-handed admission of “my hands are tied”. To answer me that “it’s not a perfect world” is a blatant denial of responsibility from those most responsible to protect and promote our fundamental liberal democratic principles.

Canada joined the Organization of American States (OAS) in 1990. Canada’s Comprehensive Land Claims policy does not meet the standards being recommended in the Americas.<sup>32</sup> In particular, the Comprehensive Land Claims policy and its offspring such as the BC Treaty process, the Deh Cho process and the Akaitcho Treaty 8 process, do not embrace the concept of restitution. The Inter-American Commission on Human Rights (IACHR)<sup>33</sup>, the human rights arm of the OAS, promotes restitution. The Proposed American Declaration on the Rights of Indigenous Peoples recommends restitution for past wrongdoing wherever possible, compensation being viewed as a last resort.<sup>34</sup>

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<sup>32</sup> Proposed American Declaration on the Rights of Indigenous Peoples (Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th regular session):

“Article V. No forced assimilation

1. Indigenous peoples have the right to freely preserve, express and develop their cultural identity in all its aspects, free of any attempt at assimilation.
2. The states shall not undertake, support or favour any policy of artificial or enforced assimilation of indigenous peoples, destruction of a culture or the possibility of the extermination of any indigenous peoples.

...

Article X. Spiritual and religious freedom

1. Indigenous peoples have the right to freedom of conscience, freedom of religion and spiritual practice, and to exercise them both publicly and privately.
2. The states shall take necessary measures to prohibit attempts to forcibly convert indigenous peoples or to impose on them beliefs against their will.
3. In collaboration with the indigenous peoples concerned, the states shall adopt effective measures to ensure that their sacred sites, including burial sites, are preserved, respected and protected. When sacred graves and relics have been appropriated by state institutions, they shall be returned.
4. The states shall encourage respect by all people for the integrity of indigenous spiritual symbols, practices, sacred ceremonies, expressions and protocols.

...

Article XVIII. Traditional forms of ownership and cultural survival. Rights to land, territories and resources

...

7. Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged, or when restitution is not possible, the right to compensation on a basis not less favorable than the standard of international law .

...

Article XXIV.

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the Americas.”

<sup>33</sup> “The Inter-American Commission on Human Rights is an organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter.” Article 1, para.1, Statute of the Inter-American Commission on Human Rights, approved by Resolution N1 447 taken by the General Assembly of the OAS at its ninth regular session, held in La Paz, Bolivia, October 1979.

<sup>34</sup> Proposed American Declaration on the Rights of Indigenous Peoples, *supra* at note 32, Article XVIII para. 7.

The IACHR recently expressed its surprise at Canadian officials' lack of knowledge of Canada's human rights obligations:<sup>35</sup>

"The Commission noted a surprising lack of information or understanding on the part of administration *and judicial officials* at both the federal and provincial levels of Canada's regional and international human rights obligations in the refugee context. The Commission also noted a perception on the part of some officials that international human rights law was a question falling within the sphere of foreign affairs rather than one pertaining to the implementation of domestic law."<sup>36</sup> [Emphasis added] The same appears to hold true in the context of Aboriginal peoples.

The Aboriginal peoples and their political organizations have been demanding change to the Comprehensive Land Claims policy, as the following illustrates:

"Mr. Minister [Robert Nault, federal Department of Indian Affairs and Northern Development], just a couple of other items that I would add that you didn't address that I think that are important to this table. One of them is the whole issue of our relationship in and around treaty making and that issue of certainty. We believe and we've reached agreement with the Union of B.C. Indian Chiefs and other structures in this province [of British Columbia] to say that the existing federal comprehensive claims policy is a hindrance to our development. It's a hindrance to us reaching agreement with Canada and British Columbia and there must be a review of that. Again, we want to be a

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<sup>35</sup> Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, February 28, 2000:

"1. This report examines a series of issues relating to the situation of human rights of persons subject to the refugee determination system of Canada. That system has been recognized by many sources, including the United Nations High Commissioner for Refugees, as demonstrating a strong commitment to providing durable solutions for refugees in need of protection. Overall, the system is extremely generous in terms of accepting and resettling refugees, and exemplary in many important respects. The present report studies the system in that context, while focusing on a number of very specific issues concerning compliance with Canada's inter-American human rights obligations, including the ability of asylum seekers who have reached Canada to obtain access to the refugee determination system, the availability and scope of administrative review and judicial protection for persons seeking refugee status whose claims have been rejected, the ability of persons in detention for reasons of public security to obtain judicial review of the legality of that detention, and the availability and scope of judicial protection for the rights of Canadian-born children directly affected by proceedings to remove a non-citizen parent or parents from Canada.

2. Pursuant to its competence as the principal organ of the Organization of American States (hereinafter "OAS") charged with protecting and promoting human rights in the Americas, the Inter-American Commission on Human Rights (hereinafter "Commission" or "IACHR") has been monitoring the human rights situation in Canada since the country became an OAS member State in 1990.1 In accordance with its mandate, which is further defined in its Statute and Regulations, the Commission monitors human rights developments in each member State of the OAS. The Commission periodically deems it useful to report the results of its study of a particular country, formulating the corresponding recommendations designed to assist that State in ensuring the fullest enjoyment of protected rights and liberties by all persons subject to its jurisdiction.

3. This report was prepared on the basis of material gathered by the Commission, in particular during an on-site visit it carried out in Canada in October of 1997 to observe the refugee determination process and the domestic remedies available to refugee claimants. The report refers to information gathered in preparation for, during, and following that visit. Material referred to also includes relevant data provided by governmental, intergovernmental and non-governmental sources collected through the Commission's normal monitoring procedures, as well as media reports and data gleaned from the processing of individual petitions. Finally, the Commission has taken full account of the observations formulated by the Government of Canada in response to the draft version of the present report. ...

168. As indicated, this report analyzes specific issues relating to Canada's compliance with its human rights obligations under the OAS Charter and the American Declaration. On the basis of its examination, the Commission notes that achieving enhanced compliance with applicable human rights standards would be greatly facilitated by the adoption of measures aimed at ensuring that State authorities involved in all aspects of the refugee system are aware of the obligations Canada has freely undertaken. With certain important exceptions, the Commission noted a surprising lack of information or understanding on the part of administration and judicial officials at both the federal and provincial levels of Canada's regional and international human rights obligations in the refugee context. The Commission also noted a perception on the part of some officials that international human rights law was a question falling within the sphere of foreign affairs rather than one pertaining to the implementation of domestic law.

169. As a State Party to the Charter of the OAS, Canada has freely undertaken to uphold respect for human rights, one of the fundamental principles of the Organization. Given that the American Declaration is a source of international obligation, that those subject to Canada's jurisdiction are entitled to its protections, and that the failure to observe those rights may give rise to State responsibility on the international plane, it is of fundamental importance that all relevant authorities, at the provincial and federal levels, are fully aware of its provisions, as well as those pertaining to other treaties and instruments in effect in Canada."

<sup>36</sup> *Ibid.*

part of that review, Mr. Minister. We'd be willing to work in cooperation and partnership but I think that it's not good enough to say that as has been said is that we've got a policy and it doesn't affect treaty negotiations or the relationship between Canada and first nations down the road."<sup>37</sup>

Canada's response through Minister Nault was as follows: "Now I want to say to you that I also made an offer a number of months ago, one that I continue to make and I'll make it again publicly to all of you, I'd like to look at different certainty models<sup>38</sup> at the tables and I have asked the summit to give me a series of models because this blanket statement that the comprehensive claims policy is an extinguishment policy is incorrect. It's infactual (sic) and not the way that we do business here as the government of Canada any longer. And I'm quite prepared to look at other certainty models that meet the tests of the people at the individual tables and we have already set up the table. We've not had as much work as we would have liked on it but I think it's fair to say that we have agreed as principals, both the province, the federal government and the summit leaders on your behalf, that we would look at that. And I have not changed our position as a government. I'm not looking for extinguishment and those who continue to say out there that we are, I'm here to tell you that that's not the case."<sup>39</sup>

Yet the Comprehensive Land Claims Policy clearly states, "Since any settlement of claims based on these criteria could include a variety of terms such as protection of hunting, fishing and trapping, land title<sup>40</sup>, money, as well as other rights and benefits, *in exchange for a release of the general and undefined Native title*, such claims came to be called comprehensive claims."<sup>41</sup> [Emphasis added]

If Minister Nault is now stating that the policy has been changed, this is different from his position announced shortly before. He clearly stated to the Assembly of First Nations (AFN) by letter to Phil Fontaine dated July 4, 2000 that Canada was not prepared to change the Comprehensive Land Claims policy in response to the AFN's pressing demands for removal of the extinguishment requirement.

If Minister Nault is correct that the extinguishment requirement has been removed from the Comprehensive Land Claims policy, then a restatement of the current Comprehensive Land Claims policy is imperative, which also clearly revokes all past statements of the policy collectively forming the Comprehensive Land Claims policy. This would provide for removal of the language in previous policy statements referred to herein, which supports the conclusion that extinguishment remains integral to the policy.

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<sup>37</sup> Transcription prepared by Media Q Inc. March 7, 2001 1:15 p.m. (PST) at Squamish Nation Recreation Centre, North Vancouver, of speech of The Honourable Robert Nault, Minister of Indian Affairs and Northern Development; Gerald Wesley speaking.

<sup>38</sup> The federal government is contemplating a "new technique" for achieving certainty in land claims that "would require the Aboriginal group to commit to not exercising or asserting any land-based rights, other than those set out in the [land claim] Agreement. ... In addition, the technique would require a release for any past infringements of land-based rights." "Business and resource sectors have repeatedly indicated the need for a stable resource environment for exploration and development and thus will support the new technique for land-based rights." "Canada's Approach for Dealing with Section 35 Rights", leaked and Internet posted purported Cabinet submission by Minister of Indian Affairs and Northern Development Robert Nault, recommendations to Cabinet November 24, 2000 at p. 7 of Communications Overview.

<sup>39</sup> *Ibid*, Minister Nault speaking.

<sup>40</sup> Note that reference to protection of "land title" is not to be confused with or interpreted as Aboriginal title or Native title. The policy is referring to fee simple title registered under provincial systems of land registry, often referred to as settlement lands in the land claims agreements: "Generally, the settlements may provide for prescribed preferential rights to wildlife on Crown lands. Exclusive rights *would be limited to fee simple or the equivalent Native lands*": *In All Fairness A Native Claims Policy Comprehensive Claims*, published under the authority of the Hon. John C. Munro, P.C., M.P., Minister of Indian Affairs and Northern Development, Canada, Ottawa, 1981, p. 24 [Emphasis added].

<sup>41</sup> *In All Fairness A Native Claims Policy Comprehensive Claims*, published under the authority of the Hon. John C. Munro, P.C., M.P., Minister of Indian Affairs and Northern Development, Canada, Ottawa, 1981, p. 11.

Otherwise, the words of the statements of the Comprehensive Land Claims policy<sup>42</sup> govern, which can only be interpreted as an extinguishment policy. In which case, Minister Nault is seriously misleading people and bringing Her Majesty's Honour into disrepute.

As recent as November 24, 2000, it was reported that recommendations to the federal Cabinet drafted for Minister Nault's submission confirmed that the Comprehensive Land Claims policy is an extinguishment policy:

"The 1986 comprehensive claims policy provides two approaches for achieving certainty in relation to land-based rights:

1. The cession and surrender of Aboriginal land-based rights throughout the settlement area in exchange for the rights defined in the land claim treaty; or
2. The cession and surrender of Aboriginal land-based rights except on specified lands retained by the Aboriginal party."<sup>43</sup>

There was also nothing other than "business as usual" in a very recent federal statement. Nothing was stated contrary to the continued existence of the extinguishment requirement in the Comprehensive Claims Policy and Status of Claims dated April 2, 2001 put out by Minister Nault's Department of Indian Affairs and Northern Development. To the contrary, it states this:

"In the provinces, most of the lands and resources that are the subject of comprehensive claim negotiations are under provincial jurisdiction. Moreover, by establishing *certainty of title to lands and resources, claims settlements benefit the provinces.*"<sup>44</sup> [Emphasis added]

Where a surrender or extinguishment of Aboriginal title and lands occurs, underlying Crown title vests in the province, which is exactly how the "claims settlements benefit the provinces."

Another fundamental problem with the Comprehensive Land Claims policy is the second "new approach" of the original policy statement in 1973, "that although any acceptance of such a claim would not be an admission of legal liability, the federal government was willing to negotiate settlements of such claims."<sup>45</sup>

That Canada is unwilling to assume responsibility for the results of Her Indian policies was confirmed more recently: "The uniform approach [the Nisga'a land claims approach, a surrender of all rights, land-based and all other, such as self-government rights] is also problematic because it would require the Aboriginal party to provide a release for any claim for past infringement of the inherent right [of self-government] (an example of such a claim might be that the prohibition on the use of Aboriginal language in residential schools infringed Aboriginal rights to educate children, resulting in cultural loss and damages). However, the courts have not yet ruled on such claims and no criteria exist for acceptance or compensation. In *Gathering Strength*, Canada provided an apology to Aboriginal people for the impact of past social policies, but chose not to establish a policy or process to compensate for such claims. ... Seeking a release of past infringement claims would turn self-government negotiations into a grievance resolution process, requiring a new policy, financial resources and process for the acceptance and negotiated resolution of such claims."<sup>46</sup>

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<sup>42</sup> Including *In All Fairness A Native Claims Policy Comprehensive Claims*, published under the authority of the Hon. John C. Munro, P.C., M.P., Minister of Indian Affairs and Northern Development, Canada, Ottawa, 1981.

<sup>43</sup> "Canada's Approach for Dealing with Section 35 Rights", leaked purported Cabinet submission by Minister of Indian Affairs and Northern Development Robert Nault to Cabinet, November 24, 2000 at pg. 11, para 7 of Analysis.

<sup>44</sup> Comprehensive Claims Policy and Status of Claims, April 2, 2001.

<sup>45</sup> *In All Fairness A Native Claims Policy Comprehensive Claims*, published under the authority of the Hon. John C. Munro, P.C., M.P., Minister of Indian Affairs and Northern Development, Ottawa, 1981, "Basic Guidelines", p. 12.

<sup>46</sup> "Canada's Approach for Dealing with Section 35 Rights", leaked purported Cabinet submission by Minister of Indian Affairs and Northern Development Robert Nault to Cabinet, November 24, 2000, p. 4, para. 16.

Canada continues to deny any form of restitution to Aboriginal peoples, both in terms of admission of guilt and in terms of compensation. Canada is even unable to commit to full necessary funding for the implementation and operation of concluded self-government agreements.<sup>47</sup> A “healing fund” established by Canada as part of its Gathering Strength policy is mired in bureaucracy and allegations of selective favouritism and of being far too little to truly meet the needs of the many thousands of people directly and indirectly affected by “past social policies”.<sup>48</sup>

On December 9, 2000 Deputy Minister of Indian Affairs, Shirley Serafini, delivered an apology on behalf of the Government of Canada to the Nuu chah nulth people: “The strength you have shown as individuals, families, and First Nations fortifies us in our conviction to work hard to ensure that what happened to you will never happen again, to you, to your families, in your communities or to any other community.” Serafini is reported to have also said, “If we expect to move forward as a nation, we have to address the issues related to the effects that the Indian residential schools had on the Nuu-chah-nulth peoples.”<sup>49</sup>

But it is still happening and Canada continues in the political belief that in order to “move forward” conquering the Aboriginal peoples remains necessary. The Aboriginal peoples have not been conquered but Canada continues down that path. If we expect to move forward, this has to be addressed. Otherwise the effects of the residential school system, only but one manifestation of the effort to conquer the Aboriginal peoples, will continue and be compounded by renewed effort.

The Atlantic Policy Congress of First Nation Chiefs are experiencing federal efforts to have them sign fishing deals to purportedly facilitate their treaty rights to fish. When these chiefs say, “What we can do is come up with ... a template ... that is worded in such a way that everything is protected and they cannot use it against us for the implementation of a treaty right in the future,”<sup>50</sup> This is not possible given existing federal policy and in the absence of a new policy statement.

“ ‘The only reason the Millbrook First Nation signed the [fishing] agreement last year was [for] peaceful access to the waters to train our people ... and for employment,’ said Millbrook Chief Lawrence Paul. ‘That’s all we signed it for.’ ”<sup>51</sup> It matters not the reasons for signing any agreement, all that matters is that it is freely signed. Such a statement is no defence to allegations arising later that the effect of entering into the agreement prejudiced rights or constituted representations by the chiefs on behalf of their bands.

The federal government has confirmed that all dealings *are* prejudicial to the Atlantic fishing peoples who are faced with deciding whether or not to enter into these fishing deals.<sup>52</sup> This is notwithstanding the presence of “without prejudice” clauses:

“Related to First Nation concerns about the ‘without prejudice’ provisions in template agreements, I understand that a number of communities are concerned that any negotiations will be construed as ‘consultations’, and that this will be used to justify infringement of their rights. I do not wish to debate whether or not these are consultations. In my view, this is not the issue. The real issue is whether First Nations see benefits to entering into practical fisheries arrangements and whether those benefits outweigh any concerns. The agreements we are proposing are time-limited (up to three years) and explicitly *without prejudice to First Nations’ positions in the broader DIAND-led process where treaty and Aboriginal rights are addressed. In light of these safeguards, it is for First Nations to*

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<sup>47</sup> Particularly in Canada’s Far North.

<sup>48</sup> See note 46 above.

<sup>49</sup> David Wiwchar, “Canada apologizes for residential school system”, Windspeaker News, January 2001, <http://www.ammsa.com/windspeaker/windnewsjan2001.html>

<sup>50</sup> The Daily News (Truro) February 21, 2001 (Halifax, Nova Scotia).

<sup>51</sup> *Ibid.*

<sup>52</sup> March 2001 letter to Chief Lawrence Paul Chief and Second Peter Barlow, Co-Chairs, Atlantic Policy Congress of First Nation Chiefs, Amherst, Nova Scotia, from the Honourable Herb Dhaliwal, P.C., M.P., copied to Mi’kmaq and Maliseet Chiefs, the Honourable Robert Nault, P.C., M.P. and James MacKenzie, Fisheries and Oceans Canada.

*decide whether these are significant risks.* However, I submit that the benefits of peaceful, orderly and successful entry into the fishery are substantial and should far outweigh any concerns.”<sup>53</sup> [Emphasis added]

The federal government did *not* say that the negotiations for interim fishing deals *would not be construed as consultation*. It is perfectly possible to conduct “without prejudice” negotiations, where each party is precluded by agreement expressed very carefully and particularly, usually by their lawyers, from using the negotiations in or for any other purpose or from citing them in any way. Clearly these negotiations are not proceeding “without prejudice” to the Aboriginal peoples concerned.

