

## *Commentary*

# WHEN THE LAW BREAKS DOWN: ABORIGINAL PEOPLES IN CANADA AND GOVERNMENTAL DEFIANCE OF THE RULE OF LAW<sup>©</sup>

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I was born and spent my early adult years to the age of twenty-five in apartheid South Africa; in that context, law's roles and limits in the face of civil resistance, the denial of civil liberties, and massive civil disobedience were blatant. I have thus seen and experienced first-hand the extremely negative atmosphere in which people live, and the dissent that arises in the context of an internally-colonized country in the shadow of oppression and governmental defiance of the Rule of Law.

Without making any direct comparisons between apartheid South Africa and this gentle and just society, Canada, I have eight points that I wish to make with respect to Aboriginal peoples, governmental defiance, and the breakdown of law. Four or five have to do with governments, Aboriginal peoples and the Rule of Law, and the balance between law's roles and limits.

First, Aboriginal peoples have been and are being internally colonized in Canada, through a long, deliberate and ongoing process of cultural suppression, dispossession, breach of promise and trust, legislative and other oppression, as well as state and public discrimination and violence. Fundamentally, Aboriginal peoples have never freely consented to their collective dispossession through the wholesale taking of their traditional lands and resources across this land, the debilitating effects of which are truly extraordinary in a highly developed country such as Canada.

In a recent address to the British Association for Canadian Studies, then-National Chief of the Assembly of First Nations Matthew Coon Come summarized current federal policies and practices towards First Nations peoples in Canada, governmental defiance of the Rule of Law, and the debilitating socio-economic consequences thereof as follows:

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The long history of First Peoples' relationship with the Canadian Crown has included:

- the continued application, to this day, of the colonial and oppressive *Indian Act*;
- the involuntary removal of successive generations of First Nations children into the so-called residential schools, aimed at eliminating the integrity and continuity of our societies;
- the dispossession of indigenous peoples through forced relocations and successive takings of almost all of the land and resources of First Nations peoples; and
- the enactment and enforcement of other laws, policies and practices calculated to weaken our societies, economies and governments and force our people to assimilate and disappear into the Canadian "mainstream" as individuals.

Right now, as we talk, First Nations in Canada face the imposition—over our protest and against our will—of a huge suite of federal legislation, "Indian Act II". This legislation reinforces colonial legislative approaches to our peoples, and derogates from and ignores our fundamental rights, including our Aboriginal and treaty rights that are, ironically, recognized in Canada's Constitution.

...

Overall, the federal government of Canada continues to refuse to work with Aboriginal peoples to fully implement the comprehensive and unanimous findings of its own Royal Commission on Aboriginal Peoples.

The federal government refuses, as indicated by the U.N. Committee on Human Rights, to ensure restoration of lands and resources to First Nations across the country adequate to ensure the political, economic and cultural survival of our peoples.

The federal government continues to insist on non-assertion, release, surrender, or extinguishment of all Aboriginal rights and title in and to our traditional lands and resources as a precondition to negotiations with any First Nation group.

The federal government continues to maintain and strengthen its *Indian Act* domination of all aspects of First Nations' existence, in violation of our fundamental human right to govern ourselves and determine our own political future.

The federal government refuses to promptly, fairly and equitably address thousands of cases of governmental and private theft of First Nations' traditional and reserve lands and resources.

The federal government refuses to implement the Treaties entered into between our Nations and the Crown, seeking instead to limit or extinguish their terms. ...

### Coon Come continued:

Allow me to provide you with a few examples of the disparities facing indigenous peoples in Canada, be they resident in their traditional lands "on reserve", or be they in urban areas such as Vancouver, Winnipeg or Toronto:

- Aboriginal infant mortality is almost twice as high as the rate of infant mortality overall in Canada.

- Aboriginal life expectancy is still six or so years lower than non-Aboriginal Canadians'. This is a terrible cost of literally millions of lost potential years of life.
- Tuberculosis is uncommon in non-Aboriginal Canada, yet is *forty-three times higher* among registered Indians than among non-Aboriginals born in Canada.
- Less than fifty years ago, diabetes was unknown among our peoples; now we suffer this deadly disease at rates that are often *the highest in the world*.
- [Human Immunodeficiency Virus and Acquired Immunodeficiency Syndrome (HIV/AIDS)] rates in Canada overall have dropped. But there is a rising epidemic of HIV/AIDS among Aboriginal peoples: Aboriginal people, only 5% of the total population in Canada, represent 16% of the HIV infections. To quote official federal sources, this infection rate "could have a *devastating impact* on First Nations, Métis and Inuit communities."
- Fetal alcohol syndrome occurs at rates up to 1,000 cases per 10,000 births, up to *three hundred times higher* than in most western countries.
- Our fatal injury rates are *6.5 times higher* than all other Canadians;
- Aboriginal women, living on and off reserve, are targets of discrimination, both by the broader society and also in Aboriginal and reserve communities. They are the victims of racism, of sexism and of unconscionable levels of domestic violence;
- Approximately 500 Aboriginal women have been murdered or reported missing over the past 15 years. There has been little, if any, media coverage, and police do not seem to be actively searching for any of these women;
- Aboriginal peoples are perhaps 5% of the Canadian population. In federal prisons in Canada, Aboriginal offenders comprise 17% of the inmate population. In some Canadian provincial prisons, these rates are as high as 70%.
- Perhaps of the greatest concern is the *high rate of suicide*. Hopelessness, despair, self-destructive behaviour, substance abuse, suicide attempts and completed suicides are all at tragically high levels. Underlying the problem of suicide are hopeless conditions.<sup>1</sup>

The association between the present "Aboriginal condition" in Canada and issues of land and resource dispossession is obvious to most interested observers but is systematically ignored by governments. As stated in 1996, after five years of exhaustive study by the Royal Commission on Aboriginal Peoples (whose nine commissioners included a Supreme Court Justice and a Quebec Court of Appeal Justice):

... Aboriginal peoples have had great difficulty maintaining their lands and livelihoods in the face of massive encroachment.

