# UNEXTINGUISHED: RIGHTS AND THE *INDIAN ACT*

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Rights discourse can be simultaneously liberating and limiting.[1] Rights are limiting when they are essentialized, universalized, and placed above the fray of human affairs.[2] They can be dangerous when they are abstracted from the real-world struggles faced by ordinary people.[3] On the other hand, rights can be liberating if they are used as political tools.[4] They create opportunities to either challenge or facilitate governmental action.[5] When rights are regarded as real-world—rather than metaphysical—instruments, they can be strategically deployed or discarded, given the grounded context in which they operate.[6] Rights are not heavenly endowments or intellectually pure forms.[7] They are very human constructs and, as such, are not beyond human manipulation.[8] As Oliver Wendell Holmes observed: "The life of the law has not been logic: it has been experience."[9]

The experience of Indigenous peoples within Canada's constitution highlights the composite nature of rights. Rights have been both liberating and

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[1] Critiques of rights in legal scholarship are not new. See, e.g., Mark Tushnet, "An Essay on Rights" (1984) 62:8 Tex L Rev 1363; Peter Gabel, "The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves" (1984) 62:8 Tex L Rev 1563; Frances Olsen, "Statutory Rape: A Feminist Critique of Rights Analysis" (1984) 63:3 Tex L Rev 387; Duncan Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28:2 Buff L Rev 205; Wendy Brown & Janet Halley, eds, *Left Legalism/Left Critique* (Durham, NC: Duke University Press, 2002); Robin West, "Tragic Rights: The Rights Critique in the Age of Obama" (2011) 53:2 Wm & Mary L Rev 713.

[2] For a discussion of this point in an international context, see Eric Posner, *The Twilight of Human Rights Law* (New York: Oxford University Press, 2014); Jack Donnelly, "The Relative Universality of Human Rights" (2007) 29:2 Hum Rts Q 281.

[3] Paul Butler, "Poor People Lose: Gideon and the Critique of Rights" (2013) 122:8 Yale LJ 2176.

[4] Bas de Gaay Fortman, *Political Economy of Human Rights: Rights, Realities and Realization* (Oxford: Routledge, 2011).

[5] Patrick Macklem, "Aboriginal Rights and State Obligations" (1997) 36:1 Alta L Rev 97 (QL); John Borrows, "Let Obligations Be Done" in Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) at 201 [Borrows, "Let Obligations Be Done"].

[6] For an excellent historiography of the movement away from metaphysical thinking in the United States after the civil war and before the cold war, see Louis Menand, *The Metaphysical Club: A Story of Ideas in America* (New York: Farrar, Straus and Giroux, 2001).

[7] Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015).

[8] Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42:1 Harv Intl LJ 201.

[9] Oliver Wendell Holmes Jr, *The Common Law* (Boston: Little, Brown, and Company, 1881) at 1.

limiting.[10] Aboriginal and treaty rights within Canada's constitution do not flow from an ultimate convergence in values.[11] Widespread agreement about their nature and purpose is far from self-evident.[12] Reconciliation between Indigenous peoples and the Crown is an abstract aspiration.[13] In particular, efforts to overturn federal legislative discrimination have largely failed; rights discourse has not yielded significant victories for Indigenous peoples in Canada in this regard.[14] Despite strong academic commentary that section 35(1) of the *Constitution Act, 1982*[15] recognizes and affirms a right to Aboriginal self-government,[16] the Supreme Court of Canada has not recognized this power.[17] The federal *Indian Act*[18] stands in the way of good Indigenous governance while remaining resilient in the face of rights challenges.[19]

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[10] D'Arcy Vermette, "Colonialism and the Suppression of Aboriginal Voice" (2008-2009) 40:2 Ottawa L Rev 225 (QL); Mariana Valverde, "'The Honour of the Crown is at Stake': Aboriginal Land Claims Litigation and the Epistemology of Sovereignty" (2011) 1:3 UC Irvine L Rev 955.

[11] The fact that Aboriginal rights in Canada's Constitution do not flow from an ultimate convergence in values is acknowledged in *R v Van der Peet*, [1996] 2 SCR 507 at paras 18–19, 137 DLR (4th) 289 (CanLII) [*Van der Peet*]:

> In the liberal enlightenment view, reflected in the American Bill of Rights and, more indirectly, in the *Charter*, rights are held by all people in society because each person is entitled to dignity and respect. Rights are general and universal; they are the way in which the "inherent dignity" of each individual in society is respected: *R. v. Oakes*, [*infra* note 81 at para 64]; *R. v. Big M Drug Mart Ltd.*, [[1985] 1 SCR 295 at para 94, 18 DLR (4th) 321 (CanLII)].
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> Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society.
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> Note how Charter rights are described as being general, universal and inherent, while Aboriginal rights are not viewed as having the same status. While I would question the general and universal character of Charter rights too, one can see that the court does regard some rights as being specific and contingent.

[12] Thomas Flanagan, *First Nations? Second Thoughts* (Montreal & Kingston: McGill-Queen's University Press, 2000). For a static interpretation of Indigenous culture, see Frances Widdowson & Howard Adams, *Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation* (Montreal & Kingston: McGill-Queen's University Press, 2008); Gordon Gibson, *A New Look at Canadian Indian Policy: Respect the Collective, Promote the Individual* (Vancouver: Fraser Institute, 2009).

[13] John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701 (QL).

[14] Shin Imai, *The 2016 Annotated Indian Act and Aboriginal Constitutional Provisions* (Toronto: Carswell, 2015) [Imai, *Annotated Indian Act 2016*].

[15] Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35(1) [*Constitution Act, 1982*].

[16] Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012).

[17] *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204 (CanLII) [*Pamajewon* cited to SCR]. For commentary, see Russell Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993 (QL); Bradford Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R v Pamajewon*"

Since 1876, the federal *Indian Act* has inappropriately detracted from First Nations' power. The *Act* flows from the *idea* that Indigenous people are inferior and must be schooled in Canadian forms to hasten assimilation.[20] The *Act* is explicitly designed to rupture First Nations socio-political relations and forcibly absorb individual Nation members within broader Canadian society.[21] Its formal operation has devastating effects. Its underlying philosophy damages most everyone it touches. Its provisions narrowly define and heavily regulate Indigenous peoples' citizenship,[22] land rights,[23] succession rules,[24] political organization,[25] economic opportunities,[26] fiscal management,[27] educational patterns, and attainment.[28] The *Act* makes First

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(1997) 42:4 McGill LJ 1011 (QL); John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1998) 22:1 Am Indian L Rev 37.

[18] RSC 1985, c I-5 [*Indian Act*].

[19] Cheryl Simon & Judy Clark, "Exploring Inequities Under the *Indian Act*" (2013) 64 UNBLJ 103; John Borrows, "Stewardship and the First Nations Governance Act" (2003-2004) 29:1 Queen's LJ 103 (QL) [Borrows, "Stewardship"]. For a discussion of good governance in an Indigenous context, see Angela Riley, "Good (Native) Governance" (2007) 107:5 Colum L Rev 1049.

[20] The Royal Commission on Aboriginal Peoples wrote about the *Indian Act*'s purpose:

> The Indian Act of 1876 created an Indian legislative framework that has endured to the present day in essentially the terms in which it was originally drafted. Control over Indian political structures, land holding patterns, and resource and economic development gave Parliament everything it appeared to need to complete the unfinished policies inherited from its colonial predecessors. Indian policy was now clear and was expressed in the alternative by the minister of the interior, David Laird, when the draft act was introduced in Parliament: "[t]he Indians must either be treated as minors or as white men." There was to be no middle road.

*Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 255–256.

[21] John L Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in JR Miller, ed, *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) 127 at 127; E Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986), particularly the chapter entitled "General Aspects of Policy and Administration" at 37–59.

[22] Larry Gilbert, *Entitlement to Indian Status and Membership Codes in Canada* (Toronto: Carswell, 1996).

[23] The reserve system is described in Richard H Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990).

[24] Shin Imai, *Aboriginal Law Handbook*, 2nd ed (Toronto: Carswell, 1999) at 240–244.

[25] Brian A Crane, Robert Mainville & Martin W Mason, *First Nations Governance Law* (Markham, ON: LexisNexis/Butterworths, 2006) at 101–129; Robert A Reiter, *The Law of First Nations* (Edmonton: Juris Analytica Publishing Inc, 1996).

[26] Royal Commission on Aboriginal Peoples, *Sharing the Harvest: The Road to Self-Reliance: Report of the National Round Table on Aboriginal Economic Development and Resources* (Ottawa: Supply and Services, 1993).

[27] Skeena Native Development Society, *Masters in Our Own House: The Path to Prosperity: Report of the Think Tank on First Nations Wealth Creation (1999-2002)* (Terrace, BC: Skeena Native Development Society, 2003) at 59–74.

[28] For an annotated description of the *Indian Act* see Imai, *Annotated Indian Act 2016*, *supra* note 14.

Nations largely subject to provincial legislation and regulation without their consent.[29] It usurps First Nations' authority and responsibility to deal with their own problems in an effective way.

This article examines the ineffectual nature of rights discourse as it relates to overturning the *Indian Act*. It argues that rights could be more successfully employed if Indigenous peoples' own views about them were given greater prominence. In so doing, this article advances the Supreme Court's recognition that "it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."[30] Seeing rights as *perspectival* brings them into the real world. It helps us see that rights are subjective. They are human-centered creations; they do not embody objective truths. Viewing rights in this way liberates Indigenous peoples from fully embracing or rejecting them. Rights should be seen for what they are—helpful for some purposes, harmful for others. A selective invocation of rights discourse does not require the adoption of a worldview that puts rights at the centre of life. While particular worldviews may have generated rights discourse, thus making their use an extremely risky affair,[31] the future effects of these worldviews are not preordained.[32] Contemporary legal politics is rife with ambiguities, contingencies and uncertainties. Rights are neither necessarily individuated, liberal constructs,[33] nor inevitably receptive to Indigenous collective concerns.[34] Rights are susceptible to human manipulation and progressive application, though we must always respect and see truths in claims to the contrary.[35]

This article unfolds in four parts. Part I further discusses the contingent nature of rights. Part II addresses federalism in relation to the *Indian Act*. It suggests that section 35(1) of the *Constitution Act, 1982* should be interpreted to prevent unilateral action by Parliament when Indigenous governance is at issue. Part III argues that rights discourse should be used to repudiate the presumed extinguishment of Aboriginal rights by implication in Canada's historic and contemporary

[29] See *R v Dick*, [1985] 2 SCR 309, [1985] SCJ No 62 (CanLII). For commentary on the implications of provincial regulation in relation to Indians, see Leroy Little Bear, "Section 88 of the Indian Act and the Application of Provincial Laws to Indians" in J Anthony Long & Menno Boldt, eds, *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988) 175; Kerry Wilkins, ""Still Crazy After All These Years": Section 88 of the *Indian Act* at Fifty" (2000) 38:2 Alta L Rev 458 (QL); Kent McNeil, "Aboriginal Title and Section 88 of the *Indian Act*" (2000-2001) 34:1 UBC L Rev 159 (QL).

[30] *R v Sparrow*, [1990] 1 SCR 1075 at 1112, 70 DLR (4th) 385 (CanLII) [*Sparrow* cited to SCR].