Rather than conduct itself in a manner consistent with international obligations to offer equal access to resources even apart from its treaty obligations, the federal government is offering preferred means for only those willing to enter into these “negotiated agreements”:<sup>54</sup>

“Of course, my preference is for negotiated agreements. Agreements allow for an orderly and planned transition, both for First Nation communities and for non-Aboriginal commercial fishermen and their communities. They allow us to better address the specific needs and wants of individual communities. It is in everyone's interest to ensure that First Nations can successfully realize their potential in the fisheries. To that end, negotiated arrangements also provide an opportunity for the provision of vessels, gear, and financial assistance for training, capacity building and co-management arrangements to facilitate successful participation of First Nation communities in the fishery. I would hope that still further access, and capacity building assistance, can be provided to you through negotiated arrangements. I cannot force this result. I can only offer the opportunity. The choice to accept or reject this opportunity is yours.”<sup>55</sup>

Providing federal financial and other assistance to enter the industry is necessary for Canada to achieve a binding agreement. All agreements require an exchange of consideration, something of value, between the parties in order that the agreement is binding on them. Consideration is a key element of any agreement. Without consideration exchanged between the parties, each getting something of value from the other, there is no binding agreement. While often it takes the form of money, consideration can take the form of such things as being offered here by the federal government. The federal government must offer something to those Aboriginal peoples signing off on these deals in order that the agreements will bind the Aboriginal peoples.

If the Aboriginal peoples are receiving consideration in the nature of “vessels, gear, and financial assistance for training, capacity building and co-management arrangements to facilitate successful participation of First Nation communities in the fishery”<sup>56</sup>, then the Crown is receiving something as well. The only thing of interest to the Crown is the treaty right to commercial fisheries. Thus I can very comfortably conclude that this process is another example of federal efforts to extinguish or contain rights.

An Honourable Crown would offer fair and equitable means to access the fishing resource to all of the Aboriginal peoples covered by the treaty. The fishing deals offer “an opportunity for the provision of vessels, gear, and financial assistance for training, capacity building and co-management arrangements to facilitate successful participation of First Nation communities in the fishery.”<sup>57</sup> An Honourable Crown would consider Herself bound to provide this in any event and not only to those willing to sign off and thereby affect their treaty rights.

Her Majesty is tarnished by the efforts of her servants, the federal government. The Aboriginal peoples have already signed something – their treaty(ies). It is for Her Majesty to act in accordance with those sacred, signed deals. The Aboriginal peoples who have signed do not have to sign another agreement that

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

prejudices and amends the original treaty. At most Her Majesty could demand something akin to a receipt from the Aboriginal peoples acknowledging that what She has given, such as “vessels, gear, and financial assistance for training,”<sup>58</sup> has been received.

Certainly Her Majesty could inquire of the Aboriginal peoples as to their needs and what they would view as being Honourable of Her in fulfilling Her commitments under the treaty(ies). Certainly Her Majesty’s servants, the federal government, would need to consider impacts to Her subjects, the existing other users of the resource.

Her Majesty could represent to the Aboriginal peoples concerned that those things being provided are viewed by Her Majesty as at least partial satisfaction of outstanding treaty obligations; however, the Aboriginal peoples cannot be compelled to agree that those measures fully satisfy Her Majesty’s obligations under the treaty(ies).

Indeed, there should be no final, “all is paid up” point in time. Living side-by-side implies a continuing relationship that will always undergo change and adaptation as circumstances demand. This is the inherent problem of the Comprehensive Land Claims policy and other federal processes that attempt a final payout to the Aboriginal peoples, believing that to be the only means of attaining certainty.<sup>59</sup> This approach amounts to a continuing effort to conquer the Aboriginal peoples: “[A]ny land claims settlement will be final. ... The thrust of this policy is to exchange undefined aboriginal land rights for concrete rights and benefits.”<sup>60</sup>

An Honourable Crown would not attempt to coerce the Aboriginal peoples into signing new deals that will prejudice their treaties. An Honourable Crown would not offer means to access the fisheries only provided that the Aboriginal peoples are left with the future ability to only assert that their treaties are local, domestic agreements rather than the international treaties that they in fact are.

The federal government recognizes an atmosphere of mistrust surrounding its efforts to secure signed fishing agreements in the Atlantic: “I am troubled by the atmosphere of suspicion and mistrust that seems to be developing. I am writing this letter in the hope of allaying your concerns.”<sup>61</sup> The letter did little to allay my concerns.

The “without prejudice” clauses referred to in the letter only protect the Aboriginal peoples within the existing Comprehensive Land Claims policy processes. “Without prejudice” extends to protect positions asserted within the Comprehensive Land Claims policy processes.

The Minister writes, “That is why we also support a ‘without prejudice’ clause in the template agreements. *This ensures that neither First Nations nor the federal government are prevented from advancing our respective positions in future discussions that will address aboriginal and treaty rights.*” [Emphasis added]

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<sup>58</sup> *Ibid.*

<sup>59</sup> There may also exist a fear that a separatists’ movement may occur in the absence of fully assimilating the Aboriginal peoples. A separatists’ movement implies removal of those not of the separatists’ group whereas Aboriginal peoples speak of “paddling two canoes down the same river”, “living side-by-side”, sharing and mutual caring and respect. This is *not* the language of a separatists’ movement. Aboriginal peoples appear to fully accept the statement of Chief Justice Lamer of the Supreme Court of Canada in *Delgamu’ukw*, *supra* at note 17, “Let us face it, we are all here to stay”.

<sup>60</sup> *In All Fairness A Native Claims Policy Comprehensive Claims*, published under the authority of the Hon. John C. Munro, P.C., M.P., Minister of Indian Affairs and Northern Development, Ottawa, 1981, “Basic Guidelines”, p. 19.

<sup>61</sup> March 2001 letter to Chief Lawrence Paul Chief and Second Peter Barlow, Co-Chairs, Atlantic Policy Congress of First Nation Chiefs, Amherst, Nova Scotia, from the Honourable Herb Dhaliwal, P.C., M.P., copied to Mi’kmaq and Maliseet Chiefs, the Honourable Robert Nault, P.C., M.P. and James MacKenzie, Fisheries and Oceans Canada.

The Minister further writes, "I re-appointed Mr. James MacKenzie to lead the fisheries negotiations. Mr. Mackenzie has a mandate to negotiate agreements of up to three years duration. This allows time for the broader DIAND-led process to make progress while at the same time providing immediate access to First Nations in a timeframe that provides planning stability to all interested parties. Neither I nor Mr. MacKenzie have a mandate to negotiate or define treaty rights in this process, and the provisions from the template agreement discussed above make this absolutely clear. On the second track, the Minister of Indian Affairs and Northern Development, through his Chief Federal Negotiator, Mr. Tom Molloy, is leading negotiations to address broader treaty and Aboriginal rights issues. *Negotiating with Mr. MacKenzie and signing a fisheries agreement will not restrict your position in the broader, DIAND-led process.*" [Emphasis added]

And further, "The agreements we are proposing are time-limited (up to three years) and *explicitly without prejudice to First Nations' positions in the broader DIAND-led process where treaty and Aboriginal rights are addressed.*"

These deals *do* have the potential to prejudice positions the Aboriginal peoples may wish to take based on law and fairness outside of the federal Comprehensive Land Claims policy processes. Since the Comprehensive Land Claims policy has as its goal extinguishment, certainty and assertion of rights restricted to within a domestic framework, this can be highly prejudicial to the Aboriginal peoples who may prefer to assert international human and humanitarian rights and seek protection of developing international humanitarian law and treaty law.

The Minister also writes, "The Marshall decision holds out great promise for the future of Aboriginal communities in the Maritime provinces and the Gaspé Region of Quebec. I want to ensure that they assume their rightful place in the fishery, and to do so in a peaceful, orderly way that safeguards conservation of the resource for all."<sup>62</sup>

It is the treaty(ies) that holds out great promise for the future of Aboriginal communities, not just a decision of a domestic court.<sup>63</sup> It is the responsibility of Her Majesty to ensure that the Aboriginal peoples are accorded their rightful place in the fishery. The federal government cannot assert that Her Majesty is keeping Her word by demanding new deal making in the nature proposed for the sake of peace and conservation. Her Majesty in Right of Canada is responsible for "peace order and good government"<sup>64</sup> and those are responsibilities separate from Her responsibilities under the treaty(ies). Aboriginal peoples should not be expected to assist Her in Her obligations of "peace, order and good government"<sup>65</sup> at the potential expense of their rights. Aboriginal peoples agreed to be allies, and can certainly be expected to be cooperative and reasonable, but not at great personal risk to themselves as peoples.

Councillor and vice-chief Ken (Scrappy) Perley calls the negotiations, " 'too colonialistic' as is the mindset of Mackenzie himself, whom he characterized as 'arrogant.' "<sup>66</sup> I certainly agree with Perley regarding the fishery negotiations however I have not met Mr. Mackenzie.

Indian Brook<sup>67</sup> Chief Reg Maloney has consistently asked for a united position from the other Atlantic Policy Congress of First Nation Chiefs against signing the fishing agreements being offered by the federal

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<sup>62</sup> *Ibid.*

<sup>63</sup> In the *Marshall* decision referred to by the Minister, the Supreme Court of Canada has assisted Her Majesty in understanding Her obligations under a treaty through interpretation of the treaty. Her courts are unable however, to compel Her Majesty to act in accordance with Her obligations, which remain a matter of Her Prerogative.

<sup>64</sup> Section 91, *Constitution Act, 1867.*

<sup>65</sup> *Ibid.*

<sup>66</sup> Joan Taillon, "Debt forces band alliance with DFO", *Windspeaker*, January 2001.

<sup>67</sup> The Indian Brook band was also featured on Canadian national television news April 30, 2001 because of an unusual event in one of the reserve homes. After a wall was freshly painted, raised bubbles appeared at only one place on the wall bearing a striking resemblance to the Virgin Mary holding baby Jesus. This home is now being visited by many who say they find this a welcome and important sign of hope for a community experiencing despair.

government but worries that the incentives being offered, the consideration, will prove too difficult for some to resist.

In the Far North, some negotiating Aboriginal groups in the Northwest Territories appear to believe that they have been successful in moving the Crown into specialized *policy* as opposed to the reality of different *processes* under the *same* policy. Examples are the Deh Cho process and the Akaitcho Treaty 8 process. They seem to believe that in structuring their own unique processes for resolving issues between them and the Crown they have somehow changed the federal government's Comprehensive Land Claims policy, which they have not. They may well believe that their so-called unique processes will enhance and protect Aboriginal rights. They may well fail to realize that even with the benefit of lawyers to advise them, they are in processes falling squarely within the federal Comprehensive Land Claims policy, a policy that continues to require "certainty" or extinguishments, either directly or by other means. The Comprehensive Land Claims policy continues to require a trading off of original rights in exchange for rights set out in the land claim settlement agreement, and when it comes to land, "certainty and finality" rule. Canada stands to benefit immensely from diamond development and other development in the Northwest Territories. Rather than being prepared to share this with the original peoples, Canada continues what it started and pursues conquest of the Northern peoples.

The Deh Cho and the Akaitcho peoples cannot later profess to have been fooled or misled. The facts: the Crown is not willing today to deal honourably and respect their international human rights. Even the Dogrib people, of whom the federal government appears to be aware have expressed a strong desire to *not* do a deal that requires extinguishment, continue to pursue negotiations towards "certainty", signing off on an Agreement in Principle that leaves out just what "certainty" will look like. This is like spending years negotiating who will drive the car and when, but without knowing if there is even any car available to drive at all.

This reminds me of a set of negotiations I was asked to assist in as lawyer for an Indian band in British Columbia. The band was seeking to join in on the sewer and water services of a neighbouring municipality. The negotiations had been going on for sometime and were becoming heated, so the band asked me to step in. I spent the first meeting only with the municipality mayor and councilors and professional advisors and representatives. I educated and facilitated an open forum to assist them in getting to know and understand their neighbours, allowing them to ask questions without fear of sounding "politically incorrect" or racist or unintentionally insulting the chief and councilors. Deals often go sideways because some such offence has occurred.

The next meeting was to be a more formal service contract negotiation. I had asked for the municipal technical people to be present. Shortly into the meeting I simply asked of the municipal representatives, "So, what are we talking about here anyhow? How much excess capacity do you guys have?" I was met with complete silence and the look of someone who has just been caught with his hand in the cookie jar. A bit of throat clearing and looking about at each other resulted in the answer, "Uh, I don't know". I laughed and looked hard at the senior engineer and said incredulously, "Don't sit there and tell me you don't know." I continued to look silently into his eyes and realized the truth. "I can't believe you have wasted all my client's time and money. You don't even have anything to sell." I said.

The municipality knew what the band needed and wanted and why they were at the table negotiating. Since specific questions such I had asked had not been asked before, indeed, perhaps would usually never need to be asked in another context, the municipality felt entitled to continue a deception. The sewer and water system was actually at 110 per cent usage. There was no excess capacity. The municipality was desperate for money to increase the system in order to adequately service existing users. The municipality wanted the obligation from the band to pay for the sewer and water system, but had no intention whatsoever to give them access to it. Municipal development areas were already lined up with priority

commitments. Any projects of the band would have had to wait for decades, with the band paying the whole time.

I advised my client to throw the municipal guys out and said I would no longer act on the matter, as it was wasted effort. I suggested to my client that they build their own system and watch these municipal guys come crawling to them in the future. Indeed I believe this has occurred and now the band has the upper hand in negotiations.

That last meeting took place at an incredible spot on the lakeshore, in a large, aged log building, the kind of building that makes you feel immediately warm and happy as you enter it and encourages you to gaze up into its supporting beams as if sensing someone looking down on you. The faint smell of sage calms and settles you. Outside was peppered with wild flowers and large trees swayed in the gentle wind. It was still too cold but the sandy beach looked inviting nonetheless. As I was leaving the meeting, I looked out onto the clear rippling water and at the surrounding areas where I was told the people gather for picnicking and long summer days. Having a young child myself, I flashed on giggling, running children splashing and playing in the water. I asked, "Are you sure you want to develop this part here? You know, white people do not have places like this to come to. Their children never see something like this. This is priceless." An Elder present smiled and nodded at me and then gave the chief a stern look. The chief froze in the Elder's gaze and then responded to me, "Ah, well, no actually, we were thinking about the part over there," and he pointed down towards town. "I think we'll be leaving this place here alone."

Northerner Jonas Antoine, of the Deh Cho people, is an astute man: "I have a sneaking suspicion that the federal government goes along with things that fit into their comprehensive claims policy, and if it doesn't, the government just won't move".<sup>68</sup> As is Arnold Hope, also of the Deh Cho: "Why are we being asked to sign agreements on land that we believe, that we know is really ours?"<sup>69</sup>

I met Dave as I was contemplating the prospect of individual Aboriginal rights attaching to and portable with the person as I boarded the Broadway Street bus<sup>70</sup> one afternoon in Vancouver. I had sat wedged beside him at the front of the very full bus. He turned to look at me with a warm smile and began to talk. He is of the Deh Cho people in the Far North.<sup>71</sup> He had been in Vancouver however for more than 30 years and said, "I like it here, I don't want to go back to the Northwest Territories – too cold." But he also explained how his mother had raised him in the traditional ways. He still possessed his religious belief system and practiced his beliefs as taught to him. He still speaks, he told me. It struck me how illustrative Dave was to what I was trying to understand and express. Dave may no longer reside where he was born,

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<sup>68</sup> "Deh Cho chiefs present agreement", CBC North, Fort Simpson, N.W.T., February 13, 2001, <http://north.cbc.ca/cgi-bin/view/?news/2001/02/13/12dehcho>.

<sup>69</sup> *Ibid.*

<sup>70</sup> Riding a bus can bring some interesting lessons. Another experience I had on the same route was an encounter with an Aboriginal man originally from the Yukon Territories in the Far North. He appeared to have some substance abuse problems and may well have been intoxicated when we spoke. He carried three large rough metal pipes precariously in a torn and scruffy backpack and may have been coming from a manual labour type job. Other riders were giving him an extremely wide berth and disapproving looks. He roughly asked my son, age 11, who was seated beside me, "Hey, you like squaws?" And started to tease him, making him uncomfortable and unsure of how to respond. I wondered to myself what had been done to this man to cause him such trauma for him to be in such a state. He suddenly turned to me and looked at me steadily. He began to tell me in a clear, steady voice all about it. He had always wanted to be a dentist and he was a good student. His band sent him down to Vancouver for his dentistry studies. He worked hard at it and did well, he told me. He only needed one more term to complete his studies, but his funding was cut off. "Just one more term," he emphasized, shaking his head. He was told by the band office, "No one will hire an Indian dentist anyway." He then tried to find work to earn the money needed to finish his studies, he told me. At this point he said to me in the voice and mannerisms of those who had so harshly spoken the words to him as a young, ambitious man looking for work, "Go away. No one hires an Indian." He looked profoundly sad as the memories rushed back to mind. Then he giggled and slurred, "But I showed 'em. I'm a dentist. I'm my own dentist." And he showed me where he had pulled his own teeth out; he had very few left.

<sup>71</sup> I had just spent one year in Yellowknife, NWT, so I was familiar with the background of his people.

but he remains Deh Cho nonetheless, no matter where he is. He is not assimilated nor any less an Aboriginal person with rights simply because he resides elsewhere on Turtle Island.

Should the Deh Cho people decide to surrender their rights, will this make Dave any less a Deh Cho will full rights? The Deh Cho have committed to the Comprehensive Land Claims process, though they are apparently of the belief that they have been successful in committing the federal government to some new, “unique process”: “ ‘You won’t find anything like this anywhere in Canada, in fact it’s described in the agreement as unique to the Deh Cho,’ said the Deh Cho chief negotiator Chris Reid.”<sup>72</sup> Of course any agreement with a party is unique to that party.

Deh Cho leaders point to a land-use plan being put into place while negotiations are underway. As discussed above, this protects the federal and territorial Crown. The lands that become subject to a land-use plan are then considered occupied Crown lands and are no longer vacant lands that would remain under Aboriginal use in accordance with the *Royal Proclamation of 1763*.