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<sup>1</sup> Matthew Coon Come, "Remarks to the British Association of Canadian Studies" (Lecture given to the British Association of Canadian Studies, Leeds, 9 April 2003) [unpublished, archived with author] [emphasis in original].

This encroachment is not ancient history. In addition to the devastating impact of settlement and development on traditional land-use areas, the actual reserve or community land base of Aboriginal people has shrunk by almost two-thirds since Confederation, and on-reserve resources have largely vanished. The history of these losses includes the abject failure by the Indian affairs [sic] department's stewardship of reserves and other Aboriginal assets.<sup>2</sup>

#### The Royal Commission continued:

[Aboriginal peoples']... lands and resources were taken from them by settler society and became the basis for the high standard of living enjoyed by other Canadians over the years. Only a small proportion of Canada's resource income has come back to Aboriginal people, most in the form of transfer payments such as social assistance. *This has never been, and is not now, the choice of Aboriginal people.*<sup>3</sup>

**Second**, the modern liberal democratic discourse upon which Canada is now premised is wholly inadequate for the extraordinary situation facing Aboriginal peoples in Canada; this situation is one of wholesale colonization and dispossession through continuing non-consensual means and the deliberate and continuing extinguishment of their most distinct and important rights, their Aboriginal and treaty rights, against their wishes and contrary to their interests.

The discursive gulf between governments and Aboriginal peoples is enormous. On the one hand, in liberal (with a small "l") terms, there are, to paraphrase the language of Prime Minister Chrétien's latest Throne Speech,<sup>4</sup> some troublesome gaps between the socio-economic and demographic statistics of "Aboriginal people" and all other Canadians that we must all continue to work to reduce. (The negatively singular noun "people" and the individualizing term "Aboriginals" are now used over "Aboriginal peoples" in virtually all government and media discussion. Again, this is contrary to the wishes of Aboriginal peoples across the Canadian geographic, class, material, and cultural spectrum from professionals to the homeless and from the urban to the rural who still conceive of themselves as part of collective Aboriginal societies. In the language of section 35 of the *Constitution Act*<sup>5</sup> and the two International Covenants, it is "peoples" (with an "s")<sup>6</sup>, that have been, and are still being,

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<sup>2</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2, CD-ROM: (Ottawa: Libraxus, 1997) at paras. 7607-08.

<sup>3</sup> *Ibid.* at para. 4443 [emphasis added].

<sup>4</sup> House of Commons Debates, 002 (1 October 2002) at 1130 (Rt. Hon. Jean Chrétien).

<sup>5</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11, s. 35.

<sup>6</sup> Articles 1 of both the *International Covenant of Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* declare that "All peoples have the right of self-determination." Hence the ongoing semantic war (concerning whether Aboriginal peoples are "peoples" with an "s," or just "groups," "populations," or "Aboriginals") in the international arena between governments

dispossessed and politically oppressed.)

On the other hand, to once again quote the restrained language of the Royal Commission:

Regardless of the approach to colonialism practised ... the impact [of the Euro-Canadian occupation of Canada] on Indigenous populations was profound. Perhaps the most appropriate term to describe that impact is “displacement.” Aboriginal peoples were displaced physically—they were denied access to their traditional territories and in many cases actually forced to move to new locations selected for them by colonial authorities. They were also displaced socially and culturally, subject to intensive missionary activity and the establishment of schools—which undermined their ability to pass on traditional values to their children ... they were also displaced politically, forced by colonial laws to abandon or at least disguise traditional governing structures and processes in favour of colonial-style municipal institutions.

... Paradoxically, however, the negotiation of treaties continued, but side by side with legislated dispossession, through the *Indian Act*. Aboriginal peoples lost control and management of their own lands and resources, and their traditional customs and forms of organization were interfered with in the interest of remaking Aboriginal people in the image of newcomers.<sup>7</sup>

This latter analysis provides a representative sample of an ongoing and present-day discourse of colonization, displacement, dispossession, oppression, and, sometimes, even cultural genocide being deployed by commissions, academic commentators and onlookers like myself, as well as Aboriginal peoples themselves. Unfortunately, most non-Aboriginal Canadians would be shocked to learn how widespread and deeply held this discourse of oppression and dispossession is on the part of Aboriginal peoples in Canada.

**Third**, the British Crown had a stark choice in its desire to occupy and colonize the jewel that was then Rupert’s Land. Up to the early 1800s, Native nations were important allies and strategic bulwarks against the French and American rebels, and were also indispensable economic partners in the fur trade. This was a key reason for the issue of the *Royal Proclamation* in 1763. However, by the early nineteenth century, Native nations began outliving their usefulness in the fur trade and strategic alliances. Unlike in South Africa, for example, Aboriginal peoples in Canada were not required or perceived to be particularly useful for their labour in sectors such as mining or agriculture and, as a result, they began to simply be perceived as being “in the way” of settlement and development.<sup>8</sup>

The Crown could theoretically have tried going the route of the Americans, using out-and-out wars of extermination against the Indians in

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including the government of Canada and indigenous peoples.