[31] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System (A Critical Edition)* (New York: New York University Press, 2004).

[32] Joseph Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94:1 Yale LJ 1.

[33] Paul W Kahn, *Putting Liberalism in Its Place* (Princeton, NJ: Princeton University Press, 2008).

[34] Robert A Williams Jr, "Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for People of Color" (1987) 5:1 Law & Ineq 103.

[35] Audre Lord, "The Master's Tools Will Never Dismantle the Master's House" in Reina Lewis & Sara Mills, eds, Feminist Postcolonial Theory: A Reader (New York: Routledge, 2003) 25 at 25; Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

jurisprudence. The assumption in the *Sparrow* case, that the Crown could unilaterally extinguish rights prior to 1982, is offensive. It does not advance a politically persuasive point of view, particularly when considering Indigenous perspectives on the meaning of the rights at stake. In advancing this theme Part IV argues that the *Indian Act* has not extinguished Indigenous governance rights under doctrines of sovereign incompatibility, actual consideration of the conflict, or explicit legislative enactment. Furthermore, the fact that the federal government has regulated Indigenous governance in great detail does not amount to the extinguishment of Indigenous governance. The federal government has explicitly recognized First Nations' customary powers to exercise authority in relation to governance, land, and broader organizational questions.[36] These points all lead to the conclusion that Indigenous governance is a pre-existing and unextinguished right under section 35(1). First Nations governance should be recognized as existing, not as a result of the universal or abstract nature of Aboriginal rights, but because these rights have not been—and should not be—politically eclipsed by contrary federal action.

## I. THE CONTINGENCY OF RIGHTS

When using rights as political tools First Nations people could argue that the *Indian Act* contravenes Aboriginal and treaty rights protected in section 35(1) of the *Constitution Act, 1982*. In fact, any statute that infringes upon Aboriginal and treaty rights could be subject to challenge under section 35(1). As noted earlier, such arguments would not claim ultimate truths about the world. Throughout history, and even at present, societies have organized themselves in different ways. Societies have appealed to other values in seeking to improve their relationships. Rights are a relatively recent invention and, while they are a vast improvement over many ways of dealing with conflict, they are not timeless or universal.[37] As John Gray observed: "Human rights are not immutable truths, [nor are they] free-standing moral absolutes whose contents are self-evident. They are conventions, whose contents vary as circumstances and human interests vary."[38] Applying John Gray's observation to Canada's particular circumstances, Indigenous rights could function as conventions—"as convenient articles of peace, whereby individuals and communities with conflicting values and interests may [find ways] to co-exist."[39]

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[36] My first published article made this point in some detail in the context of the legal history of my community, the Chippewas of the Nawash: see John Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self Government" (1992) 30:2 Osgoode Hall LJ 291 [Borrows, "Genealogy of Law"].

[37] See Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed (Ithaca: Cornell University Press, 2003) at 1: "I do not, however, argue that human rights are timeless, unchanging or absolute; any list or conception of human rights—and the idea of human rights itself—is historically specific and contingent."

[38] John Gray, *Two Faces of Liberalism* (New York: The New Press, 2000) at 106 [Gray, *Two Faces*].

[39] *Ibid* at 105.

In making this argument it must be stressed that it is not only Aboriginal rights that are contingent and conditional on their surrounding contexts.[40] My central argument is that rights in general are not fundamental to a free and democratic society.[41] They are very, very, very important in our current mode of organization. They are "strong ethical pronouncements as to what *should* be,"[42] and their robust use in contemporary jurisprudence is understandable.[43] However, it is also important to simultaneously acknowledge that rights are not essential to human dignity and prosperity.[44] Rights have a downside. They can even be undesirable in certain instances if they diminish democratic debate and engagement.[45] Yet it is true that it is difficult to imagine human flourishing without rights, at least in our present circumstances, and I would hate to see rights go under our current framework. In fact, I want to preserve and strengthen their development and application, as long as their limitations are recognized.[46] If we claim that rights are fundamental, we overreach. Such claims can create false horizons which limit our imagination and action in the real world.[47] Rights discourse may prevent us from seeing other viable alternatives in challenging domination.[48] In this respect I am anti-fundamentalist when it comes to rights and other essentialized legal constructs.[49]

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[40] I recognize that such claims can be somewhat unconventional in present-day legal circles. Rights discourse has dominated legal theory for many years. Ronald Dworkin wrote about rights being 'trumps' in argument: see Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1977).

[41] Jeremy Bentham called natural rights "nonsense on stilts" when arguing for a non-foundational understanding of rights: see J Bowring, ed, *The Works of Jeremy Bentham*, vol 2 (Edinburgh: William Tait, 1843) at 501.

[42] Amartya Sen, *The Idea of Justice* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2009) at 357 [Sen, *The Idea of Justice*].

[43] Ethna Regan, *Theology and the Boundary Discourse of Human Rights* (Washington, DC: Georgetown University Press, 2010).

[44] Sen, *The Idea of Justice*, *supra* note 42 at 355–387.

[45] There are critics of desirability of rights discourse in Canada who fall on the so-called right and left of the political spectrum: see Joel Bakan, Just Words: Constitutional Rights and Social Wrongs (Toronto: University of Toronto Press, 1997); Alan Hutchinson, Waiting for Coraf: A Critique of Law and Rights (Toronto: University of Toronto Press, 1995); FL Morton & Rainer Knopff, The Charter Revolution and the Court Party (Toronto: University of Toronto Press, 2000); Michael Mandel, The Charter of Rights and the Legalization of Politics in Canada (Toronto, Wall & Thompson, 1989); Christopher Manfredi, Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism, 2nd ed (Don Mills, ON: Oxford University Press, 2001).

[46] I make a similar argument in John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) [Borrows, *Freedom and Indigenous Constitutionalism*]. For a discussion of how Indigenous peoples can pursue rights while recognizing their historic and contingent elements, see Paul Patton, "Foucault, Critique and Rights" (2005) 6:1 Critical Horizons 267.

[47] For strong arguments that challenge false horizons in working with Indigenous issues, see James Tully, *Public Philosophy in a New Key, Volume I: Democracy and Civic Freedom* (Cambridge, UK: Cambridge University Press, 2009) [Tully, *Democracy and Civic Freedom*].

[48] For example, if we say rights are fundamental we might spend all our time fighting about rights and consequently not make substantial changes in the real world, as I would argue is largely what has occurred under Canada's section 35(1) jurisprudence: see Ardith Walkem & Halie Bruce, eds, *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton, BC: Theytus Books, 2003); John

In fact, I worry when rights attract an almost religious aura in legal circles. A faith in their disembodied reality seems analogous to a hollow form of faith in God.[50] Rights discourse often replicates forms of dogmatic doctrinal adherence that echo religious sectarianism.[51] Rights followers can even be divided into different dominations, such as those who see political rights as separate from economic and social rights. Of course, some rights followers are more ecumenical and do not see dichotomies in political, economic and social rights.[52] Nevertheless, the supremely elevated status of rights troubles me, if not put into context. For religionists, it would seem to border on idol worship to replace God with a human construct—like rights. If one does not believe in God, it may nevertheless be troubling to see how rights can attract the kind of reverence and deference that religionists often reserve for God.[53] As a thought experiment, I can almost imagine the first four commandments of rights discourse:

> 1 And RIGHTS spake all these words, saying,
> 2 I *am* RIGHTS thy *a priori* Form, which have brought thee out of the pre-societal state of nature, out of the house of bondage.
> 3 Thou shalt have no other *a priori* Forms before me.
> 4 Thou shalt not make unto thee any other pre-eminent *a priori* Form, or any likeness *of any other a priori* Form that *is* in heaven above, or that *is* in the earth beneath, or that *is* in the water under the earth.
> 5 Thou shalt not bow down thyself to them, nor serve them: for I, RIGHTS, *am* a jealous *a priori* Form, visiting the iniquity of the fathers upon the children unto the third and fourth *generation* of them that hate me;
> 6 And shewing mercy unto thousands of them that love me, and keep my principles.
> 7 Thou shalt not take RIGHTS thy *a priori* Form in vain; for RIGHTS will not hold him guiltless that taketh His name in vain.[54]

When I asked my colleague Ben Berger for his feedback on the analogy of rights to religion, he wrote:

> I like the move from your "non-fundamentalist" approach to the religion analogy. … It struck me that your claim had more to do with rights

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Borrows, "Canada's Colonial Constitution" in Michael Coyle & John Borrows, eds, *The Right(s) Relationship* (Toronto: University of Toronto Press) [forthcoming].

[49] For arguments against fundamentalism in Canada's legal structure, see generally John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Borrows, *Freedom and Indigenous Constitutionalism*, *supra* note 46.

[50] Steven D Smith, "Idolatry in Constitutional Interpretation" (1993) 79:3 Va L Rev 583.

[51] David Kinley, "Human Rights Fundamentalisms" (2007) 29:4 Sydney L Rev 545.

[52] For a discussion of the sometimes dichotomous treatment of rights in the Canadian context, see Martha Jackman, "What's Wrong with Social and Economic Rights?" (2000) 11:2 NJCL 235.

[53] For a discussion of idolatry and rights, see Michael Ignatieff, *Human Rights as Politics and Idolatry*, ed by Amy Gutmann (Princeton, NJ: Princeton University Press, 2003).

[54] This is paraphrased from Exodus 20:1–7 (King James Version).

> discourse taking on the *worst* of religion … what religion can look like when it takes a wrong turn. And that wrong turn is when it takes on idolatrous forms. Idolatry seems to me when one replaces substance with form or makes sacred that which is not the sacred essence at all, thereby stalling your spiritual movement … idol/idle. Thought about in this way, I wonder if what's going on is that rights discourse can begin to take on features of excess faith in the abstract, just like religion … when it stops tracking the real. So is it problematic inasmuch as rights can begin to sacrifice the complexly real with faith in the abstract? Reality, politics, human life, tragedy, etc., all takes a back seat to commitment to the RIGHTS. If so...
>
> Our Rights, which art in Charters
> Hallowed be thy claims.
> Thy kingdom come, thy will be done,
> On earth as it is in theory.[55]

I agree with Professor Berger's observation.[56] At the same time, we both believe that the analogy of rights to religion should not be stretched too far.[57] Nevertheless, a comparison is made here to prompt a more critical engagement with rights discourse. We should question the sources and scope of rights and the role of faith in their development and application. Failure to do so can cause us to overlook the contingent, context-dependent nature of rights.

For example, we must continually remind ourselves that rights are subject to interpretation, which itself is dependent on "differing views of human interests"; as such, their application is not a value-free exercise.[58] Morality plays a significant role in the interpretation of rights.[59] As a result, rights can be filled with cross-cutting and inconsistent meanings.[60] Even when considering a particular right, such as liberty or freedom, contradictory objectives can be called forth in its name.[61] The meaning of liberty is enmeshed in conflict drawn from differing, even competing, values.[62] There

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[55] Email to the author.

[56] Further developments of Professor Berger's ideas are found in Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015).

[57] For a discussion of the analogies and disanalogies between rights and religion, see Nazila Ghanea, Alan Stephens & Raphael Walden, eds, *Does God Believe in Human Rights? Essays on Religion and Human Rights* (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2007).