The use of terminology and representation that something is “special” or “unique” reminds me of a tactic used at residential schools. An Indian would be singled out and told he was a “good Indian” and manipulated with “special” treatment and affection into spying on and disclosing the prohibited activities of the other Indian students, such as speaking their languages, visiting their siblings, milking a cow to supplement their diet or appearing interested in a child of the opposite sex.

In 1994 I was asked to visit a 90plus-year old man in the Fraser Valley and assumed him to be “traditional” because of from whom the request had come. After assisting him on some legal matters, we were visiting at the kitchen table over coffee. I found myself talking about the residential schools and explaining how encouraging it was that despite all of the efforts to deprive the Aboriginal peoples of their beliefs and religions, they were still flourishing. I had assumed that he had escaped the experience. I spoke at some length about some of the tactics used and how important it had been to the federal and/or church agenda that the languages be lost, and how important language was regarding the original beliefs, religions and ultimately governance and interconnection to the land and resources.

To my surprise, the man became visibly upset, tears flowed and he blurted out, “But I was a good Indian.” And then he told me about it. Until that point in time he had always thought he had been special, selected at residential school because of what he could do for his people by setting the example of being good in “white” ways. He had told on many Indians while at residential school and the full reality of what he had been a part of and how he had helped to deprive his people of their rights hit full and hard. I spent hours with him, telling him more, as he continued to ask. At the end, when he said he understood, he was silent for quite a while. His head bent down, a few tears dropped into his clasped hands, and I sat with him. He then looked up at me and smiled and thanked me, reached out and held my hand. He said he was saddened by the fact that so much time had gone by. Then inspiration took hold and he announced in a strong, clear voice: “But I’ve still got lots of time left to do things.”

There has been a final comprehensive land claim settlement agreement implemented by legislation for the Nisga’a. There are some lessons in reviewing the history of how this came to be. The Nisga’a have been outspoken and lobbied government for many years: “When Attorney-General Martin wrote from Victoria to the Superintendent-General of Indian Affairs in Ottawa after the visit in 1899, he enclosed a petition signed by 138 Indians who referred to themselves as Christian Indians. This petition argued several major points. It claimed that a majority of Indians were opposed to potlatching, and that when a similar situation occurred among the whites, the law was then enforced. After mentioning the fact that the Tsimshian and the Haida had given up potlatching, the petitioners, of the Nishga tribe from Aiyansh, said:

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<sup>72</sup> *Supra*, at note 68.

'We do not wish to be behind them in civilization and progress. So long as a few of our people are permitted to go back to it, and we are burdened with its weight, which keeps us back ... We had confidence in the law and believed it would be put in force and so we waited. We did not know that there could be a dead law on the Law Book ... We have got several good cases of Potlatching now ready for trial where much property was destroyed. We have witnesses ready and are prepared to pay a lawyer. Mr. Todd has taken down some of the facts. Let the law be put in force ...' <sup>73</sup>

Nelson Leeson, a member of the new Nisga'a government suggests that the Nisga'a "learned a long time ago that a willingness to be transformed is the key to surviving as a people, to advancing as a community, to signing treaties – and, most importantly, growing spiritually."<sup>74</sup>

"Most Nisga'a leaders ... became Christian ... Most Nisga'a chiefs, and the leaders of many other tribes across Canada, Gosnell says, also picked up their leadership skills at the roughly 100 residential schools that Catholic, Anglican or United Churches managed across Canada on behalf of the federal government. ... A slightly larger minority ... despise everything about the schools. That's the group native leaders are pushing into the spotlight, for political reasons, to help make the case natives deserve justice, treaties and compensation for past wrongdoing. But the vast majority of Canada's natives, suggests [Jim] Millar [University of Saskatchewan historian] are like Gosnell: most remain Christian, mixing the faith with native culture."<sup>75</sup>

"Now that I'm 64, I look back on what happened to me at residential school and I think that it did me a lot of good. Who said life is easy? Life is a continual struggle from the time you're born until the time you're put in the ground."<sup>76</sup>

"The new Nisga'a nation, which has arguably the most advanced form of aboriginal self-government on the continent, was not only achieved in this land next to the Alaskan panhandle in the name of Jesus Christ – but with the direct help, political and financial, of the country's mainline churches.

Self-government, many believe, was accomplished in this remote valley, 800 kilometres north of Vancouver, for two major reasons: The Nisga'a have an especially organized and sophisticated clan-based culture, and they embraced, adapted and took on Christianity as their own. ... Anglican Reverend Ian Mackenzie ... sat on the Nisga'a treaty negotiations committee for 21 years ... 'It's a fundamental justice issue,' Mackenzie says, explaining his church's longtime support of both the Nisga'a's land claims and the Nisga'a's way of adopting Christianity. ... the head of the Native Ministries Consortium at the Vancouver School of Theology, John Mellis ... says the Nisga'a close connection with the Anglican church, which has traditionally been one of the pillars of the Canadian political and business establishment, has 'served the Nisga'as' purposes in giving them access to people in authority.'

As far as Nisga'a elder Lorene Plante is concerned, the moral, educational and financial support of the Anglicans and other mainline denominations has been invaluable to their cause.

'From the beginning of our negotiations, the church was really helpful,' Plante says. 'It was always there. When it was hard to do fundraising, they'd always come up with a fund to tap. We're the biggest givers now to the diocese because we've never forgotten their help.'<sup>77</sup>

The purported majority of the Nisga'a appear from the previous statements to represent an example of a people being forced to blend their religious beliefs with "apparently compatible secular ideologies" in the hopes of becoming effective public actors. "But accommodation has too often metamorphosed into assimilation, so that purportedly Christian communities often minimize and trivialize belief to the point of non-recognition."<sup>78</sup>

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<sup>73</sup> F.E. LaViolette, *The Struggle for Survival Indian Cultures & the Protestant Ethic in B.C.*, *supra* at note 1, at 78-79.

<sup>74</sup> Douglas Todd, "The Flood and the Faith", *The Vancouver Sun*, December 27, 2000, p. A9.

<sup>75</sup> Douglas Todd, "Residential schools stir both fond and bitter memories", *The Vancouver Sun*, December 27, 2000, A9.

<sup>76</sup> *Ibid.*

<sup>77</sup> Douglas Todd, "The Nisga'a and the Cross", *The Vancouver Sun*, December 26, 2000 p. A21.

<sup>78</sup> M.H. Ogilvie, "Overcoming 'The Culture of Disbelief' " (1995) 29 L. Soc. Gaz. 105 at 107.

The Nisga'a agreed in their "treaty", a land claim settlement agreement under the federal Comprehensive Land Claims policy, to surrender all of their rights: "The 'uniform approach' would require that self-government treaties secure certainty and finality for section 35 rights, which are not land-based, using the same legal techniques, which are used to achieve certainty and finality for land-based rights. This 'uniform' approach was adopted in the Nisga'a land claim and self-government treaty. British Columbia insisted on a full and final settlement of all Aboriginal rights and the Nisga'a did not wish to distinguish between land-based rights and other Aboriginal rights. Such an approach minimizes legal risks for the Crown by securing finality for all self-government rights not included in the treaty and a release of any claims for past infringement of such rights. Such an approach is clearly an acceptable approach for Canada where all parties agree."<sup>79</sup>

The reality of the Nisga'a final land claim agreement is that there now exists a large group of people who can be legally referred to as, "Canadians of Nisga'a descent". Similarly, there are Canadians of Italian descent, of Greek descent and of Scottish descent. Another example is of Black people in the United States being considered Americans of African descent or African-Americans. Europeans immigrated to Canada but in doing so did not acquire any land-based rights in Canada. Black people in the United States were forcefully removed from their African homelands, but did not gain land-based rights on arrival in the United States.

The Canadians of Nisga'a descent are now legally a minority group possessing minority rights in Canada. They are individuals who share characteristics but are not a nation or a peoples. Minority rights are very different from the rights of the Indigenous/Aboriginal/Original/First peoples. Minority rights are not land-based rights. Minority rights focus on ensuring non-discrimination and fair treatment of individuals sharing the minority features by the majority of individuals who do not.

The Nisga'a people remain a peoples however, albeit, much smaller in number. They are the remaining "traditional", non-assimilated Aboriginal people who continue to hold and practice their original beliefs. They do not agree that they are now only present-day remnants of a now extinct people. They do not agree that they simply constitute a minority in Canada. To the contrary, they say the Nisga'a people are very much alive and continue to be a peoples, no matter what kind of government is imposed upon them and no matter the characteristics of the people holding office in such government.

The House of Sga'nisim asserts that the Nisga'a Tribal Council did not have the authority to negotiate the final land claim agreement. They sought a court injunction<sup>80</sup> to restrain the passing of implementing legislation but were unsuccessful. The court referred to the referendum being held and the agreement approved by a majority of the Nisga'a and could not find a basis of irreparable harm necessary for all injunctions to succeed.

If the House of Sga'nisim asserts the continuing right to its religious community, the new Nisga'a governments must not infringe upon the religious rights of the House of Sga'nisim. The House of Sga'nisim may well continue to comprise the original Nisga'a people whereas the others have become recognized as Canadians of Nisga'a descent. The latter are a people only in a domestic "within the Constitution of Canada" sense but have removed themselves from status as a people in the broader, international sense.

The Nisga'a scenario provides an illustration of the reality that after years of colonization and effort to conquer the Aboriginal peoples, essentially in Aboriginal society two kinds of religions now dominate the

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<sup>79</sup> "Canada's Approach for Dealing with Section 35 Rights", leaked and Internet posted purported Cabinet submission by Minister of Indian Affairs and Northern Development Robert Nault, recommendations to Cabinet November 24, 2000 at para 14.

<sup>80</sup> *House of Sga'nisim, Nisibilada v. Canada*, 2000 BCCA 260, [2000] B.C.J. No. 821 (B.C.C.A.)

landscape: Christian-based and Aboriginal religions. With this comes the possibility of differing forms of government. Not every Aboriginal peoples will be satisfied with following the Nisga'a example.

These new forms of government can be viewed as broken down into two general categories:

1. Canadian "Christian" forms, such as the Nisga'a, municipalities created within the constitution of Canada. These governments cannot infringe traditional Aboriginal religious practices and community.
2. Traditional Aboriginal religious self-governing communities. These governments cannot infringe Christian religious practices.

The fundamental difference between the forms of government comes down to beliefs systems:

1. Adopting a Christian form follows belief or acceptance that the Crown, the King or Queen as the case is, owns all of the land and resources on it, including all of the animals. Many in England believe that God handpicked the King/Queen to own everything. Some believe that the King/Queen is a direct relative or descendant of God, and as such, privileged and god-like, much different from the masses. This form of government is within the constitution of Canada.
2. Adopting an Aboriginal form follows continued belief in the right to the land and the gifts of the Creator, such as game and fish and a foundation of an allodial land title, title in the people by virtue of having been placed there by the Creator. This form of government is not within the constitution of Canada. It flows from the autochthonous<sup>81</sup> constitution of the Aboriginal peoples of Turtle Island.

The Aboriginal peoples of Turtle Island have a constitution, which predates European contact. This is *not* a constitution rooted in another country, such as the constitution of Canada rooted in English sovereignty. This is the original constitution governing the original inhabitants of Turtle Island. It is rooted in and of Turtle Island and continues in existence today. It predates the Canadian constitution by millennia.

This autochthonous constitution is also religious and spiritual and the Creator is supreme. I have been permitted to understand some of this constitution but it would not be appropriate for me to elaborate nor to discuss specifics. This is not a written constitution such as the United States created after their revolution. I can say it remains valid constitutional law for the Aboriginal peoples. Though some people of Aboriginal descent no longer adhere to it, i.e. Nisga'a under the land claim settlement agreement, there are many Aboriginal peoples on Turtle Island that do.

The Christian belief system is not specifically tied to land whereas traditional Aboriginal belief systems are. Adherence to the Aboriginal autochthonous constitution is perceived to threaten the Canadian system of property rights. Thus in addition to insisting on land claim settlement agreements that comply with the Comprehensive Land Claims policy, the federal government also insists upon the Aboriginal party to those deals constructing and adopting a new constitution. The people must approve this new constitution. The act of adopting a new constitution cuts the links with the previously existing-since-time-immemorial autochthonous constitution. Thus a clean legal break is achieved and therefore complete certainty is created. With a new constitution, there is no longer any connection to the original, autochthonous constitution that melds land, animal, medicine, resource, body, mind and spirit, from the four directions or doors.

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<sup>81</sup> "Autochthonous" is defined in the Concise Oxford Dictionary as being "native to the soil, indigenous", of the "original, earliest known inhabitants, aborigines".

The connection to the land and resources also explains why so many more Aboriginal people are being charged with hunting and fishing violations.<sup>82</sup> These people are being called to task on their beliefs. If they fail to assert to the officers and in court that their hunting is in connection with their religious beliefs and practices and is in accordance with their autochthonous constitution,<sup>83</sup> then they will have difficulty raising that in the future and will be seen to have abandoned these beliefs and laws.

The differences between Aboriginal societies and Canadian society-at-large are illustrated by the following example. In 1992 during a British Columbia conference on water, Chief Kathy Francis of the Klahoose Indian Band described Aboriginal peoples' relationship with water: "A creek, which to a non-native person may be seen simply in terms of flow rates and acre-feet per year, may have a special name and spiritual significance. It may be a private bathing place for special ceremonies or initiation rites ... It not only physically and spiritually cleanses people, but it also cleanses the earth and, eventually, the sea to which it inevitably flows, if left alone."

Canada's *Constitution Act, 1982* opens with the words, "Whereas Canada is founded upon principles that recognizes the supremacy of God and the rule of law."<sup>84</sup> Canada has disregarded Her founding principles by failing to respect the Aboriginal peoples laws that recognizes the Creator as supreme.

Aboriginal peoples believe as part of their religious creation theory, put very simplistically, that they were put where they are by the Creator and given all that is around them for life. All is a gift from God and with receipt of those gifts come responsibilities, to share, take care and live in concert with that around them, to preserve for the next generations. Aboriginal peoples will say they have simply always been here.

The prevalent theory of non-native people has been to support a concept of early man traveling out of Africa, with Aboriginal people simply having arrived in the Americas just a bit earlier than others here today. Some say this supports no need to recognize any rights of Indigenous peoples in the Americas.

The conclusion recently of a study of a 60,000-year-old skeleton found in Australia is said to lend support for the multi-regional evolution theory, the theory that people sprang up simultaneously in different areas, which challenges the earlier, contrary "out-of-Africa" theory.<sup>85</sup> Such recent comments also support what the Aboriginal peoples have said all along.

In another development, a book has been written, "designed to convince readers that humans have lived in the Americas for tens of thousands of years longer than scientists have generally believed."<sup>86</sup> An article discusses the

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<sup>82</sup> Chief Dan Manuel of the Upper Nicola Band was interviewed for CBC News in Merritt about December 5, 2000. This was reported on as follows: "The number of native hunting arrests in the Nicola Valley is a waste of taxpayer's money – so says Dan Manuel, chief of the Upper Nicola Band. He says several arrests have been made, but the government has lost all its cases in court. Manuel says more and more of his people are being charged with hunting and fishing violations, which he says contravenes treaties and constitutions in place, and he wants to know why the government is doing this."

<sup>83</sup> Not to be confused with some document prepared under direction of a band chief and council that may include in its title, "Constitution".

<sup>84</sup> *Constitution Act, 1982*, Part I: *Canadian Charter of Rights and Freedoms*, Preamble. Canada has always struggled to attempt to achieve a constitution rooted in Canada but faced the reality of all laws flowing from England's colonization. The *Constitution Act, 1982* is actually a schedule ("A" is the French version, "B" the English) to the British *Canada Act 1982*. This act passed into effect Canada's *Constitution Act, 1982* and purported to terminate the power of the United Kingdom to pass any further laws for Canada. In about 1931 constitutional lawyers felt that any attempt by the Parliament of the United Kingdom to abdicate any such sovereignty would fail, that it would not be legal and effective. Lawyers in about 1982 held a different view that the provision would be legally effective. I am not aware of whether this debate has been recently reconsidered. In any event, short of a Canadian revolution there was little else that could be done other than to have the Parliament of the United Kingdom pass the *Canada Act 1982*.

<sup>85</sup> Roger Highfield, "Ancient Australian questions old theory", *The Vancouver Sun*, January 9, 2001.

<sup>86</sup> "Author challenges long-held theory of Indian origins", *The Vancouver Sun*, March 15, 2001 regarding *Bones: Discovering the First Americans* by Elaine Dewar.

developments that raise “the possibility that humans have been in the Americas for the same length of time as in other parts of the globe. ... Dewar claims racist attitudes have tended to push scientists into adopting the theory that aboriginals came here only 12,000 years ago, turning First Nations into just another group of immigrants without the moral authority to make land claims.”<sup>87</sup> The review concludes that Dewar “cites considerable evidence to support her views that man did not first enter the Americas via Bering Strait 12,000 years ago.”<sup>88</sup>

The so-called Berengian Walk across a land bridge from Siberia to Alaska, known as the Clovis model of settlement, has dominated scientific views for decades, “but increasingly, new research and discoveries from the Canadian Arctic to the Brazilian jungle are challenging that theory.”<sup>89</sup> Maclean’s<sup>90</sup> features the “raucous debate” on its cover<sup>91</sup> and quotes Dewar as saying, “You have to ask the question, which we haven’t for 70 years, whether native Americans are right in their belief that they have always been here. That they *came* here is simply an unsafe assumption – there’s no evidentiary reason for it.”<sup>92</sup>

In other parts of the world and where other religious and cultural communities have been involved, it has not been enough to say to the victims, “fugghedaboutit” and offer selective apologies delivered by lieutenants with some cash on the side. The most important process, the most effective first step in mending relationships and healing, has been to deliver clear acknowledgements of wrongdoing and unfettered apology, followed by evidence of a change in ways and a commitment to future generations benefiting from the history record so as to prevent recurrence. Finally, forgiving, but not forgetting.

Where the damage to peoples occur during armed conflicts, the change of ways becomes clearly evidenced by loss of the battle resulting in the rest of the world pointing the finger and punishing the loser who committed the atrocities through international tribunals specially established for the purpose.

In Canada however, there is no open armed conflict. Continued efforts to conquer the Aboriginal peoples take the form of a cold war, complete with denials and some would say, much clandestine activity. Aboriginal people who object to the goings on are often labeled dissidents and militants, and internal to Aboriginal cooperatives: “bush and backward Indians”. Care is taken not to admit to wrongdoing and to therefore take responsibility for it. Effort is made to craft processes within the Comprehensive Land Claims policy to appear to be supportive of expressed desires of the Aboriginal peoples: that while willing to live side-by-side, to share and work together for the benefit of all, they are not prepared to be assimilated and thereby relinquish their peoplehood nor to be excommunicated from their religions and beliefs.