<sup>7</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1, CD-ROM: (Ottawa: Libraxis, 1997) at paras. 798-99.

<sup>8</sup> See Mario Blaser & Harvey Feit, eds., *In the Way of Development* (London: Zed Books) [forthcoming].

Canada. But the British public had shown a distinct distaste for this kind of behaviour in the brutal Kaffir Wars of the late 1700s and early to mid-1800s in South Africa. In any case, it was clear to many in London that Indian wars in Canada would be waged only at very great cost, and thus, a mechanism of apparent nation-to-nation accommodation was conceived and utilized instead.

**Fourth**, as noted by the Royal Commission, the route chosen for Crown-Aboriginal relations in British North America was one of treaty making with the Indians. The Supreme Court has stated that the treaties with Native nations in Canada are “sacred promises” in which the honour of the Crown is at stake.<sup>9</sup> These treaty rights were ultimately understood by governments in Canada to be fundamental norms amenable to constitutional entrenchment, and accordingly were recognized and affirmed in a distinct part, Part III of the *Constitution Act, 1982*, in section 35.<sup>10</sup>

As recently as 1996 in its *Gathering Strength* policy, the Government of Canada echoed the Royal Commission in declaring that the treaties with First Nations are an essential “building block in the creation of our country.”<sup>11</sup> If a nearby First Nation were to pitch a circle of tipis in the quadrangle at York University and lay claim to North York for example, what would the Crown’s legal defence be? The answer is simple: it would confidently assert its rights under an historic treaty, saying that the Native nation involved had ceded and surrendered its traditional lands, and that the Aboriginal rights, title, and interests involved had thereby been extinguished.

The devil (besides the usual issues of fraud, duress, misrepresentation, and those of the oppressive and discriminatory nature of extinguishment itself) is in the details of the quid pro quo. Right across Canada (or almost right across Canada because, significantly, all of British Columbia and chunks of the Maritimes and Quebec were missed) important treaty promises were made. The very least one might expect under the circumstances is that Aboriginal treaty parties would be assured reserve lands and be promised that they would be permitted to maintain their economies and their societies’ own means of subsistence, expressed at the time in terms of their right to hunt, fish, and trap.

Important as the Crown’s “treaty rights” are, the Crown and the rest of us in Canada appear, much sooner than when the grass stopped growing and the rivers stopped flowing,<sup>12</sup> to have tired of the promises that were made to the

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<sup>9</sup> *R. v. Badger*, [1996] 1 S.C.R. 771 at 796-97.

<sup>10</sup> *Supra* note 5. It is also significant that a special section, section 25, was rather inserted into the *Charter of Rights and Freedoms* (Part II of the *Constitution Act, 1982*) providing that it should not be interpreted so as to derogate from the Aboriginal and treaty rights enshrined in Part III.

<sup>11</sup> Canada, *Gathering Strength: Canada’s Aboriginal Action Plan*, online: Indian and Northern Affairs Canada <[http://www.ainc-inac.gc.ca/gs/chg\\_e.html](http://www.ainc-inac.gc.ca/gs/chg_e.html)> (date accessed: 1 July 2003).

<sup>12</sup> Echoing the language of perpetual promise used in the written texts of many of the historic treaties between Indian nations and the Crown, Lord Denning stated in his (in)famous 1982 judgment concerning treaty rights in the context of the proposed patriation of the Constitution of Canada:

Indians. For one thing, as pointed out by the Royal Commission, the dominant society has since stolen two-thirds of the reserved lands promised in the treaties and almost all of the resources they contained, with predictably dire consequences. This has been played out over the decades before and since Confederation, in recent times for example at Oka (a story about a small corner of a treaty reserve and a golf course), Ipperwash (a story about a whole treaty reserve, a military base, and a provincial park), and Burnt Church (a story about a corner of a treaty lobster fishery and the Department of Fisheries and Oceans (DFO)). For another, the treaties left the Indians with far too little land and resources to survive as nations because (among other reasons) it was intended that they would soon disappear and the Indians would be assimilated into the “Canadian mainstream.”

In short, Aboriginal peoples’ treaty rights have of late been constitutionally recognized and affirmed, but most of the subject matter has been stolen, sold, or given away by the government’s Indian Agents to themselves and their friends, or taken by the Crown for a railway right-of-way here, a gravel pit, a military base, or a subdivision or a line of lakeside cottages there. This is now the story of Canada’s thousands of outstanding so-called specific claims, the ones with respect to which the government of Canada is now proposing self-serving statutory limitations of liability.

Rather than honouring these treaty rights, Canadian society, as represented by the Crown, is now exploiting the almost universal duress of indigenous poverty and desperation to extract new agreements from the peoples who are holders of these “sacred” treaty rights. In the Maritimes, Quebec, Manitoba, and the Northwest Territories, the name of the game is now treaty extinguishment. No matter if the treaty is an historic one or a modern one, the Crown is now seeking “certainty,” “finality,” liquidation, and extinguishment of these pesky, eternal treaty rights and promises that are perceived to be costly. Canada, the society, economy, and culture built upon this land, grows in socio-economic well-being and strength, but the obligations and promises made to the indigenous treaty counterparts are being made to conveniently disappear.