[58] Gray, *Two Faces*, *supra* note 38 at 70.

[59] *Ibid*.

[60] Conflicting interpretations of rights are present in many Supreme Court of Canada cases. For example, in *Gosselin v Québec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429 (CanLII), the Court provided different interpretations of the meaning of life, liberty and security under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *supra* note 15. For commentary concerning these differences, and the material basis of rights discourse, see Margot Young et al, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: University of British Columbia Press, 2007).

[61] Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) at 1.

[62] Gray, *Two Faces*, *supra* note 38 at 72.

is no *a priori* space to find incontestable meanings in relation to rights; culture and context matter a great deal in rights discourse.[63]

This means that any theory of rights must acknowledge and incorporate the reality of conflict about their nature and scope. Consensus about the content or desirability of rights has not been found. We will always be mired in conflict about their meaning. This is a current fact of legal life, but it should not cause us to despair or to abandon them. Despite their less than ideal status and the ever-present possibility of conflict, rights can have value, particularly for Indigenous peoples. Rights occupy a political space where provisional peace could be advanced through argumentation, conflict and persuasion. The thesis of this article is that, despite many failures, First Nations peoples should (with extreme caution) continue to use rights discourse within section 35(1) of the *Constitution Act, 1982* to challenge the *Indian Act*'s failure to facilitate freedom and democracy. Rights discourse could be used to challenge the role of Parliament when Aboriginal and treaty rights are at issue.

## II. Federalism, Indigenous Peoples and Rights Discourse

In line with this view, and to apply rights discourse to a particular issue, I argue that Parliament should not be able to act unilaterally in relation to Indigenous peoples merely because federal powers found in section 91(24) of the *Constitution Act, 1867* extend to "Indians, and Lands reserved for the Indians."[64] Federal power should not make 'Indians' subordinate within Canada's political and legal orders. Federal officers should not have the last or only word in this field. The invocation of Aboriginal rights can assist in this goal because constitutional rights are supposed to limit government action. With section 35(1) as a guide,[65] section 91(24) is open to more democratic interpretations.[66] It does not have to be read to justify domination.

For example, the technical wording of section 91 as a whole is that federal powers are granted "*in relation to*" matters not assigned exclusively to provincial legislatures. In particular, the exclusive federal legislative authority in section 91(24) only "*extends to*" Indians and lands reserved for Indians. There should be a vast difference between legislative power *extending to* or *in relation to* a subject matter and legislative power *over* a particular group of people. The federal government's power of "*extending to*" in section 91(24) should be read to bolster an "*in relation*

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[63] Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Cambridge, Mass: Harvard University Press, 2002).

[64] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].

[65] In *Sparrow*, *supra* note 30 at 1109, the Supreme Court wrote: "Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867. These powers must, however, now be read together with s. 35(1)."

[66] For further discussion, see Bradford Morse, "Government Obligations, Aboriginal Peoples and Section 91(24) of the Constitution Act, 1867" in David C Hawkes, ed, *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989) 59.

*to*" approach to First Nations/Crown interactions.[67] A relational approach to Indigenous issues is more consistent with the goal of reconciliation that underlies section 35(1) of the *Constitution Act, 1982*.[68] As Justice Binnie wrote in the *Mikisew Cree* case, "[t]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[69]

Furthermore, in light of section 35(1) it should be recognized that Parliamentary power varies in relation to each matter in section 91 of the *Constitution Act, 1867*.[70] Some powers are broadly construed and others are narrowly interpreted. For example, the federal criminal law power in section 91(27) is currently quite broad,[71] while the power of trade and commerce in section 91(2) is much narrower.[72] This reflects the fact that many federal powers are constrained in accordance with their potential impact on provincial jurisdiction.[73] Federal powers are also constrained by Aboriginal rights.[74] This should lead to sharper distinctions between 'Indians' and other federal legislative matters found in section 91. In this respect, federal legislative power *in relation to* Indians and lands reserved for Indians should be narrowly construed when it negatively impacts on Indigenous rights. A

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[67] For a discussion of rights as relational, see Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011).

[68] A recent discussion of reconciliation in the Canadian context is found in Truth and Reconciliation Commission of Canada, What We Have Learned: Principles of Truth and Reconciliation (Ottawa: Truth and Reconciliation Commission of Canada, 2015), online: <www.trc.ca/websites/trcinstitution/File/2015/Findings/Principles%20of%20Truth%20and%20Reconciliation.pdf>. For a fuller discussion of the mutuality underlying reconciliation, see Jeffery G Hewitt, "Reconsidering Reconciliation: The Long Game" (2014) 67 SCLR (2d) 259 (QL); Mark D Walters, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada" in Will Kymlicka & Bashir Bashir, eds, The Politics of Reconciliation in Multicultural Societies (Oxford: Oxford University Press, 2008) 165.

[69] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1, [2005] 3 SCR 388 (CanLII) [*Mikisew Cree First Nation*].

[70] The Supreme Court has recognized the varying scope of different heads of powers. In *Reference re Employment Insurance Act (Can), ss 22 and 23*, 2005 SCC 56 at para 11, [2005] 2 SCR 669 (CanLII), the Court wrote: "Some heads that set forth narrow powers leave little room for interpretation. Other, broader, heads result in legislation that can have several aspects."

[71] In *RJR MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 at para 28, 127 DLR (4th) 1 (CanLII), the Supreme Court of Canada wrote: "The criminal law power is plenary in nature and this Court has always defined its scope broadly." The breadth of federal criminal law powers under section 91(27) has also been found in *Reference re Firearms Act (Can)*, 2000 SCC 31, [2000] 1 SCR 783 (CanLII); *R v Hydro-Québec*, [1997] 3 SCR 213, 68 OR (2d) 512 (CanLII).

[72] The federal trade and commerce power is interpreted narrowly, though given some scope, in *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641, 68 OR (2d) 512 (CanLII).

[73] A leading case making this point is *Ontario (AG) v Canada (AG)* (the *Local Prohibition Case*), [1896] UKPC 20, [1896] AC 348 (BAILII).

[74] The Supreme Court has been clear that Crown constraints are a part of the framework of section 35(1). As the Court observed in the leading case of *Sparrow*, *supra* note 30 at 1106, citing Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26:1 Osgoode Hall LJ 95 at 100 [Lyon, "Constitutional Interpretation"]: "Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown."

broad construction would be warranted when recognizing and affirming Aboriginal and treaty rights. 'Indians' are not like beacons, buoys, lighthouses, banks, weight, measures, the postal service, currency, promissory notes, patents, copyrights or most other federal matters listed in section 91 of the *Constitution Act, 1867*.[75] Unlike these other matters, Indians hold constitutionally protected rights and governmental powers; they have section 35(1) to bolster their sphere of influence. Therefore, section 91(24) should not be seen as authorizing unilateral decisions regarding Indians.

Despite this alternative reading of section 91(24), courts often act as if Parliamentary intention alone should determine the legal status of Indians and lands reserved for Indians. A pre-Aboriginal rights example of this approach is found in *Canada (AG) v Lavell; Isaac v Bedard*, where Justice Ritchie held: "The legislation enacted to this end was, in my view, necessary for the implementation of the authority so vested in Parliament under the Constitution."[76] This argument should have limited persuasiveness because it was decided in 1974, before section 35 came into effect. The argument of legislative necessity does not excuse the government from abiding by the more recent provisions in the *Constitution Act, 1982*. So-called legislative necessity should give way to constitutional principles directed at the recognition and affirmation of Aboriginal rights. Rights discourse should cause the courts to measure legislative intentions against Aboriginal rights. As the Supreme Court of Canada wrote in *Sparrow*:

> Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.[77]

When it comes to Indians, particularly under the *Indian Act*, the assumption that Parliamentary intention is an overriding value should be jettisoned.

Thus, when interpreting the *Indian Act*, it should be difficult to sustain the *idea* that Parliament's assimilative intention in regard to the *Act* is consistent with section 35(1) of the *Constitution Act, 1982*. The *Indian Act* was designed to heavily regulate Indigenous peoples' forms of governance and to reconstitute those forms of

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[75] Indians may be somewhat similar to aliens under section 91(25) in that Indians are people. That said, Indians are legally distinct from aliens because aliens come to Canada and require a legal process to be naturalized. Unlike aliens, Indians were 'naturalized' as peoples before Canada was formed, meaning they had political and legal rights to one another and their territories.

[76] *Canada (AG) v Lavell; Isaac v Bedard*, [1974] SCR 1349 at 1359, 38 DLR (3d) 481 (CanLII).

[77] *Sparrow*, *supra* note 30 at 1109. The Supreme Court continued: "Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick*, [*infra* note 140], and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin*[, *infra* note 144]."

governance in subordination to others.[78] While it has left certain inherent powers intact, the *Indian Act* has severely limited First Nations' participation in the Canadian state and within their own communities.[79] It has attempted to immobilize their political and legal development. While it is true that Parliament passed the *Indian Act* with a properly constituted majority, it would be the worst type of legal fiction to maintain that such action was democratic in the way the courts themselves have defined the term.[80] The *Indian Act* does not measure-up to the Constitution's democratic values. Recall that in *R v Oakes* the Supreme Court articulated some of the values inherent in the notion of democracy:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[81]

The *Indian Act* falls far short of each named value. The *Indian Act* does not respect Indigenous peoples' dignity. The *Indian Act* does not embody a commitment to social justice and equality as we currently understand these terms. The *Indian Act* does not respectfully accommodate Indigenous beliefs, nor does it respect group identity. The *Indian Act* undermines faith in social and political institutions and it does not enhance First Nations peoples' participation in society. Therefore, the courts should not place much emphasis on Parliamentary intention when interpreting the *Indian Act*. It could lead to a rubber-stamping of actions that are distinctly undemocratic and destructive of freedom.

Thus, it is important to recognize that, at least since 1982, the Crown's sovereignty is constrained by numerous obligations to Aboriginal peoples when Aboriginal or treaty rights are at issue.[82] Section 91(24) of the *Constitution Act, 1867* should be interpreted in a "large and liberal" way, which gives a generous meaning to the word 'peoples' in section 35(1) of the *Constitution Act, 1982*.[83] 'Peoples' has a political meaning under section 35,[84] as a category that denotes political collectives

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[78] See John Leslie & Ron Maguire, eds, *The Historical Development of the Indian Act*, 2nd ed (Ottawa: Treaties and Historical Research Centre, 1978).

[79] John Borrows, "Aboriginal and Treaty Rights and Violence Against Women" (2013) 50:3 Osgoode Hall LJ 699 (QL).

[80] Indians did not have the vote or franchise during much of Canadian history. See Chief Joe Mathias and Gary R Yabsley, "Conspiracy of Legislation: The Suppression of Indian Rights in Canada" (1991) 89 BC Studies 34.

[81] *R v Oakes*, [1986] 1 SCR 103 at 136, 53 OR (2d) 719 (CanLII).

[82] Borrows, "Let Obligations Be Done", *supra* note 5.

[83] *R v Gladstone*, [1996] 2 SCR 723 at para 133, 137 DLR (4th) 648, L'Heureux-Dubé CJC dissenting (CanLII) [*Gladstone*].