"It's society as a whole - the non-Indian society shutting out the native people and not accepting them."<sup>93</sup> It's about the Aboriginal man from the Yukon who cannot finish his education or get work, dealing with daily discrimination and driven to pull out his own teeth.<sup>94</sup> Acceptance and thus mutual respect is not attainable until the past is first fully dealt with, not largely ignored and passed over.<sup>95</sup> You cannot just “fugghedaboutit”.

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<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> Brian Bethune, “Mystery of the First North Americans”, McLean’s Magazine, March 19, 2001 issue.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> Lawrence Paul, co-chairman of the Atlantic Policy Congress of First Nations Chiefs and leader of the Millbrook reserve near Truro, N.S.

<sup>94</sup> See note 70 above.

<sup>95</sup> Canada did establish the Royal Commission on Aboriginal People, which received evidence and reported on incidents; however, much of the recommendations made by the Commission have been shelved and not implemented.

A good foundation is needed for future relations between the Aboriginal peoples of Turtle Island<sup>96</sup> and the states of the Americas. A solid and certain foundation is not built through application of conquering philosophies. The time of justifying and believing such things to be beneficial has long since past. There is a need to come together in mutual respect, tolerance and acceptance. To rely on the fact that this has not been done to date does not preclude responsibility to see to it that it is done. There is no excuse in saying, "But it's not a perfect world."

Canada is being given fair opportunity to take responsibility but appears to be confident in its oppressive stature<sup>97</sup> and not willing to progress. Aboriginal peoples' patience wears very thin. Though stressing the desire for peaceful resolution, Aboriginal political and religious leaders say the matter now rests in the hands of the people and warn, "The people are fed up."

Canada's Indian cold war threatens to heat up. Economies are the first to feel the heat: "Referring to the city's '10 lost years' and sense of despair, Darcy Rezac, managing director of the local board of trade, recently lamented that Vancouver [British Columbia] was little better off than Mexico's hard-pressed Chiapas province."<sup>98</sup>

Where negotiations under the existing federal Comprehensive Land Claims policy and collateral policies are not the answer for Aboriginal peoples, there is a tendency to turn to Canada's courts. The following highlights the implications of some recent court decisions.

Consultation has been the subject of some recent court decisions. The November 21, 2000 Supreme Court of British Columbia in the *Haida*<sup>99</sup> case was an application for judicial review of decisions of BC's Minister of Forests. Mr. Justice D.A. Halfyard in interpreting *Delgamu'ukw*<sup>100</sup> held that,

"In *Delgamuukw* at paragraph 168, Lamer, C.J.C. discussed the Crown's duty to consult as a factor relevant to the issue of whether an infringement of Aboriginal title is justified. He states: 'The nature and scope of the duty of consultation will vary with the circumstances,' and goes on to describe the possible minimum and maximum extent of the duty to consult. In my opinion, these statements imply that the scope of the duty to consult is an issue that must be determined at a trial. This issue, like the issue of infringement, also depends on the nature and extent of the Aboriginal title or other right that must first be established. I consider my decision to be consistent with the judgment of Sigurdson, J. in the *Westbank*[<sup>101</sup>] case."<sup>102</sup>

In commenting on the *Haida*'s petition that the *Gitanyow* case obliges good faith negotiations on the part of the Crown in the BC Treaty Process, Mr. Justice Halfyard held that it "could reasonably give rise to a duty to conduct treaty negotiations in good faith. But in my opinion, it does not logically follow from this conclusion, that the Minister of Forests, who has no statutory or contractual obligation to negotiate with Aboriginal peoples concerning their claims before replacing tree farm licences in their traditional territories, should have a fiduciary obligation to consult with them in good faith, merely because he knows about the Aboriginal claim, and has not disproved it."<sup>103</sup>

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<sup>96</sup> The area known as North America and extending south, perhaps encompassing the Americas, referred to originally by Aboriginal peoples of the area as "Turtle Island".

<sup>97</sup> "[N]one of the chiefs were surprised by allegations the federal government would try to bully First Nations with financial pressure. It appears to be a well-known government tactic." *Infra* at note 198.

<sup>98</sup> Mickelburgh, Rod, "Two solitudes west", *The Globe and Mail*, February 24, 2001, p.A7.

<sup>99</sup> *Council of the Haida Nation et al. v. Minister of Forests et al.*, [2000] B.C.S.C. 1280.

<sup>100</sup> *Supra* at note 17.

<sup>101</sup> *Westbank v. British Columbia and Wenger*, [2000] B.C.S.C. 1139.

<sup>102</sup> *Haida*, *supra* at note 99, at para. 34.

<sup>103</sup> *Haida*, *supra* at note 99, at para. 32.

In British Columbia there is no domestic duty to consult before potential infringement. Aboriginal title or rights must be first proven to exist in court by the Aboriginal peoples. Her Majesty in Right of the Province of British Columbia is very confident that Her exercise begun in earnest in 1992 in identifying and setting out uses for Crown land will render it impossible for any assertions of Aboriginal title based on Imperial and Canadian policy to succeed in Her domestic courts. Aboriginal title and rights can only be asserted, according to the Crown, on unoccupied Crown lands, and now according to domestic law, most of British Columbia can be proven to no longer be wild and waste lands.<sup>104</sup>

Surrenders “by other means” have also been dealt with in cases. Surrender can occur by “arrangements subsequent to that treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve.”<sup>105</sup> The *Blueberry River Indian Band*<sup>106</sup> case held that the failure to comply with s. 51 of the *Indian Act* does not defeat a surrender. Thus the band did not receive the land but was able to seek monetary damages.

This is another example of how often the courts will stretch situations to uphold surrenders of land leaving the Aboriginal peoples with recourse only to money. However in the case of religious uses of land, money can never be compensation that will put the Aboriginal peoples in the position that they would have been in but for the wrongful actions of others, i.e. the Crown and Her agents.

The following case illustrates what I have been saying for years. If Aboriginal people do not agree with what is going on, for example, through the actions of their chiefs and councils, they must “paper-trail” even if they cannot do anything politically or legally about it today. To “paper-trail” means to create a path of tangible evidence of objection, such as letters, petitions, press releases, declarations, statements, documented protests, etc. that can be used years in the future if necessary to demonstrate disagreement or a different state of affairs than is being presented today as representing the position of the people.

If, for example, chief and council sign an Agreement in Principle (AIP) under the BC Treaty process but the people do not endorse the AIP in a favourable vote, the fact of the existence of the signed AIP can continue to be used. The evidence of a defeated vote may be lost or ignored, especially if the vote is by show of hands. The chief and council could be held to have made representations on behalf of the people, unless of course, the people specifically show something to the contrary, such as a signed petition saying they do not agree with the AIP nor anything contained in it and that nothing contained in it binds the people in anyway, be it agreement or representation. If people wish to preserve how they voted as private, they could attest to having witnessed how many people voted and what the outcome of the vote was, who said what, etc.

Care must then be taken in preserving these documents. It has not been unusual, for example, for band offices and homes to be mysteriously burned to the ground. I know of a situation where an older man thought that burying his documents would best protect them; however, he later forgot where he buried them. Another example relates to the entrenched Crown practice of providing medals and flags to chiefs, for example from Treaty No. 7 Between the Queen and the Blackfeet, “in recognition of the closing of the Treaty”. Many descendants of these chiefs who received medals and flags who had them placed in their care have had them stolen. They have consistently found the circumstances of the thefts unusual. One man recently told me he found it strange that while living in a very modest apartment, his stereo, television and money remained untouched but his medal from his grandfather, which was hidden away, was the only thing disturbed or taken. He had not shown anyone the medal nor talked about it, as he had been so carefully instructed by his Elder. I explained that the Crown would have known full well to

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<sup>104</sup> See my previous discussion on this above beginning at p. 4.

<sup>105</sup> *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, 83 D.L.R. (4<sup>th</sup>) 381, [1991] 3 C.N.L.R. 79 (S.C.C.) at C.N.L.R. at 81.

<sup>106</sup> *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344.

whom the medals had been given and to whom they would likely be passed. Because of the established practice of the Crown, the existence of these medals and flags evidence the existence of a treaty of a kind well beyond any domestic, “modern-day treaty” under the federal Comprehensive Land Claim policy.

The December Ontario Court of Appeal decision in the *Chippewas*<sup>107</sup> case, under appeal to the Supreme Court of Canada, has been criticized by a lawyer for three neighbouring, intervening bands: “[Paul] Williams argued that Aboriginal title should not be so easy to dispense with. ‘What we tried to say [in court] was that extinguishment is something you should do very reluctantly’.”<sup>108</sup> Perhaps Mr. Williams fails to realize that this case was decided not on extinguishment by the Crown but rather by abandonment by the band.

“In our view, the evidence leads to the inescapable conclusion that, notwithstanding the absence of a surrender, the Chippewas accepted the sale”.<sup>109</sup> “The failure to complain about [chief] Wawanosh’s actions in connection with the Cameron transaction, or to repudiate that transaction, constitutes evidence from which it can be reasonably inferred that Wawanosh acted with the authority of the Chippewa bands affected by the transaction, or at least that they accepted his actions, once they became known.”<sup>110</sup>

The court took into consideration “the motion judge’s findings of the historically vulnerable situation of the Chippewas, their lack of formal legal capacity for approximately 100 of the 150 years and their dependence on the Department of Indian Affairs with respect to legal claims until the late 1970s or early 1980s.”<sup>111</sup> However, the court placed great weight on the finding that “[d]espite the obvious fact that settlers were on what had formerly been reserve lands, *there was not a whisper of complaint from the Chippewas.*”<sup>112</sup> [Emphasis added]

The Chippewas were left with a monetary remedy only, and could not obtain the land: “[W]e are of the view that the Chippewas have no entitlement to the remedies they seek for the return of the disputed lands and that they are left with their claim in damages against Canada and Ontario.”<sup>113</sup>

Even in this day and age we continue to see signs of the manifest white race theory superiority view in the statement from a very persuasive and leading court, the Court of Appeal for Ontario, of Justice C.A. Osborne ACJO, Justice G.D. Finlayson J.A., Justice Doherty J.A., Justice Louise Charron J.A. and Justice Robert J. Sharpe J.A.: “There is overwhelming evidence that the Chippewas *were an intelligent people* who as of 1839 were keenly aware of their land rights and were most diligent in preserving those rights.”<sup>114</sup> [Emphasis added]

Aboriginal peoples do not always have their lands and rights taken away from them. They can as well abandon them, which also takes the form of acquiescing in wrongful use or taking. Aboriginal peoples are free to leave territory and to abandon an activity.

In considering whether to approach the domestic courts, Aboriginal people should be aware that the court system is not a strictly constitutionally separate institution in Canada, nor is the executive function: “The separation of powers as a principle requires that the main functions of government – namely, the executive, legislative and judicial functions – be assigned to different branches and that these branches be staffed by totally separate groups of state officials. As far as executive-legislative relations go, there is little room for the application of this principle in Canada with a parliament-cabinet system of government in which the executive is headed by the

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<sup>107</sup> *The Chippewas of Sarnia Band v. Canada et al.* (December 21, 2000) <http://www.ontariocourts.on.ca/decisions/2000/december/chippewas.htm> at para. 21.

<sup>108</sup> Paul Barnsley, “Courts flip-flop to serve third party interests”, *Windspeaker*, February 2001, <http://www.ammsa.com/windspeaker/windnewsfeb2001.html>.

<sup>109</sup> *The Chippewas of Sarnia Band*, *supra* at note 107 at para. 21.

<sup>110</sup> *The Chippewas of Sarnia Band*, *supra* at note 107 at para. 140.

<sup>111</sup> *The Chippewas of Sarnia Band*, *supra* at note 107 at para. 273.

<sup>112</sup> *The Chippewas of Sarnia Band*, *supra* at note 107 at para. 273.

<sup>113</sup> *The Chippewas of Sarnia Band*, *supra* at note 107 at para. 24.

<sup>114</sup> *The Chippewas of Sarnia Band*, *supra* at note 107 at para.130.

leaders of the strongest party in the legislature. ... Separate as the judicial branch has become in the practice of Canadian government, there is still little recognition of this in the formal Constitution, which does not explicitly establish the judiciary as a separate branch of government. Nor has constitutional interpretation set any firm boundaries on the responsibilities that can be assigned to the judiciary."<sup>115</sup>

Section 101 of the *Constitution Act, 1867* provides for the federal power to set up "a general court of appeal for Canada" and "any additional courts for the better administration of the laws of Canada." The federal Parliament established the Supreme Court of Canada in 1875. The court's composition and jurisdiction are established by federal law and not by Canada's constitution.

Although it is considered that "[s]ince the advent of section 52 of the Constitution Act, 1982 (affirming that the Constitution is the 'supreme law' in Canada), it is no longer accurate to describe the judiciary as a subordinate branch of government",<sup>116</sup> the Canadian Constitution does not expressly provide for a separation of powers.<sup>117</sup> "Assuming the judicial branch has its own constitutional authority, the source of that authority is neither uniform nor self-evident."<sup>118</sup>

A special invitation conference by British Columbia Chief Justice Allan McEachern to selected participant judges, lawyers and legal scholars from throughout the world was held May 9 - 11, 2001. The delegates were assembled to consider the principle of judicial independence. Canada likes to consider Herself as being on the leading edge of such an essential concept, or at least strives to be *seen* to be a leader in the field. Her senior justices routinely proffer advice on how to structure judicial independence in other countries.

This is rather ironic considering that Canada does not have a functioning liberal democracy given the absence of the separation of powers of the executive, the legislature and the judiciary. The doctrine of the separation of powers, such as espoused by John Locke in *Two Treatise of Government*, aims to ensure liberty by preventing a concentration of too much power in too few hands.

Recently Hamar Foster, University of Victoria professor of law,<sup>119</sup> reportedly commented, "When Sir Matthew Begbie was appointed the first judge of B.C. in 1858, he was in effect attorney-general as well ... 'He drafted many of the laws and then sat, much as a medieval judge did, and interpreted what he had drafted,' he said. 'So the differentiation of responsibility amongst the legislature, the executive and the judiciary is an idea that took a long time to evolve. And the concept is evolving."

Canada has seen a marked increase in the concentration of powers over the past few federal governments. Both federally and provincially, the electorate bemoans the disturbing trend of elected representations having decreased effectiveness in their legislative bodies because of the prevalence of the party system and the manner in which the party leader, who controls the executive as well, controls the elected members of the party. Then there is the matter of the appointment of judges.<sup>120</sup>

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<sup>115</sup> P. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 89-90.

<sup>116</sup> Lorne M. Sossin, *Boundaries of Judicial Review The Law of Justiciability in Canada*, (Toronto: Carswell, 1999) at p. 11.

<sup>117</sup> "The Act does not separate the legislative, executive and judicial functions and insist that each branch of government exercise only 'its own' function. As between the legislative and executive branches, any separation of powers would make little sense in a system of responsible government; and it is clearly established that the Act does not call for any such separation. As between the judicial and the two political branches, there is likewise no general separation of powers." Peter Hogg, *Constitutional Law of Canada*, 4<sup>th</sup> edition (Toronto: Carswell, 1997), at p. 7-24.

<sup>118</sup> Lorne M. Sossin, *supra* at note 116 at p. 13.

<sup>119</sup> On the occasion of a special invitation conference by British Columbia Chief Justice Allan McEachern on the concept of judicial independence, marking the 300<sup>th</sup> anniversary of the British *1701 Act of Settlement*, in Vancouver, British Columbia.

<sup>120</sup> See note 122 below.

The concept of a liberal democracy based on a firm separation of powers is not evolving quickly enough in Canada, particularly when it comes to the Aboriginal peoples.<sup>121</sup> The question of the independence of the judicial system for most people in Canada is largely irrelevant and confined to academics. These issues are however important for Aboriginal peoples to consider in that the issues Aboriginal peoples raise in the courts tend to be perceived as threatening directly or indirectly the core of Her Majesties powers and underlying authorities in Canada.

It is important for Aboriginal peoples to understand that the courts may not be entirely constitutionally separate from the Crown in Canada.<sup>122</sup> It is equally important for Aboriginal peoples to understand the limits of Her Majesty's domestic courts, which is identified through the justiciability of matters before Her courts.

"The justiciability of a matter refers to its being suitable for determination by a court."<sup>123</sup> "Courts are designed to make pronouncements of law. Arguably, they accomplish this goal more effectively and efficiently than any other institution could. Where the heart of a dispute is political rather than legal, however, courts have no particular advantage over other institutions in their expertise, and may well be less effective and efficient than other branches of government in resolving such controversies, as the judiciary is neither representative of the political spectrum, nor democratically accountable."<sup>124</sup> Political matters that are not suitable for determination by a court are said to not be justiciable before that court.

The courts are also limited by the intention of Her Majesty: "While the courts must determine the meaning of statutory provisions, they do so in the name of seeking out the intention or Sovereign will of Parliament, however purposively, contextually or policy-oriented may be the interpretative methods used to attribute such meaning."<sup>125</sup>

Her Majesty has prerogative. "Prerogative powers consist of those powers afforded to the Crown (and by extension, the executive branch of government) by the common law. Courts traditionally have regulated the scope of such prerogatives, but not their exercise. Executive action relating to foreign affairs is cited as a classic example of a prerogative power."<sup>126</sup> The courts cannot force Her Majesty to exercise Her prerogative. Her courts are limited to interpreting, but cannot force, behaviour.<sup>127</sup>

Political questions are not suited for decision by the courts: "Political questions, therefore, must demonstrably be unsuitable for adjudication. These will typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution through adversarial presentation of evidence or the judicial process."<sup>128</sup>

Supreme Court of Canada Justice Michel Bastarache recently made a statement that can be interpreted as his warning that many Aboriginal peoples' issue are not justiciable in Canada's courts. During an

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<sup>121</sup> Rather unusual occurrences during proceedings today tend to be restricted to litigation and prosecutions involving Aboriginal peoples' rights. Some of these are documented in my latest book, *Sookinchute*, soon to be released. Canada has an unsavoury history of not only calling upon Her military and Her national police force, the Royal Canadian Mounted Police, and it is rumoured, Her national security forces, but also upon Her judiciary to help control "Her Indian problems". Examples of this are set out in my first book, *Gustafsen Lake: Under Siege* (TIAC Communications Ltd., 1997) ISBN 1-896780-01-6.