There is, however, a new problem. Since 1982 and the section 35 constitutional entrenchment of treaty rights, this extinguishment of treaty rights can apparently only be achieved with Aboriginal consent (if it can legally be

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Indians will be able to say that their rights and freedoms have been guaranteed to them by the Crown—originally by the Crown in respect of the United Kingdom—now by the Crown in respect of Canada but—in any case, by the Crown. No Parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada *as long as the sun rises and the river flows*. That promise must never be broken.

*R. v. Secretary of State for Foreign & Commonwealth Affairs*, [1982] 2 All E.R. 118 at 129-30 (C.A.) [emphasis added].

done at all). Through the 1990s the Crown sought, and in some cases (such as the infamous story of the *Northern Flood Agreement Treaty* of 1977)<sup>13</sup> extracted and imposed, comprehensive treaty extinguishment agreements, enacting concomitant statutes of extinguishment of fiduciary and treaty rights. For good measure, lest these extinguishments be found by a future court on application by a treaty beneficiary to have been invalid, the bands involved were brought to agree to forever indemnify the Crown.

There is a further, even newer, problem for the Crown. In 1998, the United Nations Human Rights Committee declared that extinguishment of Aboriginal and treaty rights by Canada is a violation of article 1 of the International Covenant on Civil and Political Rights concerning self-determination.<sup>14</sup> Agreements purportedly extinguishing existing treaty rights, and new post-1982 land-claim agreements extracting extinguishments of Aboriginal rights and title from Aboriginal peoples (such as the Nisga'a and Nunavut agreements) are thus apparently in violation of Canada's international human rights obligations (in respect of no less fundamental right than the right of self-determination).

The Crown's next calculated move emerged recently in the form of a leaked secret policy paper suggesting a semantic response to this dilemma of wishing to achieve "certainty" and the extinguishment of these constitutionalized and internationally recognized human rights, but without using the words "surrender" or "extinguish." It was suggested that rather than outright extinguishment of treaty rights, the Crown would from now on seek to enter new agreements that would define the totality of a given Aboriginal nation's rights; the Aboriginal party concerned would solemnly agree in perpetuity never to assert its Aboriginal or treaty rights, just as though the rights had never existed. This would be accompanied by "fall-back" provisions such that in the event that a future court upheld the treaty rights, the band would have released and indemnified the Crown. This so-called non-assertion/fall-back release policy was apparently recommended to Cabinet as a solution to the extinguishment dilemma.<sup>15</sup>

Aboriginal peoples and their supporters wondered whether this

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<sup>13</sup> See Andrew Orkin, "Northern Flood Agreement 1977: A Case Study in Treaty Extinguishment and Violation of Fundamental Human Rights" in Jean-Luc Chodkiewicz & Jennifer Brown eds., *First Nations and Hydroelectric Development in Northern Manitoba—The Northern Flood Agreement: Issues and Implications* (Winnipeg: University of Winnipeg, 1999) at 106.

<sup>14</sup> See UN CCPR, 65th Sess., 1747th Mtg., UN Doc. CCPR/C/79/Add.105 (1999); see also Andrew Orkin & Joanna Birenbaum, "Aboriginal Self-Determination Within Canada: Recent Developments in International Human Rights Law" (1999) 10(4) *Const. Forum Const.* 112.

<sup>15</sup> Canada, *Approach For Dealing With Section 35 Rights: Ministerial Recommendations To Cabinet* (24 November 2000)(Confidential Cabinet Briefing Document) [unpublished, archived with author].

proposed approach, ominously entitled an “Approach for Dealing With Section 35 Rights,” would actually come to pass in practice. Lo and behold, we recently obtained a fine example of exactly such a diabolical agreement out of the Northwest Territories involving the “non-assertion/fall-back release” extinguishment of Treaty 11.<sup>16</sup>

I have concluded, after years of work with First Nations in Canada in the context of negotiations with the Crown and other efforts to maintain, assert, and implement their treaties according to their spirit and intent, that the treaty process of the last three hundred years or so has been a massive, historic Royal protection scam-turned-fraud-turned-two-step process of dispossession.

For the Indians (and then Aboriginal peoples) in Canada: first settlers and their governments occupy the neighbourhood and your people get offered the Queen’s “protection” while being told you are squatters and have no rights. In return for “accepting,” you are promised that you will be allowed to continue earning a basic subsistence living while remaining on a dusty and resourceless corner of your traditional lands. Then they soon come back again to take away that corner of the land and cancel or prosecute your peoples for pursuing the promised right to pursue a basic living, and in return they may give you a finite cash settlement (inadequate for the purposes of national survival or development) in return for agreeing to never assert your Aboriginal or treaty rights (the ones that they told you you never had). That’s it, that’s all, and your people inevitably subside into a life of dispossession, dependency, hopelessness, and despair.

**Fifth**, these and other practices of dispossession have constituted, to this day, an extraordinary, evolving, and highly refined form of social warfare over more than three centuries against “the Indians” in Canada.