[84] *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paras 34–35 (CanLII); *Canada (Indian Affairs) v Daniels*, 2014 FCA 101 at paras 97–98, 371 DLR (4th) 725 (CanLII); *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14 at para 77, [2013] 1 SCR 623 (CanLII*); R*

who are 'partners in confederation'.[85] Section 91(24) should not be interpreted in an originalist context;[86] it must be viewed in light of an ongoing nation-to-nation relationship between the federal Crown and Indigenous peoples.[87] 'Peoples' has meaning in international law. Section 35(1) was drafted with this meaning as a backdrop to the domestic implementation of Canada's international obligations.[88] Canada recognizes its international legal obligations as being relevant and persuasive as a source of law for the purpose of interpreting domestic statutes and as possibly assisting courts in the contextual approach to interpreting s 91(24).[89]

As I have argued elsewhere,[90] governmental obligations to First Nations peoples include: preventing the perpetuation of the "historical injustice suffered by aboriginal peoples at the hands of colonizers,"[91] not imposing unjustifiably

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*v Sioui*, [1990] 1 SCR 1025 at 1038, 70 DLR (4th) 427 (CanLII) [*Sioui*]; *R v Powley*, 2003 SCC 43 at para 11, [2003] 2 SCR 207 (CanLII).

[85] Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Supply and Services Canada, 1993) [RCAP, Partners in Confederation].

[86] John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 SCLR (2d) 351 (QL).

[87] *Chippewas of Sarnia Band v Canada (AG)*, 51 OR (3d) 641, 195 DLR (4th) 135 at para 56 (CA) (CanLII). See also John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 125 where nation-to-nation commitments related to the Treaty of Niagara are outlined as follows:

> [T]hrough participation and consent, the Anishinabek and the Crown representatives created a pattern to follow in 'constituting' their relations. The principles include, among others the recognition of Aboriginal governance, free trade, open migration, respect for Aboriginal land holdings, affirmation of Aboriginal permission and consent in treaty matters, criminal justice protections, military assistance, respect for hunting and fishing rights and adherence to principles of peace and friendship.

[88] Catherine Bell, "Métis Constitutional Rights in Section 35(1)" (1997) 36:1 Alta L Rev 180 at 185 (QL):

> Rights arising from peoplehood are uncertain because the word 'peoples' is not defined in Canadian constitutional law and minimal domestic judicial opinion has been rendered on this point. However, it is a term which was used frequently in international political discourse at the time s. 35 was negotiated to distinguish colonized indigenous populations from nation states and ethnic minority immigrant populations within those states.

[89] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69–71, 174 DLR (4th) 193 (CanLII).

[90] Borrows, "Let Obligations be Done", *supra* note 5 at 206.

[91] *R v Côté*, [1996] 3 SCR 139 at para 53, 138 DLR (4th) 385 (CanLII) [*Côté*]:

> … a static and retrospective interpretation of s. 35(1) cannot be reconciled with the noble and prospective purpose of the constitutional entrenchment of aboriginal and treaty rights in the *Constitution Act, 1982*. Indeed, the respondent's proposed interpretation risks undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies. To quote the words of Brennan J. in *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1 (H.C.), at p. 42:
>
>> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.

unreasonable limitations on rights,[92] not imposing unjustifiably undue hardships on the exercise of rights,[93] not unjustifiably denying Aboriginal peoples their preferred means of exercising rights,[94] minimally impairing Aboriginal rights,[95] allocating resources to Aboriginal peoples in cases where rights would be infringed,[96] conserving resources for Aboriginal peoples where rights would be infringed,[97] protecting the safety of Aboriginal rights users,[98] ensuring economic and regional fairness when infringing Aboriginal rights,[99] appropriately structuring administrative discretion in relation to Aboriginal peoples,[100] giving priority to Aboriginal peoples when rights are infringed (which varies with the nature of right),[101] providing for Aboriginal participation in resource development when rights are infringed,[102] reducing economic barriers for Aboriginal peoples when rights are infringed,[103] and not violating Aboriginal individuals' *Charter* rights.[104] Additional obligations include: recognition, affirmation, reconciliation,[105] non-extinguishment of rights without consent,[106] compensation,[107] consultation,[108] accommodation,[109]

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[92] *Sparrow*, *supra* note 30 at 1112.

[93] *Ibid*.

[94] *Ibid*.

[95] *Ibid*. See also generally *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746 (CanLII).

[96] *Sparrow*, *supra* note 30 at 1117: "The appellants have, to employ the words of their counsel, a 'right to share in the available resource'." See also *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 167, 153 DLR (4th) 193 (CanLII) [*Delgamuukw*], "that the conferral of fee simples for agriculture, and of leases and licenses for forestry and mining reflect the prior occupation of aboriginal title lands."

[97] *Sparrow*, *supra* note 30 at 1115–1117.

[98] For judicial statements that Aboriginal rights must be exercised in a way that does not endanger the safety of others, see, e.g., *R v Sundown*, [1999] 1 SCR 393 at para 26, 170 DLR (4th) 385 (CanLII); *R v Badger*, [1996] 1 SCR 771 at paras 88–92, 133 DLR (4th) 324 (CanLII) [*Badger*].

[99] *Delgamuukw*, *supra* note 96 at para 161, quoting *Gladstone*, *supra* note 83 at para 75: "legitimate government objectives also include 'the pursuit of economic and regional fairness' and 'the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups.'"

[100] "In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance." *R v Adams*, [1996] 3 SCR 101 at para 54, 138 DLR (4th) 657 (CanLII) [*Adams*].

[101] *Gladstone*, *supra* note 83 at paras 59–80.

[102] *Delgamuukw*, *supra* note 96 at para 167.

[103] *Ibid*.

[104] See, e.g., *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1 (CanLII).

[105] See *Mikisew Cree First Nation*, *supra* note 69 at para 1: "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions." Reconciliation comes from Latin roots *re*, meaning 'again'; *con*, meaning 'with'; and *sella*, meaning 'seat'. Reconciliation, therefore, literally means 'to sit again with'.

[106] *R v Marshall; R v Bernard*, 2005 SCC 43 at para 39, [2005] 2 SCR 220 (CanLII) [*Marshall; Bernard*]: "Prior to constitutionalization of aboriginal rights in 1982, aboriginal title could be extinguished by

administrative law procedural safeguards,[110] legislative dispute resolution mechanisms,[111] and mitigation strategies.[112] Due to the joint existence of Aboriginal rights *and* government obligations, Parliament should not be able to do as it pleases when it comes to Indigenous peoples.

Thus, since the *Indian Act* touches many activities that may be protected as Aboriginal and treaty rights (land, governance, education, family organization, etc.), federal obligations should constrain the government's scope for action when legislating in relation to matters currently covered by the *Indian Act*. The infringement of Aboriginal or treaty rights likely occurs when federal action is taken over issues related to Indian status, reserve rights, succession rules, political organization, economic development and education. These are all areas that should be considered unextinguished Aboriginal or treaty rights. Each field could be

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clear legislative act (see *Van der Peet*, [*supra* note 11] at para. 125). Now that is not possible." See also Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33:2 Ottawa L Rev 301 (QL) [McNeil, "Extinguishment of Aboriginal Title in Canada"].

[107] *Delgamuukw*, *supra* note 96 at para 169:

> The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in *Sparrow*[, *supra* note 30] and which I repeated in *Gladstone*[, *supra* note 83]. Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights: *Guerin*[, *infra* note 144]. In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.

See also *Sparrow*, *supra* note 30 at 1119.

[108] "The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown": *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 16, [2004] 3 SCR 511 [*Haida*].

[109] *Ibid* at paras 49–50:

> The terms 'accommodate' and 'accommodation' have been defined as to 'adapt, harmonize, reconcile' … 'an adjustment or adaptation to suit a special or different purpose … a convenient arrangement; a settlement or compromise': *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. […] The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *R. v. Sioui*, [*supra* note 84] at p. 1072, the Court stated that the Crown bears the burden of proving that its occupancy of lands 'cannot be accommodated to reasonable exercise of the Hurons' rights'. And in *R. v. Côté*, [*supra* note 91] at para. 81, the Court spoke of whether restrictions on Aboriginal rights 'can be accommodated with the Crown's special fiduciary relationship with First Nations'. Balance and compromise are inherent in the notion of reconciliation.

[110] *Ibid* at para 51; *Adams*, *supra* note 100 at para 54.

[111] *Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 SCR 585 (CanLII); *Haida*, *supra* note 108 at para 44: "The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases."

[112] See, e.g., *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 44, [2004] 3 SCR 550 (CanLII).

considered "integral to the distinctive culture" of Indians under the *Van der Peet* test,[113] and thus protected under section 35(1) of the *Constitution Act, 1982*. This way, rights discourse could be of greater use to Indians, despite the contingent, non-universal status of rights. Rights can lead to authoritative proclamations in our present context because governments have chosen to bind themselves to their non-discriminatory interpretation and application.

## III. Questioning Extinguishment in Canadian Law

Despite the potential infringement of Aboriginal or treaty rights by the *Indian Act*, some may argue Indians' rights were extinguished by past government action before 1982. This colonial and oppressive argument assumes that Indigenous rights, interests, responsibilities and possessions could be legitimately terminated by unilateral government action prior to the enactment of section 35(1). The notion that Indigenous peoples' ways of life can disappear through government action replicates troubling stereotypes.[114] It assumes there was something inferior, incompatible, less desirable or less worthy about Indigenous rights before they were given explicit protection. In the Aboriginal rights context, extinguishment is an offensive doctrinal concept that builds upon and entrenches discriminatory assumptions and stereotypes. It should be overturned. If properly deployed, rights could be an important step in discarding Canada's colonial past. Rights discourse could challenge abstract concepts about what it means to be Indigenous in Canada; Indigenous peoples are often portrayed as past-tense peoples in Canada.[115]

Unfortunately, the Supreme Court of Canada has not developed non-discriminatory interpretations of extinguishment. In fact, the very first Aboriginal rights case decided under section 35(1) boldly reaffirmed extinguishment and ushered this doctrine into the heart of Canadian constitutional law under the *Constitution Act, 1982*.[116] In *Sparrow*, the Court was asked to consider the meaning of 'existing' in the phrase 'existing Aboriginal and treaty rights', as written within section 35(1). In endorsing extinguishment, the Court wrote that:

> The word 'existing' makes it clear that the rights to which s. 35(1) applied are those that were in existence when the Constitution Act, 1982 came into effect. This means that extinguished rights are not revived by the

[113] *Van der Peet*, *supra* note 11 at para 46.

[114] Roy Harvey Pearce, *Savagism and Civilization: A Study of the Indian and the American Mind* (Los Angeles: University of California Press, 1988); Berry Brewton, "The Myth of the Vanishing Indian" (1960) 21:1 Phylon 51.

[115] Unfortunately, in its initial formulation, the Supreme Court of Canada failed on precisely these grounds, as it defined Aboriginal rights in a past-tense fashion. See John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22:1 Am Indian L Rev 37.

[116] Extinguishment was a part of Canadian law prior to 1982. See McNeil, "Extinguishment of Aboriginal Title in Canada", *supra* note 106 at 316–326.