<sup>122</sup> This is a different issue from the fact that in Canada, judges of the supreme courts and courts of appeal in each province are appointed by the federal Minister of Justice and the Prime Minister appoints the chief justices of the superior and federal courts.

<sup>123</sup> Lorne M. Sossin, *supra* at note 116, at p. 5.

<sup>124</sup> Lorne M. Sossin, *supra* at note 116, at p. 133.

<sup>125</sup> Lorne M. Sossin, *supra* at note 116, at p.131.

<sup>126</sup> Lorne M. Sossin, *supra* at note 116, at p.180.

<sup>127</sup> Constitutional torts have not been pursued in Canada as they have been, for example, in the United States. In the United States, the court has ordered government to take certain action, for example in the integration of schools and other civil rights cases. However, the separation of powers in the United States is constitutionally entrenched.

<sup>128</sup> Lorne M. Sossin, *supra* at note 116, at p. 132.

interview to several Southam newspapers and the *Lawyers Weekly*, Mr. Justice Michel Bastarache said that the courts are not the best place to settle land claims and other “ill-defined” aboriginal rights. Justice Bastarache stated that he disagreed with the Supreme Court of Canada 1999 *Marshall* decision that expanded fishing rights in Atlantic Canada.

The Canadian Judicial Council found no grounds for complaints from the Atlantic Policy Congress of the First Nations Chiefs<sup>129</sup> and from the Ontario Criminal Lawyers Association that Justice Bastarache had shown bias in his comments. The complaint of “anti-aboriginal bias” made against Supreme Court of Canada Justice Michel Bastarache was dismissed. Justice Bastarache’s comments were held not to erode public confidence in his ability to hear arguments, deliberate on and decide issues fairly. Justice Bastarache was therefore not removed from office.

I completely concur with the findings of the Canadian Judicial Council. Mr. Justice Bastarache was simply commenting on a matter of justiciability. By suggesting that Aboriginal peoples’ issues may not be justiciable, Mr. Justice Bastarache cannot be accused of being susceptible to rendering bias decisions on such issues. Rather, Mr. Justice Bastarache may well have been warning that he may at some point consider himself unable to decide on such issues at all, on the basis that such issues are not justiciable.

In *Delgamu’ukw*<sup>130</sup> this issue of justiciability arose but ultimately the Supreme Court of Canada did not address it. The Court chose to simply send the entire matter back to trial. The trial judge however cited a passage from *Calder*<sup>131</sup> citing a passage from the American Supreme Court decision in *United States v. Santa Fe Pacific Railway*.<sup>132</sup>

“Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in this regard is supreme. The manner, method and time of such extinguishments raise political and not justiciable issues. *Buttz v. North Pacific Ry.* 119 U.S. 55.”<sup>133</sup>

This perhaps explains the emphasis in the Supreme Court of Canada’s decision encouraging negotiations to resolve Aboriginal issues in Canada and the fact that only *obiter* or statements and not actual binding decision was made on most of the substantial issues. The Court can only be concerned with what the deal was that the Sovereign made at the time. Further, if the Sovereign has stepped away from that deal, the Court is permitted to determine that such stepping away did in fact occur, that it was actually done, and that the Sovereign was plain and clear in His/Her intent to step away from the deal. Her Majesty retains Her prerogative to decide to step away. The Court cannot question the right of the Sovereign to step away from treaties and the recognition of Aboriginal rights. Only the Honour of the Crown and international pressures, politics and business, and public opinion, in any way influence or control that.

The courts are limited to interpreting treaties in order to determine the intent of the Sovereign. With regards to the treaties entered into by Her Majesty with the Aboriginal peoples, the submissions to the court have made clear to the court that Her Majesty does not wish to view the treaties as international treaties. The courts thus have turned their minds to analysis such as reflected in the following:

“[W]hen considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement ... As a result, it is well

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<sup>129</sup> “Chiefs call for resignation of Supreme Court judge, CBC News WebPosted January 31, 13:07:17, 2001, [http://cbc.ca/cgi-bin/view?/news/2001/01/31/native\\_judge010131](http://cbc.ca/cgi-bin/view?/news/2001/01/31/native_judge010131).

<sup>130</sup> *Delgamu’ukw v. British Columbia*, *supra* at note 17.

<sup>131</sup> *Calder v. British Columbia*, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145 (S.C.C.).

<sup>132</sup> (1941), 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (U.S. Ariz).

<sup>133</sup> *Calder*, *supra* at note 131, at 347.

settled that the words in the treaty must not be interpreted in their strict sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of signing.”<sup>134</sup>

All of the so-called treaty cases in Canada were decided for purposes of s. 87 or 88 of the *Indian Act*, as it was at the relevant time. All other comment by the courts saying that these treaties are not international agreements is simply the courts’ reflection of the wishes of Her Majesty, which they are inherently limited to reflect as Her courts. All such comment is truly *obiter dicta* and not binding as to how these treaties are viewed outside of the domestic viewpoint of Her Majesty and Her courts.

The domestic viewpoint is that “[t]reaties are neither mere contracts nor international agreements with independent countries. They are ‘sui generis’ agreements (see *R. v. Simons*, *R. v. Sioui* and *R. v. Badger*) which bind the Crown to certain obligations.”<sup>135</sup> Another example of such a case is the *White and Bob* case, where the issue is dealt with after being set out with the benefit of a heading: “As to whether or not the document Exhibit 8 is a treaty within Section 87 of the *Indian Act*.”<sup>136</sup>

Canadian courts are unable to decide whether these treaties are treaties within the international viewpoint. That must be left to the international arena where the treaties have just started to be looked at and are in fact being accepted as international in nature.<sup>137</sup>

Aboriginal peoples’ rights under their treaties are augmented and reinforced by international human and humanitarian rights that also apply to protect Indigenous peoples, in particular, social and economic rights. Are social and economic rights justiciable domestically in Canada? Can issues of social and economic rights be decided in Canadian courts? Social and economic rights can include rights to adequate nutrition, clothing, housing, health, education and welfare and equal access to resources and the means for economic opportunity, such as equal access to capital.

Whether social and economic rights form part of Canada’ Constitution has not been determined.<sup>138</sup> Just what social and economic rights may be protected domestically is uncertain. The Supreme Court of Canada refrained from finding whether s. 7 of the Charter, guaranteeing a right to security of the person, protects “economic rights fundamental to human life or survival” in the *Irwin Toy* case:

“Lower courts have found that the rubric of ‘economic rights’ embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property-contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous.”<sup>139</sup>

Many argue in favour of the court’s restraint in incorporating economic and social rights within the protection of the *Charter*.<sup>140</sup> However human rights become seriously at risk where social and economic rights are not justiciable. According to Collen Sheppard,

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<sup>134</sup> *R. v. Badger*, [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 133 D.L.R. (4<sup>th</sup>) 324, [1996] C.N.L.R. 77, [1996] S.C.R. 771 (S.C.C.) [W.W.R. at 478].

<sup>135</sup> Shin Imai, *The 2001 Annotated Indian Act and Aboriginal Constitutional Provisions* (Toronto: Carswell, 2000) at 378.

<sup>136</sup> *R. v. White and Bob*, *supra* at note 5, at 648.

<sup>137</sup> The treaties referred to are not to be confused with “modern-day treaties” being negotiated pursuant to the federal Comprehensive Land Claims policy under, for example, the BC Treaty Process.

<sup>138</sup> Lorne M. Sossin, *Boundaries of Judicial Review The Law of Justiciability in Canada*, (Toronto: Carswell, 1999) at p. 191-92.

<sup>139</sup> *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 (S.C.C.) at 1003-1004.

<sup>140</sup> See for example the position of Peter Hogg who asserts that entering into economic and social rights protection would allow for judicial scrutiny of all the elements of a modern welfare state, such as levels of expenditures on social programs and could include the regulation of trades and professions: P. Hogg, *Constitutional Law in Canada*, 3<sup>rd</sup> ed (Loose-leaf edition – 1997) (Toronto: Carswell, 1992) at 44.8- 44.9.

“The perceived non-justiciability of economic rights also represents one of the most important lines of demarcation with civil and political rights and has contributed to their characterization as less important human rights. Since they often cannot be directly enforced through litigation, they are seen as mere inspirational guide-posts for the development of future government policy. Some scholars suggest that this non-justiciability means that economic rights are not considered ‘real’ rights.”<sup>141</sup>

Supreme Court of Canada Chief Justice Beverley McLachlin, reported on complete with a half page animated photograph of her in the local press, has issued a plea for help. She recently asked lawyers to help the court to set limits on *Charter* rights. Chief Justice McLachlin spoke on the occasion of the 15<sup>th</sup> anniversary of Canada’s equality rights provision contained in the *Charter*. She “appealed to the legal profession for help Friday in the Supreme Court of Canada’s ‘daunting’ struggle to set limits on equality rights as a time when seemingly everyone wants in.” Specifically referenced is the worry about social and economic rights: “The court is therefore being thrust into the ‘uncertain sea of value judgments’ in which it must establish boundaries based on legal, political, economic and social considerations, she said. ... ‘We recognize stereotypical discrimination when we see it and we usually know what to do about it, McLachlin said in a 30-minute speech at York University. ‘When the goal is equal distribution of benefits, the rules seem less clear than where the goal is the amelioration of [the] downtrodden class’s situation.”<sup>142</sup>

The Hon. Chief Justice McLachlin’s plea for help in limiting rights points us in the wrong direction. This does not bring us closer to that perfect world.

International law is not justiciable in Canada’s domestic courts.<sup>143</sup> “[T]he enforcement of international agreements or obligations, and legal claims that derive their authority from outside the jurisdiction of Canadian courts, either under international law or by virtue of the actions or laws of another state, may also constitute ‘political questions’ that exceed the capacities and legitimacy of Canadian courts to review.”<sup>144</sup>

An example of a non-justiciable issue is described in the *Penikett* case regarding the proposed Meech Lake Accord: “Indeed, the written arguments of counsel for the petitioners does not assert that the provisions of conventions and treaties to which Canada is a party are part of the law of Canada even if not incorporated by legislation. Rather, the petitioners simply ask that the court declare ‘that the proposed Constitution Act, 1987 is inconsistent with Canada’s international obligations’... However, in my view, it is entirely a matter for Canada, either in the context of the procedure by which the Constitution may be amended or in an ordinary statute enacted by the competent legislative body, to decide whether or not in its domestic law Canada will comply with its international treaty or conventional obligations. Whether the provisions of a constitutional amendment that has been approved and proclaimed is or is not consistent with Canada’s international obligations is not justiciable in the sense that it is neither obligatory nor appropriate for the courts to decide such an issue.”<sup>145</sup>

Specifically considering the enforceability of international treaties in Canada’s domestic courts, Sossin notes, “The enforcement of international treaties or agreements generally will not be justiciable in domestic courts unless these instruments have been incorporated into domestic law. ... the Jay Treaty, as an international treaty, was not a treaty within the meaning of section 35(1) of the Constitution. An international treaty is one between the nations who are parties to the treaty, and the rights created or conferred by an international treaty belong exclusively to the sovereign countries which are contracting parties to it. In order for individual members of those nations to have rights under the treaty, the treaty must have been implemented by national legislation. With respect

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<sup>141</sup> C. Sheppard, “A Review of Lucie Lamarche, ‘Perspectives occidentales du droit international des droits économiques de la personne, Brussels: Bruylant, 1995. Pp xlv, 513” (1996), 41 McGill L.J. 907 at 913.

<sup>142</sup> Janice Tibbetts, “Help us set limits on equality rights, Supreme Court judge asks lawyers”, The Vancouver Sun, April 7, 2001, p. A3.

<sup>143</sup> Lorne M. Sossin, *Boundaries of Judicial Review The Law of Justiciability in Canada*, (Toronto: Carswell, 1999) at 196-97.

<sup>144</sup> *Ibid* at 194.

<sup>145</sup> *Penikett v. R.*, [1987] 5 W.W.R. 691, 43 D.L.R. (4<sup>th</sup>) 324, reversed (1987), 21 B.C.L.R. (2d) 1, [1988] N.W.T.R. 18, 45 D.L.R. (4<sup>th</sup>) 108, [1988] 2 W.W.R. 481, leave to appeal refused 46 D.L.R. (4<sup>th</sup>) v1, 27 B.C.L.R. (2d) xxxv (note), [1988] 6 W.W.R. Lxix (S.C.C.) at 104-5.

to the effect of the Jay Treaty on the [*R. v. Vincent*] case at bar, Lacourciere J.A. held, '... A right mentioned in an international treaty is not justiciable before a Canadian court. ...' "146

In the case of the treaties with Aboriginal peoples, the *Indian Act* is seen as implementation by national legislation so as to bring certain aspects of the treaties within the ambit of justiciability of Canada's domestic courts. There has not however been full implementation of the treaties. Treaties have to be implemented but Canada wants in the course of Her proposed so-called implementation to actually have the old treaties replaced by land claims agreements or treaty entitlement agreements, all of which are modern-day "treaties" within the context of s. 35 of the *Constitution Act, 1982*. This would eliminate any connection the original treaties have to international status and recognition. If Canada's strategy works, the treaties will be replaced with local domestic agreements solely within the Constitution of Canada.

To illustrate the connection between issues facing Aboriginal Peoples in Canada and international human rights, I set out the following from the International Covenant on Civil and Political rights. Without going into the details, the allegations arising out of the residential school system suggest that each of the following has been breached in Canada. Perhaps the most telling in breach is the allegation that the children in attendance were referred to by number rather than by their names (see Article 24 below.)

The International Covenant on Civil and Political Rights states, " ... *Recognizing* that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

...

Article 1

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

...

Article 7

No one shall be subject to torture or to cruel, inhumane or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

...

3(a) No one shall be required to perform forced or compulsory labour;

...

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

...

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

...

Article 20

...

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

...

Article 24

...

2. Every child ... shall have a name.

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<sup>146</sup> Lorne M. Sossin, *Boundaries of Judicial Review The Law of Justiciability in Canada*, (Toronto: Carswell, 1999) at 195.

The *Hasan*<sup>147</sup> case was brought under Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms in the European Court of Human Rights: Article 9 reads,

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”<sup>148</sup>

“The applicants maintained that the right to manifest one’s religion in community with others meant that the community should be allowed to organize itself according to its own rules. In their view any interference in the internal life of the organization was a matter of concern not only to the organization but also to every person who belonged to the religious community ... The applicants were thus of the opinion that the alleged forced removal of the leadership of their religious community concerned their individual rights protected by Article 9 of the Convention ... The commission considered that the organization of a religious community was an important part of religious life and that participation therein is a manifestation of one’s religion. The applicants’ complaints therefore fell within the ambit of Article 9 of the Convention.”<sup>149</sup>

State interference with religious leadership has occurred with the Aboriginal peoples. Chiefs were removed, sometimes meeting untimely deaths, and replaced with Indian agents and selected chiefs and councils under the *Indian Act*. At contact, the societies of Aboriginal peoples were interwoven social, political and religious structures. There was no separation of state and church. There was no separation of religious practice from daily living. These were and in many cases remain, religious communities.

On February 22, 2001, the Trial Chamber II of the International Criminal Court for Yugoslavia (ICTY) in The Hague rendered a landmark decision in the *Kunarac, Kovac and Vukovic Case*. The Tribunal ruled that acts of sexual enslavement, mass rape, forced prostitution and torture “are a form of slavery that in the context of an ethnic war constitute a crime against humanity. ... What the evidence showed, said Judge Florence Mumba who read the verdict was ‘Muslim women and girls, mothers and daughters together, robbed of the last vestiges of human dignity, women and girls treated like chattels, pieces of property at the arbitrary disposal of the Serb occupation forces.’ ... The women and children were taken from surrounding villages and bused to seemingly ordinary buildings ... But they became places of horror, where women were raped in classrooms ... The rapes were not an ‘instrument of war,’ the court declared, pointing out there was no evidence to suggest any soldiers were ever ordered to commit rape. But rape was used as an (sic) ‘weapon of terror,’ designed to traumatize a Muslim population that the ethnic Serbs wished to expel. ... Amassing the evidence was also difficult because it required convincing Muslim women to come forward to recall and then publicly describe horrific acts.”<sup>150</sup>

A former B.C. prosecutor<sup>151</sup> noted, “ ‘It’s the first time a case of this magnitude has been brought before the courts, ... It’s the first time a war crimes trial was based solely on sexual offences – rape, torture and enslavement. Usually it’s been an add-on to a murder case. It was also the first convictions for sexual enslavement.’ The war crimes tribunal found that the systematic rape and sexual enslavement of Muslim women by Bosnian Serb soldiers is a crime against humanity.”<sup>152</sup>

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<sup>147</sup> *Case of Hasan and Chaush v. Bulgaria* (Application no. 30985/96) Strasbourg, October 26, 2000.

<sup>148</sup> *Hasan, supra* at note 147 at para. 55.

<sup>149</sup> *Hasan, supra* at note 147 at paras. 56 and 59.

<sup>150</sup> Wallace, Bruce, “War crimes tribunal finds rape a crime against humanity: Serbs found guilty of brutalizing and enslaving Muslim girls”, *The Vancouver Sun*, February 23, 2001, p. A10.

<sup>151</sup> Dirk Ryneveld, “is one of six senior tribunal prosecutors but is the only Canadian. He was interviewed for the job by Justice Louise Arbour, the former chief prosecutor of the tribunal before she was appointed to [the] Supreme Court of Canada.” Hall, Neal, “Ex-B.C. lawyer headed prosecution against troops in landmark was crime rape decision”, *the Vancouver Sun*, February 26, 2001, p. A7.

<sup>152</sup> Hall, Neal, “Ex-B.C. lawyer headed prosecution against troops in landmark was crime rape decision”, *Ibid*.

Editorial commentary on the case included the following: “They looked so civilized, the three Bosnian Serbs, standing in their elegant suits complete with neckties to solemnly face the judgment of the modern world on charges including rape and torture. Thankfully, those charged with judging the threesome were not fooled by their appearances and effectively denounced them as barbarians – thus moving civilization itself a significant step forward. ... The momentous verdict against these three men was the first time rape has been defined as a crime against humanity. A crime against humanity is considered a graver crime than torture, which was the category under which earlier sexual crimes were prosecuted. The judgment is being widely celebrated by women’s groups around the world. While the convictions are indeed a victory for women everywhere, they also represent a victory for humanity, which is universally better off for it. ... Today, even as wars and conflicts rage in the world’s hot spots, even as unfortunate people continue to endure horrors unimaginable to those of us lucky enough to live in developed countries, the world is a bit better off. We have, together, traveled a great distance from the times when society turned a blind eye to war-time rape, tacitly considering it part of a soldier’s rightful plunder.”<sup>153</sup> We still have a great distance to travel when it comes to our treatment of Aboriginal peoples in Canada.