Treaty extinguishment with fountain pens, however, has not been the sole means of this colonial war. In his November 2001 presentation to the House Standing Committee on Justice and Human Rights concerning Canada’s *Anti-Terrorism Bill (C-36)*, former Chief Coon Come testified that:

[i]n 1995, a handful of unarmed native men, women, and children asserted their people's land rights to an ancestral burial ground by occupying a corner of Ipperwash Provincial Park in Ontario. ... [A] huge and heavily-armed tactical police response was deployed to quell this lawful and non-

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<sup>16</sup> Canada, Indian and Northern Affairs Canada, *Backgrounder Tlicho Agreement: Key Changes From Dogrib Agreement-In-Principle (AIP)* (4 September 2002), online: <[http://www.ainc-inac.gc.ca/nr/prs/s-d2002/02198cbk\\_e.html](http://www.ainc-inac.gc.ca/nr/prs/s-d2002/02198cbk_e.html)> (date accessed: 10 July 2003). For a detailed discussion of the historic and modern application of the policy of extinguishment by the federal Crown, see Grand Council of the Crees (Eeyou Istchee), “A Study in Contrasts: A New Vision of Aboriginal Inclusion in Quebec and the Continuing Federal Government Imposition of Extinguishment of Aboriginal Rights Across Canada” (Submission of the Grand Council of the Crees (Eeyou Istchee) to the Indigenous Rights in the Americas Project Americas & Caribbean Regional Experts Meeting in Georgetown, Guyana, 23-25 June 2003) [unpublished, archived with Grand Council of the Crees, Ottawa].

violent protest. It now appears that the use of lethal force was ordered at the highest levels of the Ontario provincial government. The result was the police shooting of three native protesters, one of whom—Dudley George—was killed. ...

Ipperwash stands as just one case study among many that demonstrate the risk posed to first nations by legislation that gives heightened powers to police, narrows the civil rights of those involved in legitimate dissent and protest activities, and limits or suspends the civil rights of those perceived by the government to be involved in “terrorist” activities.

#### Coon Come continued:

I myself have in the past been termed a “guerrilla” by governments because of my people’s use of the judicial process. The repeated characterization of First Nations peoples as insurgents in the past justifies our grave concerns about the risk of anti-terrorism legislation harming our most basic rights. ... Although Canada is one of the more democratic and free countries in the world, its governments and law enforcement institutions are fallible and, as far as many of our people are concerned, sometimes mal-intentioned at high levels.<sup>17</sup>

In its volume on indigenous peoples and extrajudicial execution,<sup>18</sup> Amnesty International notes that, in these circumstances, security forces routinely falsely claim that they were returning fire. It was no surprise in early legal and investigative work on the Ipperwash case to find that the Ontario Provincial Police (OPP) had made such a false claim within hours of killing Dudley George. For two years, until a judge ruled that the Aboriginal peoples had been unarmed and that OPP Sergeant Kenneth Deane had knowingly killed an unarmed man, the media insisted on portraying the small group of First Nations protesters as being armed.

In a report on Ipperwash, a Canadian Broadcasting Corporation (CBC) newscast used file footage from elsewhere of a dark man in a camouflage outfit priming a shotgun. In its major Ipperwash documentary, the CBC’s “The Journal” repeatedly used a posed image of a ruddy hand holding a pistol as its motif. When the George family protested to the CBC that the protesters were unarmed, the CBC stated that its producers had to have “creative licence” to make the coverage interesting for viewers.

(Interesting indeed. Other genuinely interesting coverage in recent years has included images taken in the Maritimes and the Great Lakes of white mobs burning First Nations’ fishing boats and beating First Nations fishers with

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<sup>17</sup> Canada, Standing Committee on Justice and Human Rights, *Minutes of Proceedings and Evidence*, (1 November 2001) at 1540, online: Parliament of Canada <<http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Meetings/Evidence/justev41-e.htm>> (date accessed: 1 July 2003).

<sup>18</sup> Amnesty International, *East Timor violations of human rights: extra-judicial executions, “disappearances”, torture, and political imprisonment, 1975-1984* (London: Amnesty International, 1985).

baseball bats; the stoning by non-natives of a cavalcade of Mohawk women, elders, and children evacuating Oka; the shroud-covered frozen bodies of homeless First Nations people dropped off outside town by prairie police forces; and the faces of hundreds of disappeared and presumably killed Aboriginal women into whose fate there has been little or no investigation.)

Sadly, the mischaracterization of Aboriginal peoples' resistance as insurgency and government's harsh, forceful, and often-lethal responses are nothing new in Canada. In his exceptional 1998 Osgoode Society study, *White Man's Justice: Native people in 19th Century Canadian jurisprudence*, Sidney Haring provides chilling details of the systematic use of state violence and force, including the execution of Indian Chiefs and leaders in British Columbia, as a political tool to subdue the Indians. In addition to the systematic application of judicial and statutory "violence," governments have consistently acted in violation of the law of the time. I believe these state violations of the Rule of Law cannot be easily dismissed as the folly of another less conscious age, in light of the contemporaneously-stated opposition of the Aboriginal victims themselves, their lawyers when they had it, and clergy, many of whom articulated their protest and the grounds for them in very modern terms.

**Sixth**, the long oppression and almost complete dispossession of Aboriginal peoples in Canada (notwithstanding the much-heralded "grants" of rights to a tiny percentage of their original traditional lands and few if any of their natural resources in such agreements as the *James Bay Agreement* of 1975, the *Nunavut Agreement* of 1992, or the *Nisga'a Agreement* of 1999) has almost always engendered significant Aboriginal reaction and resistance, especially in light of the scattered and dispersed nature of Aboriginal society in Canada.

The fact that we in the dominant society do not always hear about this response and resistance does not mean it is not happening. Aboriginal peoples and their communities are highly politicized and politically-conscious, however culturally and logistically muted the means of expressing this resistance may be. As a testament to Aboriginal peoples' (and their lawyers' and supporters') abiding faith in liberal social institutions, there have been (and still are) thousands of court cases from coast-to-coast-to-coast, and dozens of negotiating tables, in spite of the huge delays involved, the cost, and very, very spotty results. There have been legal and negotiated victories of sorts, but one can legitimately question the extent to which the landlessness and lack of resources of Aboriginal peoples, the terrible underdevelopment and social disparities they engender, and the socio-economic cost these conditions continue to extract have been genuinely addressed and redressed as a result.