> Constitution Act, 1982. A number of courts have taken the position that the word 'existing' means being in actuality in 1982.[117]

In my view, this is the most troubling paragraph ever penned by the Supreme Court of Canada. These three sentences may have done more to terminate Aboriginal rights than any other single action in Canadian history. The Court swallowed a host of troubling pre-1982 assumptions regarding extinguishment when it ruled that the word 'existing' did not 'revive' rights.[118] In saying that rights cannot be revived, the Court assumed that they were already extinct due to prior government action.[119]

The affirmation of the government's power to unilaterally extinguish Aboriginal rights prior to 1982 is a wide-ranging ratification of past injustices.[120] In this light it is difficult to regard *Sparrow* as a victory for Aboriginal peoples.[121] While *Sparrow* importantly constrained Crown sovereignty post-1982, the case is ultimately a huge loss for Aboriginal peoples in a broader context. With a few keystrokes, the Supreme Court of Canada potentially erased existing powers that were—and should still be—held by Aboriginal peoples despite the Crown's attempts to expunge such activities. Indigenous peoples could spend the next 100 years arguing for Aboriginal rights under the seemingly more generous *Sparrow* framework, only to discover that most of their rights are off-limits to constitutional protection because of these three superficially innocuous sentences.

It is not clear why the Court accepted the Crown's point of view regarding extinguishment. The Court did not have to rule this way; it could have rejected extinguishment. It could have held that extinguishment has always been unconstitutional, regardless of the date the Crown claimed to exercise this power. After all, the body deciding *Sparrow* is the *Supreme* Court of Canada—it did not have to accept lower court opinions about extinguishment. In the same case the Court held that section 35(1) was "not just a codification of the case law on aboriginal rights that had accumulated by 1982."[122] The Court could thus have deviated from the case law and rejected historic acts of extinguishment.

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[117] *Sparrow*, *supra* note 30.

[118] In *Van der Peet*, *supra* note 11 at para 28, the Supreme Court of Canada reaffirmed the idea that "[a]t common law aboriginal rights did not, of course, have constitutional status, with the result that Parliament could, at any time, extinguish or regulate those rights".

[119] Alternative arguments could have been developed which recharacterized extinguishment as restriction. For example, the United States Supreme Court was able to eventually develop arguments that inherent rights that were recognized and affirmed could revive Indigenous powers that were previously considered to be restricted. See *United States v Lara*, 541 US 193 (2004) at 199–200, 124 S Ct 1628.

[120] For a discussion of how courts in the United States have concluded Indigenous rights are extinguished, see Joseph William Singer, "Well Settled?: The Increasing Weight of History in American Indian Land Claims" (1994) 28:2 Ga L Rev 481.

[121] For a positive assessment regarding the potential of the *Sparrow* case, see RCAP, *Partners in Confederation*, *supra* note 85 at 31. For a contrary opinion commenting on the limitations of the *Sparrow* decision, see WIC Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15:2 Queen's LJ 217.

[122] *Sparrow*, *supra* note 30 at 1106, quoting Lyon, "Constitutional Interpretation", *supra* note 74 at 100.

The Court's approach to the 'idea' of extinguishment also seems contrary to the trajectory of contemporary rights discourse. Extinguishment is not an acceptable part of international Indigenous human rights law.[123] Nor does extinguishment have a place in general Canadian Charter jurisprudence. It is difficult to imagine that courts would sanction past extinguishment of rights to religion, association, life, liberty, security, equality and the like before the Charter came into being. One wonders why it was so easy for the Court to accept the extinguishment of Aboriginal rights without detailed explanation. Though rights are not universal and beyond question, Aboriginal rights are just as important to Indigenous peoples as Charter rights are to other people.

## IV. THE *INDIAN ACT* AND EXTINGUISHMENT

As we have seen, if the extinguishment of Aboriginal or treaty rights is constitutionally permissible, then Indigenous peoples are forced onto unequal ground when arguing for their rights post-1982. Most Indigenous Nations would not be willing to concede the justice of extinguishment at any time during Canadian history. Endorsing this doctrine is not an acceptable political option. Nevertheless, rights discourse often pushes parties onto narrower grounds by forcing them into arguments 'in the alternative'. This demonstrates that rights are deficient. They are impure. They can be deeply unjust. We should check our propensity to place faith in their

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[123] The *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/295 (2007), contains provisions that can be read as disapproving of extinguishment, including the following:

> Article 8
>
> Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
>
> States shall provide effective mechanisms for prevention of, and redress for:
>
>> Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
>>
>> Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
>>
>> Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
>>
>> Any form of forced
>>
>> …
>
> *Article 28*
>
> 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
>
> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

unsullied application. Rights are not the product of pure reason; as such, rights are flawed, and we must deal with their flaws.

Thus, arguments 'in the alternative' may be made to limit the effect of the law's flawed reasoning concerning extinguishment. As a result, First Nations who challenge the *Indian Act* may feel compelled to make arguments that offend their sensibilities. For some, these 'in the alternative' arguments may unfortunately imply and seemingly concede that the government possessed a unilateral power of extinguishment prior to 1982. For example, arguing that rights were not properly extinguished in this instance may appear to suggest that rights *could be* properly extinguished in other circumstances. While I would make no such concession, those who deploy rights discourse must face this criticism. Making 'in the alternative' arguments 'without prejudice' does not necessarily avoid the problematic framing of such arguments.

Despite these problems, I will now argue that governments have not 'properly' extinguished Aboriginal rights when dealing with matters touched upon by the *Indian Act*, even though I do not concede that the government has the broader power to extinguish any Aboriginal rights at any time, in any context. This may appear to be a confusing and contradictory way to argue, particularly for readers without legal training. I confess that the practice is confusing and contradictory if taken literally. That said, Canadian legal strategies related to rights discourse cannot always be taken literally. Law is not a field based on so-called 'pure reason'. As readers will note, I have been questioning structural determinism through this article. I also do this in my work more generally. While we must always be attentive to unequal and discriminatory power dynamics, my view is that we must not take absolutist positions. We must remain aware that Canadian law accommodates tensions and potentially conflicting positions by maintaining the fiction that advancing a lesser position does not always concede a larger point. As I have been arguing, rights are ultimately rooted in practice, not in some idealized metaphysical form. The contingency of rights discourse helps us to use rights as important tools for argumentation while not requiring us to slavishly accept rights as higher intellectual forms. This is what makes rights discourse both liberating and limiting. I acknowledge these limitations while trying to work around them to achieve a more liberating result. I invoke Aboriginal rights to challenge so-called government extinguishment—not to prove there is an authentic essence to rights, but to enhance Indigenous freedom through a practice that situates Indigenous philosophy in the lived, grounded, physical realm.

### A. Tests for Extinguishment: What Constitutes Clear and Plain Intent?

While First Nations may be ushered onto tenuous ground in arguing that their rights were not 'properly' extinguished, there are some safeguards in place to challenge the government's claim to this power. My 'in the alternative' argument against extinguishment is built on three important premises drawn from existing legal discourse.

- First, the Crown has the onus of proving that it clearly and plainly intended to extinguish an Aboriginal or treaty right.[124]

- Second, the government will not be able to lightly imply extinguishment because the Supreme Court of Canada has acknowledged that "[t]he 'clear and plain' hurdle for extinguishment is… quite high."[125]

- Third, the government needs an explicit statement of extinguishment prior to 1982 if such rights are to be constitutionally incapable of revival (under our current limited framework).

If First Nations can demonstrate that the Crown has not met these standards in relation to the *Indian Act*, my arguments in the paragraphs to come could illustrate the importance of rights discourse in facilitating Indigenous freedom, despite their imperfections and limitations.

Three possible tests for extinguishment are:

1) sovereign incompatibility,
2) actual consideration of the conflict, and
3) an explicit statement concerning extinguishment.

These three standards are not exhaustive, but they do track the ways in which the Supreme Court of Canada has commented on this issue. The third standard is the most appropriate test for extinguishment, which requires an explicit statement concerning the extinguishment of Indigenous rights. This standard is the one that accords with Canada's democratic values and promotes the greatest freedom in the circumstances. I also believe this standard is most consistent with the surrounding jurisprudential framework and it aligns with interpretations of sections 91(24) and 35(1) discussed above. Nevertheless, I will now discuss all three standards in the following paragraphs.

### 1. Sovereign Incompatibility

The standard of sovereign incompatibility would be a poor standard upon which to construct a test for the extinguishment of Aboriginal or treaty rights. It gives the Crown the widest possible scope in undermining Indigenous freedoms and is not a high hurdle for the Crown to clear. According to a thin line of authority from the Supreme Court, an Aboriginal or treaty right would be extinguished under the sovereign incompatibility test if such a right was "inconsistent with the new relationship" Aboriginal peoples experienced when others arrived in their lands.[126] Under this test rights could be extinguished through the mere assertion of Canadian

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[124] *Sparrow*, *supra* note 30 at 1099.

[125] *Van der Peet*, *supra* note 11 at para 133, Lamer CJC.

[126] *Mitchell v Minister of National Revenue*, 2001 SCC 33 at para 150, [2001] 1 SCR 911 (CanLII) [*Mitchell*], quoting RCAP, *Partners in Confederation*, *supra* note 85 at 23.

law, without any need to attend to democratic aspirations underlying Canada's constitutional order. As noted in *Mabo v Queensland (No 2)*, an Australian case, "[i]t would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects…, its first fruits were to strip them of their rights."[127]

Intent to extinguish must be unambiguous and certain—not implied, refracted and complex. Conjecture about the policy reasons behind extinguishment should never be a substitute for direct, unequivocal legislative expression. The judicial role requires the legislature and not the courts to declare whether Aboriginal rights were extinguished prior to 1982. Furthermore, the sovereign incompatibility approach should be unnecessary in an era of constitutional interpretation where overlapping spheres,[128] rather than watertight compartments,[129] characterize the scope of jurisdictional power in Canada's Constitution. In searching for reconciliation very little inconsistency between Crown and Aboriginal rights and interests should be found.[130] Consistency and harmonization between political actors in Canada should be the norm.[131] Fortunately, though courts have entertained the idea, they have never ruled that extinguishment can be satisfied through sovereign incompatibility. As Chief Justice McLachlin wrote in *Mitchell*: "This Court has not expressly invoked the doctrine of 'sovereign incompatibility' in defining the rights protected under s. 35(1)."[132]

### 2. Actual Consideration of the Conflict

Another test the courts might use to assess the Crown's intention to extinguish is whether there is evidence of an actual consideration of a conflict between Aboriginal

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[127] *Mabo v Queensland (No 2)* (1992), 175 CLR 1 at para 38, [1992] HCA 23, Brennan J (AustLII).

[128] *Starr v Houlden*, [1990] 1 SCR 1366, 72 OR (2d) 701 (CanLII).

[129] *Canada (AG) v Ontario (AG) (The Labour Conventions Reference)*, [1937] AC 326 at 354, [1937] 1 DLR 673 (JCPC).