The ICTY concluded that the definition of torture under international humanitarian law is not the same as the definition of torture generally applied under human rights law. The Trial Chamber was “of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offense to be regarded as torture under international humanitarian law.”<sup>154</sup>

“In the field of international humanitarian law, the elements of the offense of torture, under customary international law are as follows:

1. The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
2. The act or omission must be intentional.
3. The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.”<sup>155</sup>

“The decision recognized the instrumental nature of rape in wartime. Judge Mumba rejected the phraseology ‘systematic rape employed as a weapon of war,’ because ‘this could be understood to mean a kind of concerted approach or an order given to the Bosnian Serb army forces to rape Muslim women as part of their combat activities in the wider meaning.’ The Tribunal found that there was insufficient evidence for such a finding. Instead, in the case at hand rape was ‘used by members of the Bosnian Serb armed forces as an instrument of terror, an instrument they were given free rein to apply whenever and against whomever they wished.’ This understanding of rape as an instrument of terror can be applied in other cases where the evidence does not prove the existence of a direct order to rape.”<sup>156</sup>

The recent Agreement between Austria and the United States concerning the Austrian Fund “Reconciliation, Peace and Cooperation” covers the parties’ intention that the Austrian Fund will cover all claims against either Austria or Austrian companies involved in slave or forced labor in the Nazi era or World War II.

The Agreement defines “slave laborers” as “persons forced to work while under detention in a concentration camp or similar place of confinement under inhumane conditions”. The Agreement defines “forced laborers” as including those transported to the territory of the present-day Austria “by force or by deception” and forced

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<sup>153</sup> “Rape sentences reflect a victory for justice ‘Crimes against humanity’ deservedly broadened”, Editorial, the Vancouver Sun, February 26, 2001, p. A10.

<sup>154</sup> Para. 496. The decision read in open court is found at [www.un.org/icty/pressreal/p566-e.html](http://www.un.org/icty/pressreal/p566-e.html) and the full text of the decision is found at [www.un.org/icty/judgment.htm](http://www.un.org/icty/judgment.htm).

<sup>155</sup> Para 497, *Ibid.*

<sup>156</sup> Judgment of Trial Chamber II in the Kunarac, Kovac and Vukovic Case, by Julie Mertus, Assistant Professor at the American University School of International Service, Senior Fellow, U.S. Institute of Peace, *ASIL Insight*, ©2001 American Society of International Law, 2223 Massachusetts Avenue, NW Washington, DC 20008-2864; Tel. 202-939-6000; Fax: 202-797-7133; <http://www.asil.org/insights.htm>.

to work subject to, among other things, a “significant limitation of freedom”, denial of personal rights or “particularly severe disciplinary measures.”

Slave or forced laborers who worked in agriculture, forestry or personal services will receive AS 20,000 and those who worked in industry and the postal service will receive AS 35,000 from the Fund. The Austrian “Reconciliation, Peace and Cooperation” Fund will also compensate those who were then-residents of the territory of present-day Austria who were treated as described above by the Nazi regime because of their ancestry, religion, nationality or sexual orientation, or in connection with medical experiments. The Fund will also compensate people who were transported to present-day Austria under age 12 with at least one parent who was a slave or forced laborer or who suffered “demonstrably severe and lasting physical or psychological damage” because of forced labour.

The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) Appeals Chamber decided the appeal of *Prosecutor v. Delalic* (“*Celebici* case”) on February 20, 2001<sup>157</sup>. The Trial Chamber had found three Bosnian Serb civilians responsible for the unlawful confinement, torture and rape of Bosnian Serb civilians at the Celebici prison camp in central Bosnia from May to October 1992. Mr. Delalic was acquitted.

The three found guilty appealed to the ICTY Appeals Chamber alleging that the Trial Chamber had erred by not applying any legal test to establish whether an intervening state’s control over insurgents could render the conflict international and in finding that the Celebici camp’s Serb prisoners could be considered as not being Bosnian nationals and thus qualifying as “protected persons” under Geneva Convention IV.

The Trial Chamber’s decision was upheld. The Chamber stated that for purposes of Geneva Convention IV, victims in “today’s ethnic conflicts ... may be ‘assimilated’ to the external State involved in the conflict, even if they formally have the same nationality as their captors.”<sup>158</sup> Nationality is to be determined by “substantial relations” rather than by “national characteristics” and should consider the difference in ethnicity of the victims and the perpetrators and their bonds with the foreign intervening state.<sup>159</sup>

Consistent with the decision in the *Tadic* judgment, which sets out the “overall control” test, “ethnicity may become determinative of national allegiance.” The Appeal Chamber held that the Bosnian Serbs being detained in the Celebici camp must be seen as having been “in the hands of a party to the conflict, Bosnia and Herzegovina, of which they were not nationals.”<sup>160</sup>

The final judgment of the Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *The Prosecutor v. Dusan Tadic* case was released on May 7, 1997. Article 5 of the ICTY Statute gives the Tribunal the power to prosecute for crimes “when committed in *armed conflict*, whether international or internal in character, and directed against any civilian population.” [Emphasis added] Crimes against humanity include murder, extermination, enslavement, deportation, imprisonment, torture, rape, “persecutions on political, racial and religious grounds,” and “other inhumane acts.”

The Tribunal in *Tadic* held that “the commission of crimes against humanity is necessarily a part of customary international law for which individual criminal responsibility will lie. ... In addition, the tribunal, relying in part on the decision of the French *Court de Cassation* in the case *Federation Nationale des Deportés et Internes Résistants at Patriotes and Others v. Barbie*, indicated that the civilian population against whom the act is perpetrated can, in certain circumstances, include persons who at one time performed acts of resistance. The Tribunal also concurred with an earlier decision of Trial Chamber I in the *Mrksic (Vukovar Hospital)* ICTY Rule 61 proceeding that a single

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<sup>157</sup> The *Celebici* case decision is found in PDF format at <http://www.un.org/icty/celebici/appeal/judgment/cel-aj010220.pdf>

<sup>158</sup> *Celebici* case, *supra* at note 157, at para. 83.

<sup>159</sup> *Celebici* case, *supra* at note 157, at para. 84.

<sup>160</sup> *Celebici* case, *supra* at note 157, at para. 106.

act can qualify as a crime against humanity as long as there is a link with a widespread or systematic attack against a civilian population. Likewise, the Tribunal agreed with Trial Chamber I in its Rule 61 ruling in the *Nikolic* prosecution that, although a 'policy' to commit crimes against humanity must exist, it need not be the policy of the State but could be instigated or directed by a non-State organization or group. With respect to the crime against humanity of persecution under Article 5(h) of the ICTY Statute in particular, the Tribunal found that persecution can encompass inhumane or other acts that 'seek to subject individuals or groups of individuals to a kind of life in which enjoyment of some of their basic rights is repeatedly or customarily denied,' whether or not they are enumerated elsewhere in the Statute, and that such acts can take numerous forms, including those of a physical, economic or juridical nature. The Tribunal also held that the grounds for persecution under Article 5 of the Statute should be read disjunctively, such that each of the grounds, political, racial or religious, in and of itself is sufficient to establish a crime against humanity."<sup>161</sup>

Tadic was found guilty of violations of the laws and customs of war and of crimes against humanity for persecution of Serbs on religious and political grounds, and for inhumane acts as the result of his actions undertaken when he was aware of a general Serb policy of and discrimination against non-Serbs. The *Tadic* decision was the first to examine Article 7(1) of the ICTY Statute, which provides for individual criminal responsibility against anyone "who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime under Article 2 to 5 of the Statute."<sup>162</sup> Tadic was found to have knowingly aided, abetted or otherwise assisted, directly and substantially in the commission of a crime.

In the judgment issued on September 2, 1998 by the International Criminal Tribunal for Rwanda finding Jean-Paul Akayesu guilty on various charges of genocide and crimes against humanity, the Tribunal held that mass rape can constitute a crime against humanity. Though there is no commonly accepted definition of rape in international law, the Tribunal states that it includes acts used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. The Tribunal held that rape when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity constitutes torture. The Tribunal specifically recognizes that sexual violence, including rape, when committed as part of a widespread or systematic attack on a civilian population on a discriminatory basis constitutes a crime against humanity.

Crimes against humanity have occurred in Canada; however, the differences in circumstances to the circumstances that the international findings above apply to are as follows:

1. The war in Canada is ongoing in that there continues underway efforts to conquer Aboriginal peoples. As such the situation is closer in appearance to a classic cold war and does not meet the standard definition of an "armed conflict".
2. There has been no losing party against whom most can comfortably agree in pointing the finger. Aboriginal peoples continue to be the losing party and they have not achieved the position of power necessary to typically bring the wrongdoers to justice. Many of the wrongdoers are alive and continue to hold power within a society that does not fully respect the separation of powers fundamental to a liberal democracy, and they would not be inclined to expose themselves to the risk of facing personal prosecution for crimes against humanity.

Finally, one of the most interesting developments in international law having implications for the assertion that Aboriginal peoples possess not only collective Aboriginal rights but also powerful individual Aboriginal rights that attach to them and are thus mobile, is the recent finding in the Americas that under general international law, citizenship rather than residence establishes the "relevant connection"

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<sup>161</sup> Rochus J.P. Pronk & Brian D. Tittlemore, "ICTY Issues Final Judgment Against Dusan Tadic in First International War Crimes Trial Since World War II", <http://www.wcl.american.edu/pub/humright/brief/v4i3/icty43.htm>.

<sup>162</sup> *Ibid.*

between a state and an individual.<sup>163</sup> Continuing colonial orientation of government policy asserts that once Aboriginal people step out of the areas they were corralled into, they cease to be Aboriginal people.

Developments in international human rights law are relatively new. It was only a few years ago that the International Bar Association formed the Human Rights Institute. It is equally recent that there is talk about a permanent forum at the United Nations for Indigenous peoples. As recent as 1977, international law was likened to an “invisible college of international lawyers” by Professor Oscar Schachter. International law has begun to flourish and diversify and new principles and doctrinal revisionism are emerging.

In Canada, the University of Toronto offered its first seminar on Aboriginal rights in their law school curriculum in 1967. Osgoode Hall Law School followed in 1970. The Program of Legal Studies for Native Peoples was founded at the University of Saskatchewan College of Law in 1973<sup>164</sup>. During the academic year 1987 - 1988, only the University of British Columbia offered more than one seminar on Aboriginal rights and seven of thirteen Canadian law schools offered no courses on Aboriginal rights whatsoever.<sup>165</sup>

There have, however, been some peculiar efforts by Canadian lawyers, such as in the *Lax Kw'Alaams*<sup>166</sup> case. The lawyers were attempting to claim the application of British law in what would become known as British Columbia, but for a time *before* even the date of assertion of British sovereignty.

Many lawyers involved in Aboriginal rights litigation in Canada view their efforts on behalf of their clients as enforcing and creating protection of minority rights<sup>167</sup> under domestic laws. They do not understand their responsibilities to be in support of protecting peoples and their international human rights, including the right to self-determination and economic and social rights. Government is equally confused.<sup>168</sup>

There are fundamental differences between the needs and rights of, for example, visible minorities and other people living in Canada who tend to be discriminated against as the result of, for example, their disabilities or sexual preferences, and the needs and rights of the Original peoples who continue to resist Canadian governments' efforts to conquer them.

British Columbia's Premier, Ujjal Dosanjh recently stated, “I knew in my village [in India] what colonialism meant.”<sup>169</sup> If this is so, then he should well understand that the issue for the vast majority of Aboriginal

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<sup>163</sup> ICSID (Additional Facility) arbitral proceedings against Mexico under the NAFTA: *Karpa v. Mexico* (Interim Decision on Preliminary Jurisdictional Issues), Case No. ARB(AF)/99/1 (December 6, 2000).

<sup>164</sup> Ruth Thompson, “The University of Saskatchewan Law Centre” (1987-88), 11 *Dal. L.J.* 712.

<sup>165</sup> Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: *An Agenda for Action*, Ottawa: CBA, 1988, p. 87-88.

<sup>166</sup> *Lax Kw'Alaams Band of Indians v. Hudson's Bay Company* (1998), 159 D.L.R. (4<sup>th</sup>) 526 (B.C.S.C. [in chambers]).

<sup>167</sup> “Our involvement in the native law area, as litigators on behalf of First Nations, has been very exciting, challenging, and rewarding, but never boring, as a result. We have been able to see how the judiciary process has facilitated policy, and constitutional developments. Indeed, the judiciary has shown examples of one of its finest strengths in some decisions, doing what the legislature cannot do so easily, namely, *protecting minority rights* in situations where the popular political mood might be against that protection.” [Emphasis added] Marvin R.V. Storrow, Q.C. (Queen's Counsel) and Heather Caswell, “Judicial development of Constitutional Aboriginal and Treaty Rights: Our Home *and* Native Land?” Session 3: Canadian Experience with the Constitutional Protection of Aboriginal and Treaty Rights, Indigenous Peoples: Rights, lands, Resources, Autonomy Symposium, Vancouver Trade & Convention Centre, March 21, 1996.

<sup>168</sup> Susan Danard, “Land Claims: Rhetoric heats up over long-standing, unresolved issues”, *The Times Colonist*, April 30, 2001: “The NDP stop just short of calling the Liberals racists for wanting to hold a province wide public referendum on the principles underlying treaty talks. Premier Ujjal Dosanjh has made references to the Nazi Holocaust and to the slavery of Black Americans when arguing that it is morally unjust to hold a referendum on *minority rights*.” [Emphasis added]

<sup>169</sup> Tom Barrett, “Premier attacks referendum plan”, *The Vancouver Sun*, May 7, 2001, p. A7.

peoples is *not* one of minority rights. The actions of the British Columbia government under his party's<sup>170</sup> control have endorsed a colonialistic approach. Mr. Dosanjh has continued to support that approach.<sup>171</sup>

Lawyers in Canada appear blind to the full needs of their clients, Aboriginal peoples. Lawyers feel they do not have to provide advice on matters that they are not specifically asked about, nor for that matter often fully qualified to render advice on. But Aboriginal clients are not "sophisticated clients" and often do not know what to ask; they are operating within, essentially, a foreign legal system. They are often advised on short term, monetary matters only and lawyers fail to point out the long-term risks to their nationhood. Aboriginal peoples fail to understand how holding the Crown accountable for Her wrongdoing can cause them risk to their nationhood. They take the Crown to be Honourable.

Aboriginal peoples often do not understand how the law will be used against them. It is a system of law that is designed to protect the property rights of the Crown and of those who derive under Her. This system of law is inherently in conflict with the protection of their human rights. By definition, the system is biased in favour of property rights.<sup>172</sup> In Canada, human rights are subordinate to state/property/profit rights. Profits matter, human rights do not necessarily if someone's profit is at risk. However profit is very short lived without human rights. Revolutions and holy wars can be very intrusive to profits as it renders instability. There are long-term implications for humanity in allowing profits rights to outrank and strip human rights.

Today, because the chief and council act as agents of the federal government in the delivery of services etc., they should not be running Comprehensive Land Claims negotiations. Tribal councils are simply groups of chiefs and for the same reason also result in an inherent conflict of interest. Conflict of interest actually arises on three levels:

1. Chief and council are agents of the Crown;
2. Chief and council are receiving payments or benefits from being involved in these deals<sup>173</sup>; and
3. Chief and council have often proceeded without a mandate from the people but believe the deal-making will prove beneficial to themselves and/or their families.

The Law Society of British Columbia says the chief and council of an Indian band are the band for purposes of the practice of law and lawyers in BC.<sup>174</sup> By extension, lawyers are to take their instructions

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<sup>170</sup> New Democratic Party (NDP).

<sup>171</sup> In 1942, the British Government commissioned Stafford Cripps to form the Cripps mission, which set forth the proposal that India be given independence inside the British Dominion. Canada has been given independence inside the British Dominion. Canada negotiates "treaties" with Aboriginal peoples "within" the existing constitution.

<sup>172</sup> "Unfortunately, the courts have neither escaped utilitarianism nor given full credit to the democratic interpretation of s.1. Rather, I would argue that they have given s.1 an interpretation that often stresses the primacy of the needs and goals of the state": Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond", University of Toronto Law Review, Volume 54, No.1, Winter 1996.

<sup>173</sup> "Touted as the first big success story of the treaty process, the Nuu-chah-nault treaty is now in trouble with the people who count: women, youth, elders and grassroots band members. The two largest of 12 Nuu-chah-nault bands on the west coast of Vancouver Island have voted by secret ballot overwhelmingly against the treaty, one band has pulled out, three have asked for more time and five bands have voted "Yes" only by a show of hands at meetings. The Tseshah band in Port Alberni, whose acting chief and treaty negotiator George Watts is considered close to the NDP, has voted 91 per cent against the agreement-in-principle. Many Nuu-chah-nault say they have no interest in voting in a panic for a weak treaty before the New Democrat mandate expires, even if it means dealing with a Liberal [British Columbia provincial] government. ... Many women worry that the Nuu-chah-nault negotiators have become too accustomed to \$200 per diems, leased vehicles and hotel rooms afforded by treaty funding, all of which is a loan. 'It won't be the old boys' club that are bullying us into buying this bad deal, that pays back the millions we've borrowed to negotiate treaties, it will be our kids,' said one. Suzanne Fournier, "Treaty lacks native support Nuu-chah-nault women lead the charge against a deal they say is too little, too soon", The Province, Vancouver, BC, April 2001.

<sup>174</sup> Gerald J. Lecovin, G. Ronald Toews and Gerald J. Kambeitz, Q.C. of the Hearing Panel of the Law Society of British Columbia pronounced the 25<sup>th</sup> day of February, 1999. See also Notice of Appeal filed in British Columbia Court of Appeal

from chief and council on behalf of the band and not directly from the people as a whole. Thus from the point of view of the Law Society of British Columbia, the band is a represented party only through the chief and council and it will not be possible for a lawyer to step in to represent a band as instructed by the members of the band. Apart from this ruling by the Law Society of British Columbia, today the legal status of an Indian band and the authorities of its chief and council are unclear, leaving open the ability to represent the band via the people as opposed to only via the chief and council. This is likely a contributing factor to the federal government's desire to quickly introduce new governance legislation in the fall of 2001 to, *inter alia*, clarify the legal status of a band and of chief and council. This would enable the chief and council to operate more closely to that of a municipality mayor and council without risk of the members of the band asserting contrary positions or commencing contrary litigation than that within the control of the chief and council.