There have been marches and delegations from all corners of Canada to England, to Ottawa, as well as to provincial capitals. And there have been protests, in modern days almost all remarkably peaceful and non-violent, even though many have involved some form of civil disobedience such as

occupations, blockades, importation of refrigerators and Bibles across the U.S.-Canada border, and even eel- and lobster-fishing expeditions.

Sadly, however, in the last twenty years, wherever these actions have involved or impacted upon non-native interests or caused any meaningful inconvenience, such as at Oka, Ipperwash, Burnt Church, the Fraser Valley, or Sun Peaks,<sup>19</sup> the state and non-native mobs have responded with overwhelming force and the threatened or actual use of violence, notwithstanding the assertion by the native parties of their constitutionally-protected Aboriginal and treaty rights.

However, there are two important but unrecognized civil responses to this long oppression and dispossession of Aboriginal peoples in Canada that are perhaps historically the most important. Neither is what one might call a conventional form of protest or civil disobedience, but I wish to propose—with due gravity—that they be considered in that light.

In January 2002, Stephen Owen was appointed Secretary of State for Western Economic Diversification and Indian Affairs and Northern Development by the Prime Minister. A press article quoted him as stating the following:

“If you see kids in an impoverished native village, with three generations of welfare behind them and no hope for the future, and they're even moved to perhaps that most horrible statistic of despair, which is youth suicide, they are very vulnerable to someone coming in with a gun and a warrior ethic and saying, ‘Why waste your life? Be a martyr,’” said Mr. Owen, who was an advisor two years ago to the Israel-Palestine Centre for Research and Information on Final Status Peace Negotiations.

“That hasn't happened. But if it's happening in the Gaza Strip, if we are tolerating similar conditions of despair that will drive kids to commit suicide, that's a tinderbox.”

Mr. Owen, who is calling for a more pragmatic, step-by-step approach to treaty negotiations, was deputy attorney-general in B.C. during the standoff between hundreds of RCMP officers and armed native radicals at Gustafsen Lake in 1995. He questioned Canada's capacity to handle an outbreak of native radicalism ...

“If we're not moved by the injustice of it or the economic self-interest, then maybe at least we can eventually be moved by the security concern,” he said.<sup>20</sup>

Owen was immediately repudiated by Senior Indian Affairs Minister Robert Nault, in whose Ontario riding persists some of the most impoverished reserves in Canada. Owen immediately withdrew his remarks and said he had got it all

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<sup>19</sup> For an explanation of Sun Peaks see Naomi Klein, “Drums of Triumph? Not necessarily” *The Globe and Mail* (16 July 2003) A13.

<sup>20</sup> Peter O'Neil, “Liberal MP compares natives to Palestinians: Suicide bombers feared: Cabinet member's claims ‘hyperbole’, native leader says” *National Post* (5 February 2002) A3.

wrong.

In my view, Owen was absolutely correct about deep First Nations social alienation and anger. Across Canada, there are scores of communities with close to 100 per cent youth unemployment, and First Nations leaders routinely report youth anger. However, I disagree with Owen for two basic reasons, neither of which are the reasons Nault gave. The first is the factor of Aboriginal peoples' extraordinary capacity to absorb legal and socio-economic pain, and their sustained restraint in the face of centuries of discrimination, oppression, and deliberate efforts to assimilate and thus eliminate them as peoples. The second is that we are already seeing an epidemic reaction of Aboriginal people, mostly young Aboriginal people, taking control one way or another over their own lives.

Addressing the recent Parliamentary Committee hearings on the *Anti-Terrorism Act*, Richard Powless, a Mohawk from Six Nations, pointed out that:

All treaties we signed have been violated. ...

Today, everything we do, everything we thought was protected in those treaties, we're told is against the law. We can't go fishing, even though we win Supreme Court cases. We're told we can't go hunting. We're told that about everything we thought was protected. The real politics of it is we don't have much political power. ...

When things are imposed on us, as they are ... the only legitimate form of protest, dissent and assertion of our rights is often protest, is often roadblocks. We're just afraid. We have a history of knowing that.

It's been discussed here that the rule of law is imposed very quickly and very harshly to an extreme, when it happens to be us doing [the disobedience]... . Terrorism has always been an option for First Nations. ...

[T]errorism has always been a choice, an option, it's always been an option for everyone, every person on this planet throughout history. Some have chosen it; we haven't. That's my point. We've had over 400 years of contact with each other. We [First Nations peoples] haven't chosen that option.<sup>21</sup>

This historic and ongoing restraint by Aboriginal peoples in Canada, in light of the calculated injury and abuse heaped upon them, is truly remarkable and quite unique. It matches the remarkable restraint shown in the face of analogous insult, and equivalent opportunity for non-restraint, by black South Africans. This remarkable restraint was taken for granted for decades by white South Africans, and it is taken for granted here in Canada. May it last forever, but may we of the dominant society immediately stop taking it for granted.