[130] The Supreme Court of Canada has developed doctrines that permit a great deal of overlap. See *Ross v Registrar of Motor Vehicles*, [1975] 1 SCR 5, 42 DLR (3d) 68 (CanLII); *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161, 138 DLR (3d) 1 (CanLII). For a somewhat contrary view, see *Bank of Montreal v Hall*, [1990] 1 SCR 121, 65 DLR (4th) 361 (CanLII) [*Hall*], though the effect of *Hall* was reinterpreted and somewhat attenuated in *Husky Oil Operations Ltd v Minister National Revenue*, [1995] 3 SCR 453, 26 OR (3d) 81 (CanLII). However, the Supreme Court has since returned to its *Hall* analysis in *Law Society of British Columbia v Mangat*, 2001 SCC 67, [2001] 3 SCR 113 (CanLII), and *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241 (CanLII).

[131] See John Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38:2 UBC L Rev 285 at 308–312 [Borrows, "Tracking Trajectories"]; Joel Bakan et al, *Canadian Constitutional Law*, 3rd ed (Toronto: Emond Montgomery, 2003) at 254–255.

[132] *Mitchell*, *supra* note 126 at para 63. However, Justice Binnie, in his concurring opinion, was willing to find this doctrine could extinguish Aboriginal rights by the assertion of Crown sovereignty. He wrote, *ibid* at para 154: "In my opinion, sovereign incompatibility continues to be an element in the s. 35(1) analysis, albeit a limitation that will be sparingly applied." Furthermore, Chief Justice McLachlin was also willing to find that sovereign incompatibility could limit Aboriginal rights: *ibid* at paras 10, 62.

or treaty rights and the legislation in question. In her dissent in *Van der Peet*, Justice McLachlin (as she then was) wrote that

> … [t]he Canadian test for extinguishment of aboriginal rights borrows from the American test, enunciated in *United States v. Dion*, 476 U.S. 734 (1986), at pp. 739-40: "[w]hat is essential [to satisfy the "clear and plain" test] is clear evidence that [the government] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty" or right.[133]

A review of the *Dion* case reveals that Aboriginal rights can be extinguished if "upon reading the legislative history as a whole… Congress… believed that it was abrogating the rights of Indians…"[134]

The *Dion* case's formulation and application of the clear and plain test has been strongly criticized as a significant departure from long-standing standards that were more protective of Indian rights.[135] The leading commentary on Indigenous legal issues in the United States, *Cohen's Handbook of Federal Indian Law*, contains these cautions about *Dion*: "Despite its own test that Congress must have considered the conflict between the statute and the treaty [at issue], the Court cited no evidence that Congress had in fact considered reserved treaty rights."[136] The issue in the *Dion* case was whether the *Bald Eagle Protection Act*[137] and *Endangered Species Act*[138] were clearly and plainly abrogated by Congress such that Dwight Dion Jr. was prohibited from taking eagles on his reservation. The Court found Mr. Dion's rights were extinguished, even though it could not point to anything explicit on the face of the legislation or in the legislative record. Instead, the Court relied on "a *reflection of an understanding*" to determine that Indian rights to take eagles on their land were extinguished.[139] In effect, the Court said that Congress did not actually consider the conflict. It nevertheless implied that extinguishment occurred through inference—as a result of a 'reflected understanding'. This is a slender thread of reasoning. It should not be used to justify extinguishment.

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[133] *Van der Peet*, *supra* note 11 at para 286, McLachlin J dissenting.

[134] *United States v Dion*, 476 US 734 (1986) at 742 [*Dion*]. However, the *Dion* court also wrote that an "[e]xplicit statement by Congress is preferable," but not "a *per se* rule": *ibid* at 739. See *Minnesota v Mille Lacs Band of Chippewa Indians*, 526 US 172 (1999) at 203 for an example where the application of the *Dion* test did not result in a finding of extinguishment.

[135] Robert A Williams Jr, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005).

[136] Nell Jessup Newton, ed, *Cohen's Handbook of Federal Indian Law (2005 ed)* (Newark, NJ: LexisNexis, 2005) at 1158, n 301.

[137] 54 Stat 250, 16 USC § 668 *et seq*.

[138] 87 Stat 884, as amended, 16 USC § 1531 *et seq* (1982 ed and Supp II).

[139] *Dion*, *supra* note 134 at 741 [emphasis added].

Extinguishing ancient ways of life on something as seemingly ephemeral as a 'reflected understanding' does not meet the "strict" standards of proof required of the Crown in Canada, where "statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."[140] Canadian courts can do better than American courts on this front. Thus, the courts should reexamine the notion that the "Canadian test for extinguishment of aboriginal rights borrows from the American test, enunciated in *United States v. Dion*."[141] Courts should call into question the view that express language is not necessary to extinguish Aboriginal rights. As the *Dion* case illustrates, an actual consideration of a conflict is insufficiently clear and plain as a method of extinguishment when the Crown's honour is a stake.

### 3. Explicit Statement

The explicit statement standard was articulated by Justice L'Heureux-Dubé in her dissenting opinion in *R v NTC Smokehouse Ltd.*: "Clear and plain means that the government must address the aboriginal activities in question and explicitly extinguish them by making them no longer permissible."[142]

While not a majority judgment, this opinion conceives of a relationship between Indigenous peoples and the Crown characterized by principles of honour and trust-like affinity. A trustee would not lightly extinguish the rights of its beneficiary. One of the overarching principles in section 35(1) is that Aboriginal peoples should be treated "with good faith," evincing a resolve to uphold the Crown's 'honour'.[143] The canons of construction requiring high standards from the Crown exist because of the discretion the Crown can exercise in relation to Aboriginal interests.[144] These canons existed even before the *Constitution Act, 1982* came into effect.[145] The courts have put teeth into these rules of construction because their strict application best facilitates "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[146]

The jurisprudential high-water mark for the test for extinguishment requiring an explicit statement comes from *Menominee Tribe of Indians v United States* from the United States Supreme Court in 1968.[147] The issue in the *Menominee*

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[140] *Nowegijick v The Queen*, [1983] 1 SCR 29, 144 DLR (3d) 193 (CanLII) [*Nowegijick* cited to SCR].

[141] *Van der Peet*, *supra* note 11 at para 286, McLachlin J dissenting.

[142] *R v NTC Smokehouse*, [1996] 2 SCR 672 at para 78, 137 DLR (4th) 528 (CanLII), L'Heureux-Dubé J dissenting [*NTC Smokehouse*].

[143] *Haida*, *supra* note 108.

[144] *Guerin v The Queen*, [1984] 2 SCR 335, 13 DLR (4th) 321 (CanLII) [*Guerin*].

[145] *Nowegijick*, *supra* note 140 at 36, where the Court wrote "that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."

[146] *Delgamuukw*, *supra* note 96 at para 186, quoting *Van der Peet*, *supra* note 11 at para 31.

[147] 391 US 404 (1968), 88 SCt 1705 [*Menominee*].

case was whether the *Menominee Termination Act*[148] of 1954, which ended the tribe's special relationship with the federal government, extinguished their treaty hunting and fishing rights. Despite Congress' clear intent to get rid of the Menominee as a political unit, Congress did not mention the tribe's hunting and fishing rights in the *Termination Act*. Context alone was insufficient to extinguish their rights. More than a "reflected understanding" was needed. Justice Douglas wrote for the Court: "we decline to construe the *Termination Act* as a backhanded way of abrogating the hunting and fishing rights of these Indians."[149] The Court concluded the intention to abrogate is not to be lightly implied. Canadian courts have also held that extinguishment is not to be lightly implied.[150] As the Supreme Court of Canada wrote in the *Haida* case:

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably.[151]

As the preceding cases affirm, courts should require "strict" proof of extinguishment when considering Indian rights. The standard for extinguishment is "quite high". The Court should be "generous" toward the Indians, and construe extinguishment in the "narrowest possible manner against the Indians. This approach is most consistent with preserving the Crown's honour (in the absence abandoning the doctrine

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[148] 1954, 68 Stat 250, codified at 25 USC §§ 891–902 [*Termination Act*].

[149] *Menominee*, *supra* note 147 at 412.

[150] *Simon v The Queen*, [1985] 2 SCR 387 at 406, 24 DLR (4th) 390, citing *United States v Santa Fe Pacific Railroad Company*, 314 US 349 (1941) at 354. Note that while the Supreme Court of Canada has accepted the clear and plain intent to extinguish test from the *Santa Fe* case, the Court has not applied the loose construction of extinguishment in *Santa Fe* to Aboriginal rights cases. See *Gladstone*, *supra* note 83 at para 25:

> In the case at bar, the respondent argues that the test is met when the aboriginal right and the activities contemplated by the legislation cannot co-exist. Such an approach, based on the view adopted by the United States Supreme Court in *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941), is irreconcilable with the "clear and plain intention" test favoured in Canada.

Justice L'Heureux-Dubé (dissenting on another matter) also made this point clear in *NTC Smokehouse*, *supra* note 142 at para 78:

> *Sparrow* specifically stands for the proposition that the intention to extinguish must nonetheless be clear and plain. This is diametrically opposed to the position that extinguishment may be achieved by merely regulating an activity or that legislation necessarily inconsistent with the continued enjoyment of an aboriginal right can be deemed to extinguish it. Clear and plain means that the government must address the aboriginal activities in question and explicitly extinguish them by making them no longer permissible. [emphasis in original]

[151] *Haida*, *supra* note 108 at para 17.

altogether).[152] If extinguishment is going to be a part of Canadian law, the explicit statement test is the one that is most consistent with a free and democratic society.

### B. Regulation of Aboriginal Rights by the *Indian Act* is Not Extinguishment

The preceding section identified the most appropriate test for the extinguishment of Aboriginal rights, if extinguishment remains a part of Canadian law. The purpose of this argument was threefold: to identify the limitations of rights discourse, to show that rights may nevertheless be valuable to Indigenous peoples, and to apply rights discourse by challenging potential arguments related to extinguishment of Aboriginal rights under the *Indian Act*. In particular, I argued that governments could not extinguish rights without an explicit statement. In this section I will further develop this point and apply the explicit statement test to the *Indian Act* to demonstrate that this statute did not extinguish Aboriginal or treaty rights.

In applying the 'explicit statement' extinguishment test, I now want to make the case that nothing in the *Indian Act* or its detailed regulations demonstrates a clear and plain intention to extinguish Aboriginal or treaty rights to band membership, reserve lands, succession rules, band governance, economic development, or education. In fact, there is significant ambiguity on each point which is fatal to a finding of extinguishment. The foregoing arguments support my continuing use of rights discourse to expand Indigenous freedom when dealing with the *Indian Act*. I will now examine specific provisions of the *Act* to show that they do not clearly and plainly extinguish Aboriginal rights in relation to the matters which they regulate.

For example, the fact that the *Indian Act* includes express provisions that permit the Minister of Indian Affairs to "perform and exercise any of the duties, powers and functions that may be or are required" under the *Act*,[153] does not reveal a clear intention to extinguish. These provisions could be simply seen as regulating Indian lands and relationships, not as defining underlying rights. The Supreme Court of Canada analogously wrote in regard to fishing rights in *Sparrow*: "That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished."[154] Thus, the federal Minister of Indian Affairs' powers in relation to matters covered by the *Indian Act* prior to 1982 could be classified as powers of mere regulation, which could not extinguish those underlying rights upon which the *Act* touches.