The decision of the Law Society of British Columbia results in no access to lawyers by the people, the members of a band as a whole. This means there is no level playing field in land claims negotiations as well and thus no certainty is possible. There is always the ability to raise this fact in the future, to question whether informed consent was actually obtained from the people or could in fact be obtained in the absence of the benefit of independent legal advice, the legal advice being provided only to the chief and council where conflict of interest exists.

There needs to be expertise developed within Law Societies pertaining to international human rights and Aboriginal peoples and expansion of access to legal advice. Lawyers should be retained to act for the people and understand their responsibilities to be to the people, and the Law Society should be in support of this. As well, lawyers on negotiations should be required to maintain significant excess liability insurance.

Typically Canadian lawyers practicing "Aboriginal law" have focused their efforts on section 35 of the *Constitution Act, 1982*, which reads as follows:

"35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada."

The result has been a modern-day development of the legal way for the state to adhere to the rule of law and to justify infringement of aboriginal rights, even to the point of rendering them dormant. The language of section 35 should have sent off alarms: "aboriginal peoples of *Canada*". [Emphasis added] The definition of "of" includes, "belonging, connexion, possession"<sup>175</sup> and remains consistent with earlier discussion of the Aboriginal peoples as being viewed as "our Indians" and in the extreme as "our children" and "wards". Respectful language consistent with use of the term "aboriginal peoples" would not have included the words "of Canada". The stench of colonialism permeates Canada's constitution rooted in Imperial England, and section 35 and the cases interpreting it are particularly odoriferous.

In 1996, I was challenged by a provincial court judge in Kelowna to consider a more expedient way to deal with the Aboriginal issues present in the defence of my clients charged with hunting offences. He and the Crown prosecutor simply assumed that I would be proceeding under section 35. *Delgamuukw*<sup>176</sup> had run its course through the lower British Columbia courts and had taken a tremendous amount of the

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action no. CA025662, *Janice G.A.E. Switlo v. The Law Society of British Columbia*. Lawyers are bound by the self-governing decisions of the Law Society to which they are members. The Law Society acts as investigator, prosecutor, judge, jury and executioner. The details of events leading up to the filing of a complaint against the writer and during the investigation and hearing of the complaint by the Law Society is the subject of the writer's latest book, *Sookinchute*, soon to be released.

<sup>175</sup> The Concise Oxford Dictionary.

<sup>176</sup> *Supra*, at note 17.

courts' resources and time. However I had had my doubts about section 35 since before the cases interpreting it had fully unfolded. I began an earnest refreshed look at the issues and I discovered that the facts of my clients' situation fit within section 2 of the *Constitution Act, 1982*. My client asserted he was hunting consistent with his Aboriginal religious beliefs. He is married to an Interior Indian though he is from further toward the Coast. The provincial conservation officers charged him with hunting out of season and said he could only "hunt as an Indian" within the "traditional territories" of his originating family. Thus he was viewed as assimilated and not an Indian for hunting purposes because he had traveled outside of where he had been born and now resided with his wife near Kelowna.

Section 2 of the *Constitution Act, 1982*, part of the *Charter of Rights and Freedoms* ("Charter"), reads,

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

The Supreme Court of Canada has broadly interpreted the freedom of religion protected by section 2(a): "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination."<sup>177</sup>

And rejected any distinction between direct and indirect infringement of section 2(a) rights: "In my opinion, indirect coercion by the State is comprehended within the evils from which s. 2(a) may afford protection. ... It matters not, I believe, whether a coercive burden is direct or indirect, intentional or unintentional, foreseeable or unforeseeable."<sup>178</sup>

On March 7, 2001 Cowichan Chief Lydia Wheatson commented on the government of British Columbia for the first time in the BC Treaty Process agreeing to protect 1,700 hectares of land on Vancouver Island known as Hill 60 while land claim negotiations continue. Hill 60 is spiritually significant to the Cowichan because it is the site of their creation theory. The ability of the Cowichan to assert a section 2a argument to protect it is, I submit, the motivating factor in British Columbia agreeing to protect Hill 60. The Crown is responsible to protect all such Indigenous religious sites and any interference or infringement of Indigenous religions and beliefs through the desecration of religious sites is subject to attack through section 2a.

The *Kitkatla*<sup>179</sup> case concerned the province's decision to allow a forestry company to cut 40 out of 178 culturally modified trees in the Kumealon watershed. The band argued protection under section 35 and did not raise section 2a arguments. In dissent, Prowse, J.A. held that "cultural heritage objects are not simply objects, but are seen by them to be fundamentally tied to their cultural history and to the essence of their identity as Indians."<sup>180</sup> However in other areas I have knowledge that such so-called "culturally" modified trees are in fact "religiously" significant trees connected to Aboriginal religious practices and beliefs. Specific provisions of the provincial *Heritage Conservation Act* could not be so easily upheld as valid where there is infringement proposed against a religious right protected under section 2(a) of the *Constitution Act, 1982* as opposed to an Aboriginal right under section 35 of the *Constitution Act, 1982*.

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<sup>177</sup> *R. v. Big M Drug Mart* (1985), 18 D.L.R. (4<sup>th</sup>) 321 (S.C.C.) at 361.

<sup>178</sup> *Edwards Books and Art v. R.* (1986), 35 D.L.R. (4<sup>th</sup>) 1 (S.C.C.) at 34.

<sup>179</sup> *Kitkatla Indian Band v. British Columbia*, [2000] 4 W.W.R. 431, 183 D.L.R. (4<sup>th</sup>) 103, 72 B.C.L.R. (3d) 247, [2000] 2 C.N.L.R. 36 (B.C.C.A.) leave to appeal allowed (August 17, 2000), Doc. 27801 (S.C.C.).

<sup>180</sup> *Kitkatla*, *supra* at note 181, at para. 131.

In the *Kitkatla* case the band sought an injunction, which though initially applied for a short term was removed. On the balance of convenience the court decided that an injunction was not warranted. An injunction is awarded only where the applicant can demonstrate irreparable harm would result should the offending behaviour continue if the injunction is not granted. Where something is viewed as being capable of being compensated by money, an injunction will not be awarded. Should the damage feared actual occur, the courts decides that the applicant can always pursue rights to damage later. Irreparable harm means that money can never compensate for the damage inflicted.

Section 35 rights are being viewed by the courts as fully compensatable by money. In the case of religious rights and beliefs, the removal of special, religiously important trees is not compensated by money. Money cannot take the place, for example, of the location where offerings have been made by a people since time immemorial. Once a certain tree is removed, that place of worship or of gratitude is taken forever.

An Indian newspaper<sup>181</sup> reported on four members of the Wendake Longhouse who had been found guilty of hunting offences by a Quebec Provincial Court Judge. The newspaper<sup>182</sup> reported on my explanation of the differences in using a section 2a *Charter* argument, the defence of hunting consistent with spiritual beliefs, and the typical section 35 Constitution Act, 1982 defence. The critical difference is that the Court permits infringement of religious rights as framed in section 35 Aboriginal rights arguments; however, section 2a religious rights cannot be infringed, except in extremely rare circumstances such as the safety of a person. Section 2a religious rights cannot be infringed for conservation purposes – the religious right to hunt is a priority right over the rights of all others to that resource. Interfering with the religious rights of the Aboriginal peoples to hunt and fish is unjustifiably interfering with the fundamental freedoms of the Aboriginal peoples.

In January 2001, the Huron traditionalists were successful in their appeal and they were acquitted of all charges in Quebec Superior Court.<sup>183</sup> “The four men testified that they killed the animal [a moose] to use its meat in a traditional and religious feast that was to have been held 15 days later. This explanation was not contested by the Justice Ministry”<sup>184</sup>

The traditional Longhouse hunters maintained that a “treaty” framework agreement signed in February 1995 purporting to limit hunting on a wildlife reserve to one week only, during October 6 – 13, did not bind them as the band council had no mandate to sign off on their rights. Mr. Justice Tremblay held that the original trial judge had caused “a constitutional prejudice because he would have prevented [the Longhouse hunters] from exercising their treaty right or custom.” The court specifically stayed away from acknowledging any religious rights or original autochthonous constitutional rights, but pointed out that provinces can only legislate on matters of “resource and safety. Ancestral rights surpass the legislative competence of the provinces.”<sup>185</sup>

When called to task for their beliefs, these Longhouse people upheld them. They had all along asserted that they were hunting for the Longhouse. This evidence was not denied nor contested by the Crown. Hunting for the Longhouse is hunting for religious purposes and is the exercise of a religious freedom that cannot be interfered with. It is also governed by original, autochthonous, constitutional laws, and as

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<sup>181</sup> Dan Rosenburg, “Huron traditionalists fined for killing a moose”, *Eastern Door*, October 13, 2000 edition.

<sup>182</sup> *The Eastern Door*, Vol. 9, No. 44 December 1, 2000.

<sup>183</sup> The Quebec government has however entered an appeal of this decision.

<sup>184</sup> Dan Rosenburg, “Huron traditionalists acquitted of hunting moose out of season”, *The Eastern Door*, Vol. 10 No. 2, February 2, 2001, p. 6.

<sup>185</sup> *Ibid.*

noted by the appeal judge, these “ancestral rights surpass the legislative competence of the provinces.” These rights also cannot be signed away by any chief and council.

Christian Aboriginal people<sup>186</sup> may continue to collectively possess section 35 *Constitution Act, 1982* Aboriginal rights and rights derived from their land claim settlement agreements. Those rights however, can be easily and lawfully infringed by the Crown for valid objectives. Since Christian Aboriginal people do not hunt as an exercise or aspect of their religion, section 2a is not applicable to them in regards to protecting their hunting.

For Aboriginal peoples who adhere to their original religions and beliefs, a section 35 defence proves to be the wrong argument to use. The state has attempted to deal with this area of Aboriginal religion by referring to religious practices as only Aboriginal “culture”. These people should be protected by assertion of religious rights under 2(a), by adherence to their original, existing autochthonous constitution and by recourse to developing international law and relations. The state has no business in the temples of faith.

There has been continuing harassment of Aboriginal people in doing and being who they are through the laying of charges of hunting and other offences as the Canadian governments continue to assert that an Aboriginal person is only Aboriginal while remaining within certain geographical areas. “If a treaty Indian leaves his reserve and takes up any calling or occupation outside of it, he comes under the control of the provincial laws as an ordinary citizen.”<sup>187</sup>

In the *Badger* case the court held that the Natural Resources Transfer Agreement enables application of provincial conservation laws; “[h]owever, the provincial government’s regulatory authority under the Treaty and the NRTA did not extend beyond the realm of conservation.”<sup>188</sup> The provincial regulatory authority cannot extend to religion as it does to conservation.

In the *Archand*<sup>189</sup> case the court held that regulating a right to the point of the right being made unenforceable does not necessarily mean that the right ceases to exist. The right, the court held, is just rendered dormant until the regulation is repealed or no longer regulates the right to such extent. A religious right cannot be regulated into unenforceability and thereby by placed into a dormant state.

In the *St. Catherines Milling & Lumber* case<sup>190</sup> the Privy Council accepted the province’s position that the “tenure of the Indians was a personal and usufructory right, dependent upon the good will of the Sovereign.”<sup>191</sup> I submit that the good will of the Sovereign, Her Majesty, cannot be exercised so as to interfere with Aboriginal peoples’ religious rights, at least not without serious repercussions domestically and internationally.

Aboriginal rights of non-assimilated Aboriginal peoples attach to the person and not just to specific land. These rights are portable with the person. They continue to exist anywhere on Turtle Island, whether that person is on what others would view as their “traditional lands” or lands that are under municipal control either of non-native or native-based governments i.e. governments pursuant to self-government agreements under existing federal policy. The Aboriginal person still has the right to go to where the Creator sends that person for the gift of the moose needed for the Longhouse.

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<sup>186</sup> Such as the Nisga’a people who support the land claims settlement agreement.

<sup>187</sup> *R. v. Rodgers*, [1923] 2 W.W.R. 353, [1923] 3 D.L.R. 414, 33 Man. R. 139, 40 C.C.C. 51 (Man. C.A.) at D.L.R. at 415-416.

<sup>188</sup> *R. v. Badger*, [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 133 D.L.R. (4<sup>th</sup>) 324, [1996] C.N.L.R. 77, [1996] S.C.R. 771 (S.C.C.) [W.W.R. at 486].

<sup>189</sup> *R. v. Archand*, 95 A.R. 173, [1989] 3 W.W.R. 635, 65 Alta. L.R. (2d) 326, [1989] 2 C.N.L.R. 110 (Alta Q.B.).

<sup>190</sup> *St. Catherines Milling & Lumber v. R.* (1888), 14 App. Cas. 46, 4 Cart. B.N.A. 107, 58 L.J.P.C. 54 (Canada P.C.).

<sup>191</sup> *Supra*, at note 190, at App. Cas. at 54.

Aboriginal peoples located on Turtle Island do not somehow become less Wendat, Cree or Mohawk just because they are standing on a different area of Turtle Island or have chosen to marry and live with someone standing elsewhere. Their children do not lose the ability to stand where their father or mother used to stand just because they now live in the area where only one parent was born.

While Aboriginal rights are understood in a collective manner, there are as well the individual right to remain an Aboriginal person apart from skin colour and length of braid. Both collective and individual Aboriginal rights must be respected if the Aboriginal peoples are to be accorded full persons status, an event that has not yet occurred in Canada.

Non-native society is beginning to take a chapter from Aboriginal society. Non-native rural Oregon author Barry Lopez is concerned about questions of spirituality, ethics and our ability to live in peace and at one with nature. He believes that we desperately need to overcome an addiction to material possessions and the notion that we can buy our spiritual or psychological safety. His only hope for change and a better society is for us to “begin listening to the wisdom of our elders, as aboriginal societies do. ‘The least mature adult cohort, the least seasoned chronological adults – people in their 20s and 30s – are making decisions about the direction of the culture. ... I think it’s just going to increase speed until it hits a stone wall. That’s a pretty bleak picture. The only hope I see is what we might call seniors, what traditional societies call elders – they are the people who are the repositories of what works and what doesn’t. They can see through the emergency of the moment, which is no emergency at all, and the complacency of the moment – which is, in fact, the emergency.”<sup>192</sup>

Lopez’s last sentence describes a problem facing some Aboriginal peoples: complacency is the real emergency. There is however, no emergency to enter into agreements being presented by Canadian governments that insist upon completing the conquering of peoples.

There have been successful results from the raising of section 2a arguments; however, the judgments are careful not to appear actually decided on that point. There is also quiet response to Aboriginal peoples exercising their religious rights. For example in the United States, golden eaglets were required for an Aboriginal religious purpose and the Aboriginal people concerned harvested them consistent with their religious practices although they are a protected species. A decade ago in Oregon, United States courts upheld the firing of religious users of peyote from their jobs in order to protect American drug enforcement laws. Today the United States views this differently and members of the Native American Church are free to use peyote in their rituals. To my knowledge, in British Columbia wildlife officers are no longer harassing Longhouse hunters.

The Supreme Court of Canada recognized the importance of protecting religious rights early: “From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled (SIC) affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.”<sup>193</sup>

However, as the Hon. Chief Justice Beverly McLachlin of the Supreme Court of Canada has acknowledged, “Canadian history abounds with examples of attempts by establishment religions, often with government support, to suppress non-establishment religious thinking.”<sup>194</sup> There can be no more grievous example of this than the continuing treatment of the Aboriginal peoples. And as Aboriginal peoples continue to assert their religious rights both individually and as a religious community with rights of self-government that flow from that, the Supreme Court of Canada knows it may face a most difficult situation.

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<sup>192</sup> Bates, Linda, “The anti-profit prophet”, *The Vancouver Sun*, March 17, 2001.

<sup>193</sup> Rand J., *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299 at 327.

<sup>194</sup> The Hon. Madam Justice Beverley McLachlin, “Who Owns Our Kids? Education, Health and Religion in a Multicultural Society” in F.E. McArdle ed. *The Cambridge Lectures 1991* (Cowansville, Que.: Yvon Blais, 1993) at 148.

The Hon. Chief Justice Beverly McLachlin of the Supreme Court of Canada is calling for help<sup>195</sup> to limit Charter rights and the extent to which domestic courts will enforce international human rights because “little has been written ... by the courts or Canadian legal scholars, to expand our understanding of the role of religion in a liberal democracy, and why we may want to protect it even against rational state claims. This places s.2(a) in a fragile, precarious position; for, as William P. Marshall has noted, ‘A jurisprudence that is not based upon an understanding of the values involved is likely to be perceived as shallow, inconsistent, and nonpersuasive.’ Indeed, it is clear that a jurisprudence based on an inadequate understanding of the values and purpose of religious freedom will be shallow and unpersuasive, particularly to those religious communities the court most needs to persuade.”<sup>196</sup>

Canada fears that its “commitments to its self-government policies would be questioned both domestically and internationally.” Canada’s self-government policies *are* being questioned both domestically and internationally. This is why we see marketing efforts abroad by, for example, the Hon. Chief Justice Beverly McLachlin of the Supreme Court of Canada, intended, I submit, to attempt to sell to the international community that Canada fulfils and respects international human rights, when in fact Canada does not.<sup>197</sup> This brings into play the attention of the investment community and highlights concerns about Canada’s stability.

The prospects of the cold Indian Holy Wars enduring in Canada since first contact and through the continuing efforts to conquer the Aboriginal peoples today threaten to become vociferous in Canada.<sup>198</sup>

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<sup>195</sup> Janice Tibbetts, “Help us set limits on equality rights, Supreme Court judge asks lawyers”, The Vancouver Sun, April 7, 2001, p. A3. Also discussed above beginning at p. 32.

<sup>196</sup> Paul Horwitz, *The Sources and Limits of Freedom of religion in a Liberal Democracy: Section 2(a) and Beyond*, University of Toronto Law Review, Volume 54, No. 1 Winter 1996. See also Deborah Jones, “Gordon Campbell’s bad idea threatens peace, economy”, The Vancouver Sun, March 16, 2001 and Susan Danard, “Land Claims: Rhetoric heats up over long-standing, unresolved issues”, The Times Colonist, April 30, 2001: “The negotiation of native land claims is emerging as one of the most bitter and divisive issues in the provincial election campaign.”