The second, tragic Aboriginal "civil response," if one can think of it

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<sup>21</sup> *Supra* note 17 at 1640.

that way, is the epidemic of Aboriginal suicide, alcoholism, and internalized violence against self and community. In the view of the 1996 Royal Commission on Aboriginal Peoples, Aboriginal suicide statistics send a “blunt and shocking message to Canada” that “a significant number of Aboriginal people in this country believe they have more reasons to die than to live.”<sup>22</sup> The Royal Commission’s treatment of the root cause of this social tragedy is (in my view, entirely correctly) a political one, rooted in colonialism and oppression:

We believe that suicide is a special issue. It is first and foremost a matter of life and death for that minority of Aboriginal people whose inner despair threatens daily to overwhelm them. But, like other forms of violence and self-destructive behaviour in Aboriginal communities, it is also the expression of a kind of collective anguish—part grief, part anger—tearing at the minds and hearts of many people. This anguish is the cumulative effect of 300 years of colonial history: lands occupied, resources seized, beliefs and cultures ridiculed, children taken away, power concentrated in distant capitals, hopes for honourable co-existence dashed over and over again.

The death of one adolescent boy who lies down on the white line of a two-lane highway in the dark of the night and waits for a transport truck to make the darkness permanent is a symbol of that history, that anguish. The damage must be acknowledged before it can be healed.<sup>23</sup>

High rates of alcoholism, gas sniffing, and substance abuse parallel the suicide epidemic, as do elevated rates of violent death and injury. I submit that these are not “merely” shocking statistics of public health disparities or of some kind of pan-Aboriginal mental or social instability. Perhaps they are rather a direct manifestation of a rational (post-Oka, post-Ipperwash, and post-Burnt Church) collective realization on the part of many Aboriginal people that civil disobedience and resistance in the cause of Aboriginal cultural survival is futile; that Aboriginal life in Canada is objectively hopeless; and that relative material comfort, acceptance and inclusion, and collective cultural survival *as Aboriginal peoples* is not likely to be forthcoming in this G8 land of milk and honey.

Seventh, the protest and resistance of Aboriginal peoples in this context do not correctly attract the application of the nice or conventional Canadian discussions of legality, punishment, and civil responsibility. Such liberal notions are, in my view, as problematic in their application to Aboriginal peoples’ civil disobedience as they were, for example, to civil disobedience in the face of apartheid South Africa, colonial subjugation in India, or even Nazism in Germany.

The assessments of the six preceding points expose the ongoing treatment of Aboriginal peoples in Canada as being an appalling and historic

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<sup>22</sup> Canada, *RCAP Publications: Choosing Life: Special Report on Suicide among Aboriginal People*, CD-ROM: (Ottawa: Libraxus, 1997) at para. 2167.

<sup>23</sup> *Ibid.* at paras. 2151-52 [emphasis added].

wrong, involving deliberate displacement and discrimination, the destruction of families and societies, forced relocation, the withholding of essential amenities, forced assimilation, and colonial treatment—or, to use some Aboriginal peoples' own assessment, cultural genocide.

In a short back-cover comment on Sidney Harring's *White Man's Law*, Professor Peter Russell wrote that the author

has given us a most penetrating and comprehensive account of the treatment of Indians in nineteenth-century Canadian courts. He illuminates brilliantly how the judges' application of the rule of law, an essential element in the "liberal treatment" of Indians, can serve as a blunt instrument for the dispossession and subjugation of Aboriginal peoples.<sup>24</sup>

We are now in the "modern" era of the *Van der Peet* trilogy,<sup>25</sup> *Mitchell*,<sup>26</sup> and the rights yank-back in *Marshall II*,<sup>27</sup> not to mention the frozen and inherently discriminatory judicial conceptions applied to Aboriginal peoples' land and resource title in *Delgamuukw*<sup>28</sup> as well as its inherent legitimation of the extinguishment of constitutionally-affirmed Aboriginal rights. I believe that courts' applications of the Rule of Law and the supreme law of the land going into the twenty-first century unfortunately still serves on balance as a very blunt instrument for the dispossession and subjugation of Aboriginal peoples. This all reminds me of the saying from the 1960s: "Don't adjust your television, the problem is with reality." The issue is not with Aboriginal peoples' claims, dissent, or civil disobedience, the overwhelming issue is the legalized, systemically oppressive, and lethal socio-economic reality they still face.

My eighth and final point concerns moderation, liberalism, and the inadequacy of current Canadian liberal discourse with respect to the Aboriginal situation in Canada. Coon Come was widely excoriated in 2001 by the Minister of Indian Affairs and almost all of the national media (and the Assembly of First Nations was severely punished by the federal government massive funding cuts) for stating that there are unacceptable disparities between the situations of Aboriginal peoples in Canada and non-Native Canadians. This is despite the fact that in his plenary address at the World Conference against Racism in Durban, Coon Come used verbatim quotations from the Royal Commission and the U.N. Human Rights Committee. The *core content* of Coon Come's speech

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<sup>24</sup> Peter H. Russell, Book Review of *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* by Sidney L. Harring, online: University of Toronto Press <<http://www.utppublishing.com/detail.asp?TitleID=1659>> (date accessed: 1 July 2003).

<sup>25</sup> See *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723.

<sup>26</sup> *Mitchell v. Canada (Minister of National Revenue - M.N.R.)*, [2001] 1 S.C.R. 911.

<sup>27</sup> *R. v. Marshall*, [1999] 3 S.C.R. 533.

<sup>28</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

in Durban was ironically repeated in the government's next Throne Speech, namely that there are gross social disparities facing Aboriginal peoples in Canada.