Subsection 2(1) of the *Indian Act* is also ambiguous regarding the government's role in explicitly extinguishing Aboriginal or treaty rights. Section 2 defines an Indian 'band' as a "body of Indians" and states that an Indian band

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[152] *Badger*, *supra* note 98 at para 41: "Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown."

[153] *Indian Act*, *supra* note 18, s 3(2).

[154] *Sparrow*, *supra* note 30 at 1097.

council can be "chosen according to the custom of the band."[155] One in three Indian bands has chosen to organize their political affairs in accordance with their own customs.[156] The fact that Indian bands continue to function under a degree of their own inherent authority demonstrates that, rather than extinguishing Indian governance, the *Indian Act* explicitly recognized and affirmed pre-existing governance powers. When bands operate by custom, they do so in accordance with older powers which existed prior to federal legislative intervention. Since federal legislation acknowledges and builds upon inherent customary powers, it would be improper to find a clear and plain intention to extinguish Indian rights in such circumstances.

Furthermore, *Indian Act* regulations setting out procedures for conducting Band Council meetings do not contain any explicit statement extinguishing First Nations governance rights.[157] In fact, depending on the integral governance customs of the Band, the *Indian Act*'s regulation of Band meetings could be construed by some First Nations as unreasonable, as denying their preferred means of exercising their rights, or as causing undue hardship under the *Sparrow* test. If a court found that self-government was infringed through band council regulations, the government would have to justify such infringements in an honourable way and in accordance with a valid legislative objective. In evaluating whether such infringement might be found it is helpful to briefly review the status of self-government in Canadian law.

Courts have found that Aboriginal peoples exercised governance powers in what is now Canada prior to Crown assertions of sovereignty.[158] In *Calder v British Columbia (AG)*, Justice Judson observed that "the fact is that when the settlers came, the Indians were there, *organized in societies* and occupying the land as their forefathers had done for centuries."[159] Organization is essential to governance. The fact that Aboriginal peoples were "organized in societies" prior to European arrival implies that Aboriginal governance was an important element of their 'pre-contact' societies.[160] It demonstrates that their power of self-organization pre-existed the Crown's assertion of sovereignty and was in fact strong enough for Aboriginal peoples to secure land rights. These governance powers were not voluntarily

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[155] *Indian Act*, *supra* note 18, s 2 (definitions of 'band', 'council of the band').

[156] Shin Imai, *The 2006 Annotated Indian Act and Aboriginal Constitutional Provisions* (Toronto: Thomson Carswell, 2005) at 15.

[157] *Indian Band Council Procedures Regulations*, CRC, c 950 (1978).

[158] In *Sioui*, *supra* note 84 at para 69, Chief Justice Lamer observed that Imperial powers treated Indians as independent nations. Arguments in this paragraph can be found in Borrows, "Tracking Trajectories", *supra* note 131.

[159] *Calder v British Columbia (AG)*, [1973] SCR 313 at 328, 34 DLR (3d) 145 (CanLII) [emphasis added].

[160] The reserved rights theory of Aboriginal governance is also consistent with the proposition articulated in *Van der Peet*, *supra* note 11 at para 30, where Chief Justice Lamer held that Aboriginal rights exist in section 35 because "when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries" [emphasis in original].

surrendered by the Crown's assertion of sovereignty.[161] Aboriginal peoples continued to exercise their powers of governance after the Crown's assertion of sovereignty in many ways.[162] These powers are evident in matters internal to their societies and in their external relationships with Canada, through treaties, trade and conflict.[163] First Nations continue to live in organized societies down to the present day. They are governed by ancient and contemporary customs, laws and traditions that give meaning and purpose to their lives,[164] though there has been extensive regulation of these powers through instruments such as the *Indian Act*.[165]

The *Pamajewon* case would place the burden of proof for Aboriginal governance on Aboriginal peoples.[166] The Court in *Pamajewon* seemed to say that Aboriginal self-government could only exist if the practice over which governance was being claimed has continuity with a practice that was integral to their distinctive culture at the time Europeans arrived.[167] This test would require that Aboriginal peoples introduce detailed evidence to demonstrate a continuity between the practice they seek to regulate in the contemporary era with a practice that was integral to their distinctive culture prior to the arrival of Europeans.

While this is certainly one view of the matter, it is possible to argue that the Court did not completely settle the standard of proof for Aboriginal governance in *Pamajewon*. The courts may yet accept presumptions concerning the continued

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[161] However, it has been held that 'discovery' diminished Indian rights to land: see *Guerin*, *supra* note 144.

[162] In *Sioui*, the Supreme Court of Canada accepted the idea that Aboriginal governance was multifaceted, even after the assertion of sovereignty. Writing for the Court, Justice Lamer wrote that Great Britain "considered [Indian nations] as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged": *Sioui*, *supra* note 84 at 1054, citing *Worcester v State of Georgia*, 31 US (6 Pet) 515 at 548–49 (1832) [emphasis omitted]. Justice Lamer went on to say that, as a result, "[t]he British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible": *Sioui*, *supra* note 84 at 1055.

[163] Borrows, "Genealogy of Law", *supra* note 36. The ability of Aboriginal peoples to exercise their powers of governance through the post-confederation period was demonstrated every time a First Nation signed a treaty. Implied within the Aboriginal treaty-making power is that Indigenous peoples had government authority which could bind the group.

[164] Borrows, "Stewardship", *supra* note 19.

[165] For example, First Nations exercise pre-existing governance powers through the Indian custom council system under the *Indian Act*. 'Band custom' is defined in the *Indian Act*, *supra* note 18 at s 2(i) (definition of 'council of the band'); see also *Bigstone v Big Eagle*, [1992] FCJ No 16, [1993] 1 CNLR 25 (TD) (WL Can).

[166] *Supra* note 17.

[167] Chief Justice Lamer wrote that "claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard": *ibid* at para 24. The 'standard' is that "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right": *Van der Peet*, *supra* note 11 at para 46, Lamer CJC.

existence of Aboriginal governance. In *Delgamuukw*, Chief Justice Lamer expressed some hesitation in applying *Pamajewon* to a claim for self-government: "this is not the right case for the Court to lay down the legal principles to guide future litigation."[168] He further observed: "We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the Court to step into the breach."[169] These words suggest that the Supreme Court has not definitively settled the standard of proof for Aboriginal self-government and that further legal guidance is still needed. Whether the Chief Justice's hesitation to apply the *Pamajewon* test to *Delgamuukw* flows from the complexity of the facts in the *Delgamuukw* case, the need to have a more nuanced test for governance, or both, the fact remains that the Court has not yet issued the last word on Aboriginal governance. As a result, another view of Aboriginal governance is still very much alive in the cases and commentary on this subject.[170]

An example of the wide scope of Aboriginal governance powers was identified in the *Campbell* case coming from British Columbia.[171] The *Campbell* case dealt with the allegation that the Nisga'a Treaty was inconsistent with the division of powers under sections 91 and 92 of the *Constitution Act, 1867*.[172] The position taken by the opponents of the Treaty was that the Treaty was of no force or effect *to the extent* that it purports to provide the Nisga'a Government with legislative jurisdiction, or provides that the Nisga'a Government may make laws that prevail over federal and provincial laws. Justice Williamson ruled against the challenge, finding Aboriginal governance was a constitutionally protected right within the Nisga'a Treaty. He held that Aboriginal governance was a pre-existing right that had not been extinguished either by contact, by the assertion of sovereignty or by the

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[168] *Supra* note 98 at para 170.

[169] *Ibid* at para 171.

[170] The other view of the source of Aboriginal governance is the one developed in this paper to this point, which has also been articulated by the Royal Commission on Aboriginal Peoples: Aboriginal governance is an existing right recognized and affirmed under section 35(1) of the *Constitution Act, 1982*. See *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 167: "[T]he sphere of inherent Aboriginal jurisdiction under section 35(1) of the *Constitution Act, 1982* comprises all matters relating to the good government and welfare of Aboriginal peoples and their territories. This sphere is divided into two sectors: a core and periphery."

[171] *Campbell v British Columbia (AG)*, 2000 BCSC 1123, 189 DLR (4th) 333 (CanLII) [*Campbell*].

[172] Justice Williamson of the British Columbia Supreme Court in *Campbell*, *ibid* at paras 179–181 wrote about the continued existence of Aboriginal governance. As this decision makes clear, Aboriginal rights to governance and jurisdiction were not extinguished prior to or at the time of Confederation, and are not incompatible with Aboriginal governance. When the British Parliament enacted legislation dividing jurisdictional powers in Canada, it did not express any clear or plain intent to extinguish Aboriginal jurisdiction. In the absence of clear and plain intent to extinguish, Aboriginal rights to governance and jurisdiction therefore survived the assertion of British sovereignty. Furthermore, First Nations powers of jurisdiction in British Columbia have not been extinguished since confederation. The province is incapable of extinguishing First Nations jurisdiction, and the federal government has not extinguished this jurisdiction. Aboriginal jurisdictional powers remain despite the division of powers in section 91 and 92 of the *Constitution Act, 1867*.

division of powers under the *Constitution Act, 1867*.[173] Justice Williamson described these protections in the following terms, in discussing the Supreme Court of Canada's approach to the Constitution:

> … the object of the division of powers in ss. 91 and 92 between the federal government and the provinces was not to extinguish diversity (or aboriginal rights), but to ensure that the local and distinct needs of Upper and Lower Canada (Ontario and Quebec) and the maritime provinces were protected in a federal system.
>
> … the [Supreme] Court spoke of the explicit protection for aboriginal and treaty rights in ss. 25 and 35 of the *Constitution Act, l982*, as being consistent with a tradition of respect for minority rights reflecting "an important underlying constitutional value".
>
> The unique relationship between the Crown and aboriginal peoples, then, is [an] underlying constitutional value. …
>
> A consideration of these various observations by the Supreme Court of Canada supports the submission that aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten "underlying values" of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867. The federal-provincial division of powers in 1867 was aimed at a different issue and was a division "internal" to the Crown.[174]

Justice Williamson thus found that Aboriginal governance was protected as an unwritten value underlying Canada's Constitution, consistent with an unwritten constitutional tradition of respect for minority rights, and affirmed as an existing Aboriginal right under section 35(1) of the *Constitution Act, 1982*.[175] This case illustrates that Aboriginal governance can be protected and given broad scope in Canada (even if one unfortunately accepts the view that Crown sovereignty diminished Aboriginal power to a certain extent).[176]

The Royal Commission on Aboriginal Peoples also reviewed the case law and observed that the *Indian Act* did not extinguish these powers. The Commission observed that while the federal legislation "clearly purported to alter the existing

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[173] *Ibid* at paras 68–86.

[174] *Ibid* at paras 78–81.

[175] *Ibid* at paras 70, 81, 180.