<sup>197</sup> Section 35 of the *Constitution Act, 1982* is unique in the world to the Constitution of Canada. It is being showcased to the world. The Hon. Chief Justice Beverly McLachlin of the Supreme Court of Canada recently recommended its consideration as a solution for Middle Eastern countries torn by continuing holy wars.

<sup>198</sup> See Press Release, Kamloops, Secwepemc Territory, April 30, 2001, Chief Arthur Manuel, Chairman, Interior Alliance, promising “direct action”: “The proposed federal legislative package to ‘Modernize the Indian Act’ is viewed as “an attempt to modernize Indian Nations out of existence.”[The proposed First Nations Governance Act, the First Nations Financial Institutions Act, and the Independent Claims Commission Act.] ... “Parliament cannot give what already belongs to Indigenous peoples. As Indian Affairs Minister in the first Trudeau government,” Chief Manuel says, “Jean Chrétien built his career on trying to turn Indian Nations into municipalities and Chiefs into small town mayors. At the twilight of his career he now seems ready to legislate his outdated, assimilationist views on our people. ... Jean Chretien broke his 1993 Red Book promises to us; he has ignored the bulk of the RCAP Final Report and Recommendations; in eight years, unlike Pierre Trudeau, Chretien has never met with the Chiefs in Assembly. Jean Chretien has never apologized for the treatment of Aboriginal peoples by the Crown ... Since Chretien’s return to government, Chiefs and Councils are being increasingly forced to administer our own poverty because the federal government has been incrementally cutting us loose financially by ‘capping’ or eliminating programs altogether. ... Many of us wouldn’t go into the ‘self-government’ or ‘land claims’ negotiation processes the Chretien government set up, and now Chretien views us as unfinished business. We oppose Chretien’s ‘blueprint’ for legislative change because we know where it leads and we will inform our peoples of his plans to use and deceive them and *we will support our peoples in the fight for their freedom and self-determination by taking direct action.*”[Emphasis added] See also, Paul Barnsley, “Funds withheld to pressure chiefs, say First Nations leaders”, Windspeaker, May 2001: “From [Assembly of First Nations Grand Chief Matthew] Coon Come to [Penticton Indian Band Chief Stewart] Phillip to [Chief Arthur Manuel, chairman of the Shuswap Tribal Council] Manuel, none of the chiefs were surprised by allegations the federal government would try to bully First Nations with financial pressure. It appears to be a well-known government tactic. ‘I know, generally, funding is used in political purposes,’ said Manuel. ‘All of those things use our poverty against us. ... There’s no question that is probably the most, I guess, “sharp” kind of negotiating tactic the government uses.’ Phillip’s preliminary assessment of the First Nations Governance Act reflects his suspicions of federal initiatives. ‘The First Nations Governance Act appears to be designed to cut us loose,’ he said. As the government begins its consultation process, Manuel believes it has tried to drive a wedge between the chiefs and the people but he urges the people to see through the tactic.’ I tell the people that we have done what we could in trying to establish recognition of Aboriginal title and Aboriginal rights. We’ve done what we could in terms of having Section 35 added to the Constitution and having the Supreme Court recognize our rights. We have written letters. We have passed resolutions. The government has always responded that they won’t recognize these rights. They don’t recognize the resolutions and they get kind of curt

Increasingly Aboriginal peoples are considering how to defend their lands, promising “direct action”. The extent to which any Aboriginal peoples’ effort to defend their lands through “direct action” will attract international legal comment and support is unknown.<sup>199</sup> Though obviously many Canadians dislike this prospect<sup>200</sup> and may be quick to deny the possibility, legal scholars recognize the very real elements of danger, which are present today in Canada:

“[R]eligious groups may be a source of political action. Religious believers and groups arrive at a code of moral behaviour through prayerful consideration of the will of God ... rather than through obedience to the dictates of the state. Such groups thus represent an alternative and potentially competing source of moral understanding. Therefore, due to religiously motivated beliefs, religious groups may seek changes in the legal status quo, by bearing witness against a particular legal rule or political regime or through actual disobedience of the law.

Because religious groups derive their moral principles from a source other than the state's authority ... , they may arrive at and fight for a proper conception of justice where the state and the majority sometimes fail. Moreover, because religions recognize the permanence of only one authority that of God, karma, or whatever spiritual order is at the heart of the ultimate concerns of religion they will react against any tendencies on the part of the state to arrogate to itself inordinate power. ... Indeed, as Stephen Carter notes, ...

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about responding to our letters,’ he said. *‘It’s up to the people now. The people have to understand that those rights belong to them and the chiefs need to learn how to support the people.’* [Emphasis added]

<sup>199</sup> Frederic L. Kirgis (Law School Association Alumni Professor at Washington and Lee University School of Law and member of the Board of Editors of the American Journal of International Law), “Israeli Military Action in Gaza and the U.S. Response”, © 2001 American Society of International Law, Washington, DC (educational copying permitted with due acknowledgement), April 2001:

“On April 17, Israeli military forces, after what was described in the press as fierce bombardment of Palestinian security positions in Gaza, took control of a square mile of territory in the Gaza Strip (territory that had been transferred to Palestinian control pursuant to the 1993 Oslo accords) and announced plans to hold it indefinitely as a buffer zone. The Israeli action was in response to a Palestinian mortar attack on Sederot, a town in Israel about four miles from the border with Gaza. The Israeli government explained its action as part of its ongoing effort to defend Israel from Palestinian violence.

United States Secretary of State Colin Powell issued a statement that said in part, ‘The hostilities last night in Gaza were precipitated by the provocative Palestinian mortar attacks on Israel. The Israeli response was excessive and disproportionate. We call upon both sides to respect the agreements they’ve signed.’ Shortly after Secretary Powell’s statement was issued, the Israeli army announced that it was withdrawing from its positions in Gaza. The army withdrew, though it returned for 45 minutes the next day and destroyed a police station. The Israeli government denied that it had yielded to U.S. pressure to withdraw, but Israeli state radio and some others said the withdrawal was a response to U.S. pressure.

Customary international law is developed in a number of ways. One prominent way is through a process of assertion and acquiescence. Governments assert that they have a right to do something or that another government has no right to do what it is doing or proposes to do. If the other interested government(s) acquiesce in the assertion, a precedent is set. Such a precedent is not necessarily authoritative, and is subject to interpretation or even rejection over time. Like all precedents in domestic as well as international law, it is limited by its particular facts. If a comparable fact situation later arises (even if it is not exactly the same as the earlier one), government officials and other decision-makers may apply the precedent by analogy or may attempt to distinguish it from their situation. As they do so, they may confirm, expand or limit the precedent.

Under customary international law, the right of self-defense depends on both necessity and proportionality. It must be necessary to use armed force (rather than peaceful means) to defend oneself, and the use of armed force must be proportional under the circumstances. Although Secretary Powell did not expressly mention international law, his statement was tantamount to an assertion that Israel had violated the self-defense proportionality standard. Thus, if Israel did yield to U.S. pressure after Secretary Powell called the Israeli action ‘excessive and disproportionate,’ it could be interpreted as an acquiescence in a U.S. assertion that Israel acted beyond the permissible bounds of self-defense. As has been indicated above, the exact scope of any such precedent remains to be seen. The key facts appear to be: the Palestinian mortar attack on an Israeli town; the Israeli counter-attack; the seizing of territory within the recognized control of another political entity (here, the Palestinian Authority) with the announced intention to stay indefinitely; the assertion by a third state (here, the United States) that the action is disproportionate; and the withdrawal of armed forces.

International incidents can be sources of state practice (and thus can influence the development of international law), but care must be taken not to make too much of any one such incident.”

<sup>200</sup> As do religious leaders: “Violence destroys the image of the Creator in his creatures, and should never be considered as the fruit of religious conviction.’ It was a stark reminder that even the most spiritual moments cannot be separated from politics.” Alan Philps, “Pope offers forgiveness to Muslims”, The Vancouver Sun, May 7, 2001, p. A5.

'A religion is, at its heart, a way of denying the authority of the rest of the world; it is a way of saying to fellow human beings and to the state those fellow humans have erected, "No, I will not accede to your will." '[<sup>201</sup>] [Emphasis added<sup>202</sup>]

The value of religion as a powerful force for resistance and social change has long been recognized. Religion has played a central role in advocating social change well into recent decades ... In recent history, a prominent example of religion as a political force has been the civil rights movement in the United States, as exemplified in the person of the [Roman Catholic priest] Rev. Martin Luther King. King's actions can be seen as much as a reflection of his concern for the spiritual life of the nation as a reflection of his concerns over the temporal effects of injustice; his call for civil disobedience against laws that do not "[square] with the moral law or the law of God"[<sup>203</sup>] and his cry that he was "compelled to carry the gospel of freedom"[<sup>204</sup>] clearly indicate the religious thread running through his activism.

...

Of course, beyond the inspiration they offered to others, many who led and joined the movement, King included, were substantially motivated by religious compulsion. Just as King called on God in his speeches, so it would be accurate to say that according to his perception, Dr. King's God and his spiritual values called on him to make the speeches and to lead the fight for change. To this day, religious commitments to, inter alia, 'the sacredness of life, to peace, to justice, to freedom, or to the independence of religious organizations from improper government regulation' continue to motivate social criticism and activism."

Aboriginal peoples on Turtle Island continue to be perched on the horns of dilemma, continually forced there by the states of the Americas. This does not appear to be well understood by most Canadians.<sup>205</sup> So many Canadians seem to want to say to Aboriginal peoples, "Just heal already – get over it. Just get on with it." They seem to have so little patience. Of course the history of colonization and efforts to conquer the Aboriginal peoples is not well known to them.<sup>206</sup>

"[R]eligious beliefs are unique in creating what, to the religious believer, is an external compulsion, an obligation based on one's duty to a supernatural force or being. The price of disobedience may be the loss of salvation, a punishment beyond the scope of mere worldly punishments such as fines or imprisonment. But the fact that the state's punishments are minor compared to spiritual punishment does not mean that they are insignificant, or that the religious adherent does not want to obey the law. Thus, the religious observer is in a vulnerable position, caught between his or her desire to be a good citizen and the ineluctable call to religious duty and obedience.[<sup>207</sup>]

... [R]eligious believers are as likely as any others to be and to want to be good citizens. If we value their participation in society and their loyalty to the common project of creating a just state, we must respect their absolute need, under some circumstances, to be exempted from particular laws; otherwise, we lose the willing participation in society of a valued citizen. ... [it is important not to brand] such people as lawbreakers. Rather, the state should ease the way for the religious observer, so he or she is not faced with a choice between duty to God or to Caesar, and thus forced to risk being lost to one or the other.

Finally, as A. Bradney has pointed out, 'Faced with an individual conscience, resolved to act for itself alone, a mere legal system can do nothing. Penalties will not alter the true believer's mind. The only question for a legal system

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<sup>201</sup> S.L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*, New York, Anchor Books, 1994 at 41.

<sup>202</sup> This is precisely the nature of statements that were made by Aboriginal people involved in the Gustafsen Lake stand-off in the summer of 1995, as discussed in my book, *Gustafsen Lake: Under Siege* (TIAC Communications Ltd., 1997) ISBN 1-896780-01-6.

<sup>203</sup> M.L. King, Jr., "Letter From Birmingham Jail" in *Why We Can't Wait* (New York: Signet Books, 1964) at 82.

<sup>204</sup> *Ibid.* at 77.

<sup>205</sup> Many argue that most Canadians have been intentionally misled by state and media characterizations of participants as militant and/or criminal in recent civil disobedience and protest activities by Aboriginal peoples in Canada such as occurred at Oka, Gustafsen Lake, Ipperwash and Cheam.

<sup>206</sup> It came as a shock to me in 1990 when I began to uncover the history of dealings with the Aboriginal peoples to realize that after nine years of post-secondary education and two bachelor degrees, I had never even heard a whisper of such things. I immediately began to wonder what else about the history of my country had been kept from me.

<sup>207</sup> M. McConnell, "Neutrality Under the Religion Clauses" (1986) 81 Nw. U. L. Rev. 146 at 152.

that is held out as being liberal is, in punishing or stigmatising a believer for their faith, what damage will the legal system do to the conception of itself?'<sup>208]</sup>

...

Winnifred Fallers Sullivan's words are worth noting once more: 'How the courts talk about religion is critical, because the texture of the public discourse about religion creates a culture about religion.'<sup>209]</sup> The loyalty of a citizen to the state, and the likelihood that that person will fully contribute to his or her society, is surely related to how that person is treated by the state. If the language of the courts indicates a measure of indifference toward, or lack of comprehension of, religion and its value, the courts will cease to command the respect or obedience of many who would otherwise be valuable citizens.

...

[W]e may forget that religion's claims on human destiny are ancient; the state's, only temporal and transient."<sup>210]</sup>

The Crown's greatest fear is "portable Aboriginal rights", or rights that attach to the person, that cannot be touched by Canada's great effort at justification for colonization under s. 35 of the *Constitution Act, 1982*. There is also the reality that the state does not tax religious communities.<sup>211]</sup>

In early 2001 in Indonesia, thousands of Roman Catholics were rounded up, men, women and children being forcefully circumcised by old people using the same knife, no anesthesia, and being told that this has to be done in order to turn them into Muslims. Public, world outrage resulted. No one would dare say to them, "Here's some antibiotics for the infection, too bad some of you ended up sterile, heal, get on with enjoying your new life as a Muslim, your welcome, and you will be able to view your rosaries, priests robes and saints' remains in the state museum someday."

Maybe some of these people will embrace the Muslim religion and get on with it, even come to be grateful for their salvation and feel they have been made better people for their experience, but what about those who choose to remain Catholics?

On April 4, 2001 it was reported that Vancouver lawyer Drew Schroeder is filing a lawsuit on behalf of 49 now-adult children of Sons of Freedom Doukhobors. As children these plaintiffs were taken from their families by RCMP, given uniforms and a number and were held at a former TB sanatorium in New Denver, BC. The report states that the "government seized the children, after their parents refused to send them to school because of the their religious and cultural beliefs."<sup>212]</sup>

There is much at stake for everyone when we ignore religious persecution. It is not simply a matter of getting over it, it is a matter of stopping it. "[T]he scarcity of thorough attempts to confront the meaning of religious freedom in Canada leaves us unprepared to deal with the conflicts that are sure to arise with increasing frequency."<sup>213]</sup>

Canadian philosopher Charles Taylor recently lectured in Vancouver describing how secularism arose to challenge Christianity's past oppressive dominance in the West. "Christianity shaped Western culture, imposing its own strict 'correctness' on every detail of everyday life. This Christian order eventually became excessively focused on legal, moral and military affairs, losing touch with its spiritual core. That paved the way for

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<sup>208</sup> A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993) at 161.

<sup>209</sup> W.F. Sullivan, *Paying the Words Extra: Religious Discourse in the Supreme Court of the United States* (Cambridge: Harvard University Press, 1994) at 163.

<sup>210</sup> Paul Horwitz, "The Sources and Limits of Freedom of religion in a Liberal Democracy: Section 2(a) and Beyond", *University of Toronto Law Review*, Volume 54, No. 1, Winter 1996.

<sup>211</sup> "Black J. in *Everson v. Board of Education*, 330 U.S. 1 (1947) at 11 found religious freedom to have been developed from "the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."

<sup>212</sup> CBC News, [http://vancouver.cbc.ca/cgi-in/templates/view.cgi?/news/2001/04/04/bc\\_doukhobors010404](http://vancouver.cbc.ca/cgi-in/templates/view.cgi?/news/2001/04/04/bc_doukhobors010404)

<sup>213</sup> Paul Horwitz, "The Sources and Limits of Freedom of religion in a Liberal Democracy: Section 2(a) and Beyond", *University of Toronto Law Review*, Volume 54, No. 1, Winter 1996.

secularism. ... [Taylor] calls for an end to Christian triumphalism, which acts as if the answer to the world's problems resides in everyone believing in the same Christian doctrine. The philosopher credits secularism with freeing us all from the tyranny of adhering to the same religious morality. ... Despite his warnings to Christians, however, Taylor gets in more than a few jabs at secular humanism, particularly for its naiveté. He sees its lack of depth displayed ... The trouble with struggling for justice, Taylor indicates, is that it can breed self-righteousness. And the problem with secular humanistic activists is that, by definition, they're hostile to the spiritually transcendent. As a result they often lack a deep source of inspiration for philanthropic action. ... Taylor says Western Christianity provides two worthy suggestions to those seeking a better world. One is to adopt a position of unconditional compassion towards all. The second is to treat others as if they were an image of God."<sup>214</sup>

Whatever the result and form of Aboriginal peoples efforts at self-determination, nation-building can never be at the expense of peoples and their beliefs. Some fear the nation of Canada will never be built but that is no reason to disrespect the rights of the Aboriginal peoples, collectively and individually. There are ways other than by modern-day colonialism. Attempting to conquer Aboriginal peoples is not a final, lasting, and peaceful solution. *It may not be a perfect world but we must always strive in that direction.* It is of utmost importance to humanity that we do.

And that is all I have to say.<sup>215</sup>

Janice G.A.E. Switlo

### About the Author:

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Janice G.A.E. Switlo obtained her B.Com. from the University of British Columbia and her LL.B from Osgoode Hall Law School, Toronto, Ontario. She was a member of the Law Society of British Columbia from 1987 until 1997; she remains called to the BC Bar. Janice joined the International Bar Association in 1992; her practice interests include the IBA's Human Rights Institute, Indigenous peoples, access to justice and the independence of the judicial system.

Ms. Switlo is former Department of Justice legal counsel for Revenue Canada and for the Department of Indian Affairs and Northern Development. She has also acted as in-house counsel to an Indian band and advised a territorial government on Aboriginal affairs. She has been defence counsel for traditional Aboriginal people charged with hunting offences. She was defence counsel for the 1995 Gustafsen Lake stand-off accused until her injuries in an earlier motor vehicle accident prevented her from continuing. After leaving the trial, she began writing her book, *Gustafsen Lake: Under Siege*, which was published in 1997.

Janice's focus is on access to justice for Aboriginal peoples and preservation and enforcement of their rights domestically and internationally. Through her work she endeavors to educate and empower Aboriginal peoples. She provides strategic advice on current political, legal and policy objectives and developments. Her efforts have earned her recognition: Marquis' Who's Who in the World has listed her biography since 1999, "inclusion in which is limited to those individuals who have demonstrated outstanding achievement in their own fields of endeavor and who have, thereby, contributed significantly to the betterment of contemporary society".

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<sup>214</sup> Todd, Douglas, "Christianity in 2001", The Vancouver Sun, March 16, 2001.

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