Coon Come's "crime" it would seem, was where and in front of whom this dirty linen of Canadian systemic discrimination was hung and by whom. A telling exchange took place soon afterwards at the Standing Committee hearing of Bill C-36 (now the *Anti-Terrorism Act*) when Coon Come called for the insertion of a non-derogation clause in favour of Aboriginal and treaty rights, much like the one in section 25 of the *Canadian Charter of Rights and Freedoms*. Bloq Québécois Member of Parliament Pierrette Venne immediately attacked this concept saying, "I know what your claims are. I believe however, that holding the population hostage, as it was done several times, is not the best way to make friends in this world."<sup>29</sup> Coon Come responded:

I have never felt that we, as the Assembly of First Nations, have held this country hostage. I have always felt we were always denied being included in participating in the economy of this country, and that is a denial of our rights. When the courts recognize that we have rights to fish, DFO sends its officers to ram boats against our people. When our rights are recognized, there is a continual denial of those rights when the government should instead be defending them. The government should be able to sit down with us in order to seek some meaningful avenue to settle our issues through proper mandates, proper budgets, and proper time frames.<sup>30</sup>

Coon Come's discourse is still surprisingly liberal, and his expectation, in spite of violations of his peoples' rights, is apparently that if appealed to in the right way, Canada will behave as a liberal state. The characterization of Aboriginal dissent and protest as "holding the population hostage" fails to even recognize the continuing request of Aboriginal peoples in Canada for the Canadian state to behave reasonably and liberally, and their apparent belief that it will.

Interestingly, the discourse used by the Royal Commission is more piercing, and recognizes the dynamic and causal relationship between oppression, colonialism, and the assimilation and cultural extinction of entire peoples on the one hand and both Aboriginal resistance and despair on the other:

Canada is a test case for a grand notion—the notion that dissimilar peoples can share lands, resources, power and dreams while respecting and sustaining their differences. The story of Canada is the story of many such peoples, trying and failing and trying again, to live together in peace and harmony.

But there cannot be peace or harmony unless there is justice ... .

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<sup>29</sup> *Supra* note 17 at 1600.

<sup>30</sup> *Ibid.*

Our central conclusion can be summarized simply: *The main policy direction, pursued for more than 150 years, first by colonial then by Canadian governments, has been wrong.*

Successive governments have tried—sometimes intentionally, sometimes in ignorance—to absorb Aboriginal people into Canadian society, thus eliminating them as distinct peoples. Policies pursued over the decades have undermined—and almost erased—Aboriginal cultures and identities.

This is assimilation. It is a denial of the principles of peace, harmony and justice for which this country stands—and it has failed. Aboriginal peoples remain proudly different.

Assimilation policies failed because Aboriginal people have the secret of cultural survival. They have an enduring sense of themselves as peoples with a unique heritage and the right to cultural continuity.

This is what drives them when they blockade roads, protest at military bases and occupy sacred grounds. This is why they resist pressure to merge into Euro-Canadian society—a form of cultural suicide urged upon them in the name of “equality” and “modernization.”

Assimilation policies have done great damage, leaving a legacy of brokenness affecting Aboriginal individuals, families and communities. The damage has been equally serious to the spirit of Canada—the spirit of generosity and mutual accommodation in which Canadians take pride.

Yet the damage is not beyond repair. The key is to reverse the assumptions of assimilation that still shape and constrain Aboriginal life chances—despite some worthy reforms in the administration of Aboriginal affairs.

To bring about this fundamental change, Canadians need to understand that *Aboriginal peoples are nations*. That is, they are political and cultural groups with values and life ways distinct from those of other Canadians. They lived as nations—highly centralized, loosely federated, or small and clan-based—for thousands of years before the arrival of Europeans. As nations, they forged trade and military alliances among themselves and with the new arrivals. To this day, Aboriginal people's sense of confidence and well-being as individuals remains tied to the strength of their nations. Only as members of restored nations can they reach their potential in the twenty-first century.<sup>31</sup>

I leave it to another place to discuss the circumstances under which this method of protest and resistance or that mode of civil disobedience can be justified, and whether, when circumstances of *economic, cultural, and political extinction* are facing a people, an exceptional logic and morality perhaps applies. In this regard, however, it is worth quoting the Royal Commission again:

It is not difficult to identify the solution. Aboriginal peoples need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater share of the lands and resources in this country, their institutions of self-government will fail. *Without adequate lands and resources, Aboriginal nations will be unable to build their communities and*

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<sup>31</sup> Canada, *RCAP Publications: People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples*, CD-ROM: (Ottawa: Libraxus, 1997) at paras. 22-37 [emphasis in original].

*structure the employment opportunities necessary to achieve self-sufficiency.* Currently, on the margins of Canadian society, *they will be pushed to the edge of economic, cultural and political extinction.* The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of Aboriginal nations.<sup>32</sup>

The phrase *economic, cultural, and political extinction* is the unmistakable terminology of cultural genocide. Seven years after this Royal Commission diagnosis and prescription, I ask you: what forms of civil disobedience can be expected or justified if the government still does not act forcefully, generously, and swiftly, continuing down its historic path of assimilation, continually applying social duress to this end, and “legally” extinguishing constitutionally-affirmed rights? For now, this appears to still be Canada’s chosen path. To a considerable extent, the inadequacy of the discourse—and the extraordinary, widespread, official, and public non-Aboriginal ignorance and amnesia regarding Canada’s nation-to-nation (Aboriginal to Imperial) constitutional history—is a fundamental cause.

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<sup>32</sup> *Supra* note 2 at para. 8380 [emphasis added].