[176] The British Columbia Court of Appeal recently upheld a different standard for the existence of Indigenous governance in treaties. See *Sga'nisim Sim'augit (Chief Mountain) v Canada (Attorney General)*, 2013 BCCA 49, 359 DLR (4th) 231 (CanLII). There, the Court of Appeal ruled that Canada and the provinces can delegate elements of their constitutional powers to a First Nation through treaty as long as the governments oversee how these powers are used. At the same time, the Court of Appeal was quick to hold that "[i]t is unnecessary to decide whether some or all of the self-government powers derive from an inherent Aboriginal right": *ibid* at para 8. Thus, the *Sga'nisim* case does not address the central question of whether treaties incorporate inherent rights to self-government. For critical commentary, see Joshua Nichols, "Claims of Sovereignty–Burdens of Occupation: *William* and the Future of Reconciliation" (2015) 48:1 UBC L Rev 221 (QL).

governmental structures of Indian peoples… such measures did not build upon completely new foundations."[177] The Commission found that federal measures "took for granted the existence of Indian nations as distinct political entities" and left intact a degree of their inherent decision-making power. Thus, the Commission concluded that "it does not appear that federal Indian legislation purported to deprive Indian peoples of all governmental authority, even if it severely disrupted and distorted their political structures and left them with very limited powers."[178]

Thus, there are credible arguments in law and fact that Aboriginal governance is an existing Aboriginal right under section 35(1) of the *Constitution*. As I have also tried to briefly sketch, there are also significant arguments that the *Indian Act* has not extinguished Aboriginal governance powers.[179] If these arguments were accepted, future federal actions related to the *Indian Act* could be constrained because section 35(1) modifies federal power when unextinguished Aboriginal or treaty rights are at stake. The federal government should not have free rein when dealing with issues covered by the *Indian Act*; its powers should be constrained to facilitate Indigenous freedom and to further democracy. If rights discourse were employed to assist in these developments it could be argued that the federal government has, *inter alia*, duties of recognition, consultation, accommodation and reconciliation to fulfill if it were to introduce new legislation that affected unextinguished Aboriginal or treaty rights.

If such were the case, the government would have to justify the infringing provisions in the *Indian Act* by demonstrating that their passage accorded with a valid legislative objective and that their enactment preserved the Crown's honour towards the Indians. While the Crown would likely establish that the regulations embraced a valid legislative objective, they may have difficulty proving these regulations accord with the Crown's obligations of reconciliation, consultation and accommodation. In particular, the regulations may be found to be biased towards non-Aboriginal forms of governance and thus lead a Court to conclude that the Crown failed to prevent the perpetuation of the historic injustice suffered by Aboriginal peoples at the hands of colonizers, as required by *Côté*.[180] It would be

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[177] RCAP, *Partners in Confederation*, *supra* note 85 at 35.

[178] *Ibid*.

[179] See Frank Cassidy & Robert L Bish, *Indian Government: Its Meaning in Practice* (Lantzville, BC: Oolichan Books, 1989). Most communities have received the *Indian Act* structure in a complex way, without surrendering their underlying laws and philosophies, though they have been heavily influenced by its regulations. See John Borrows, *Indigenous Legal Traditions in Canada* (Ottawa: Law Commission of Canada, 2006). Perhaps the greatest challenge to the extinguishment of First Nations government through the *Indian Act* is represented by the case *Logan v Styres*, [1959] OWN 361, 20 DLR (2d) 416 (HC) (WL Can) (upholding land surrender under *Indian Act* by those opposed to band council). This is ironic because the Haudenosaunee to whom the case applies are perhaps the most clearly opposed to the Canadian government's assumption of control: Relatively few people vote in band elections, many are allied with traditional government philosophies, and most resist the idea that extinguishment can occur. While the case can be limited in its application to land allocation issues, if expansively applied it could represent a finding of Parliamentary extinguishment of traditional governance powers. In making this determination courts should remember the canons of construction, the honour of the Crown, and the the *Indian Act*'s rejection amongst the Haudenosaunee.

[180] *Côté*, *supra* note 91 at para 53.

unjust to compel First Nations to abandon their cultural governance practices for Parliamentary forms of political organization. Other *Indian Act* sections or regulations could also violate section 35 principles.

When it comes to questions of extinguishment, other *Indian Act* provisions may be considered even more ambiguous than the three paths to extinguishment described previously This would help facilitate governance as we remember that ambiguity in statutory provisions dealing with Indians should be resolved in their favour.[181] An example of ambiguity regarding extinguishment relates to whether the *Indian Act* has extinguished Aboriginal or treaty rights to make decisions concerning land allocation within these communities. Section 20 of the *Indian Act* outlines procedures for possession of reserve lands by individual Indians. These provisions state that "[n]o Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band."[182] This language may lead one to conclude that pre-existing customs related to individual land use are extinguished. However, a couple of points may cast doubt on this assumption and make extinguishment appear less clear and plain.[183]

First, most Indian bands have acted as if the *Indian Act* permitted a choice about how lands were to be used: collectively or individually.[184] Some bands choosing to use land in an individual fashion often adopted certificates of possession. In these cases, bands often allotted lands to individuals who were historically in possession of what later became land parcels under the *Indian Act*. In these circumstances it could be argued that allotment did not extinguish pre-existing allocation rights but merely allowed bands to confirm their traditional land uses.

Second, other bands have acted in accordance with the idea that a 'band' is "a body of Indians,"[185] "for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart."[186] For those bands that have adopted this interpretation, "common" use and benefit is interpreted as allowing their collective land use allocation. The fact that the *Indian Act* allows for the collective ownership and development of band lands implies custom has a role in allocating land use.

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[181] See *Nowegijick*, *supra* note 140 at 36: "statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."

[182] *Indian Act*, *supra* note 18, s 20(1).

[183] One should also note the *First Nations Land Management Act*, SC 1999, c 24, which allows First Nations to control their land allocation by opting out of the *Indian Act*, without Aboriginal or derogating any Aboriginal or treaty rights they may possess.

[184] See generally Tom Flanagan, Christopher Alcantra & André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal & Kingston: McGill-Queen's University Press, 2010) at 73–119.

[185] *Indian Act*, *supra* note 18, s 2(1)(a) (definition of 'band').

[186] *Ibid*.

Third, it is estimated that over half the individually allotted lands on reserves are not held by certificate procedures but in accordance with band customs.[187] Are such people trespassers on their own lands, even though held in accordance with their own customs, if their allotment is not held by a certificate of possession? This cannot be the case. While some judicial decisions hold that custom or band action without more can not grant a legal interest to an individual enforceable under the *Indian Act*,[188] this interpretation has not been universally followed by the courts.[189] Therefore, the better interpretation is that section 20 of the *Indian Act* has not clearly and plainly extinguished Aboriginal or treaty rights to land allocation within reserves.

Both the above governance and land allocation examples demonstrate that the *Indian Act* heavily regulated, but did not extinguish, underlying Aboriginal and treaty rights. The *Act*'s formal provisions point to the inherency and resiliency of First Nations rights.[190] The legislation's actual operation shows that First Nations continue to access their own pre-existing sources of authority to give governance meaning within their communities.[191] Recognizing these interpretations of Canadian legal doctrines related to First Nations' rights affected by the *Indian Act* undermines the legislation's constitutionality and potentially frees them from its restrictive grasp.[192] Thus, even without future amendment or changes to issues covered by the *Indian Act*, the current legislation under section 91(24) of the *Constitution Act, 1867* could be seen as a violation of section 35(1) of the *Constitution Act, 1982* because its provisions unjustifiably infringe Aboriginal and treaty rights. This demonstrates the potential usefulness of rights discourse in facilitating Indigenous freedom in a democratic context.

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[187] Douglas Sanders, "The Present System of Land Ownership" (First Nations Land Ownership Conference delivered at the Justice Institute of British Columbia, Vancouver, 29–30 September 1988) [unpublished].

[188] See, e.g., *Lower Nicola Indian Band v Trans-Canada Displays Ltd*, 2000 BCSC 1209, [2000] BCJ No 1672 (CanLII); *Joe v Findlay*, [1987] 2 CNLR 75, 12 BCLR (2d) 166 (SC) (CanLII).

[189] See, e.g., *George v George*, [1997] 2 CNLR 62, 139 DLR (4th) 53 (BCCA) (CanLII); *Stoney Band v Poucette*, [1999] 3 CNLR 321, 1996 CarswellAlta 1091 (QB) (CanLII), aff'd 1998 ABCA 244 (CanLII).

[190] Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000); Borrows, "Genealogy of Law", *supra* note 36 at 341–351.

[191] Frank Cassidy, ed, *Aboriginal Self-Determination* (Lantzville, BC & Montreal: Oolichan Books & Institute for Research on Public Policy, 1991) at 33–62. Analysis of the constitutionality of the *Indian Act* should pay attention "to the aboriginal perspective itself on the meaning of the rights at stake": *Sparrow*, *supra* note 30 at 1112.

[192] For a discussion of many of these points in a US context, see David E Wilkins & K Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001).

## V. Conclusion

Freedom is a multifaceted, contingent, context-dependent activity that is best pursued as a relational activity. Right discourse fits this pattern if we pursue it as a democratic practice which allows people to recognize and challenge false horizons in their lives. At the same time rights must be used with caution because they can constrain us if they are seen as flowing from universal, essentialized, *a priori* ideas. When rights are poorly developed and then rigidly construed they can severely diminish the scope of freedom because they can appear universally fixed and therefore impossible to change.

On the other hand, if rights were strategically deployed they could challenge the *Indian Act* and other federal actions that purportedly extinguish Aboriginal or treaty rights. First Nations have strong arguments that they possess existing Aboriginal and treaty rights under section 35(1) that are adversely affected by the *Indian Act*. For example, they could argue they have unextinguished rights related to Indian status, reserve land-holding, succession rules, political organization, economic development and education. This article has argued that First Nations could contend that the *Indian Act* invalidly touches on these matters contrary to rights protected under section 35(1).

This article has also tried to make a more general point about the doctrine of extinguishment in Canadian law. Extinguishment without consent is a highly offensive violation of Indigenous peoples' human rights and is contrary to rights discourse more generally. Alternatively, First Nations could argue that the Crown would not be able to prove extinguishment in relation to rights touched by the *Indian Act* because there is no evidence of clear and plain intent to extinguish those rights through the *Act*'s operation. For example, it could be shown that sovereign incompatibility or a mere consideration of conflicts between Aboriginal rights and the *Indian Act* should not satisfy the high standard required to prove extinguishment. Furthermore, it could be argued that extensive regulation under the *Indian Act* of existing Aboriginal and treaty rights also did not amount to extinguishment. In fact, as this article has shown, an examination of the *Indian Act* reveals many sections that recognized and built upon the pre-existing practices, customs and traditions of First Nations societies. As a result, rather than extinguishing Aboriginal and treaty rights, it could be held that the *Indian Act*'s passage and operation may be solid evidence of their continued existence, though they were negatively impacted by the *Act*'s operation. If properly deployed, rights discourse could be an important tool in developing "the rules of law, the techniques of management, and also the ethics, the *ethos*, the practice of the self, which would allow these games of power to be played with a minimum of domination."[193]

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[193] Michel Foucault, "The Ethic of Care for the Self as a Practice of Freedom" in James Bernauer & David Rasmussen, eds, *The Final Foucault* (Cambridge, MA: MIT Press, 1988) 1 at 18, cited in Tully, *Democracy and Civic Freedom*, *supra* note 47 at 121.