

## ***The Rule of Law or Whose Rule of Law?***

During October of 2020 two confrontations involving the rights of indigenous Canadians were major news stories. Each story harkened back to events that occurred many years ago. And in each case it was clear that the underlying issues had not been resolved.

One of these confrontations was between indigenous and non-indigenous fishers in southwest Nova Scotia. The 1999 Supreme Court ruling in *R. v. Marshall* (<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1739/index.do>) confirmed the treaty right of indigenous persons to fish outside of the permitted season limits established by the federal government for a particular fishery. The decision did not end tensions between indigenous and non-indigenous fishers in some Maritime communities. These tensions erupted into violence when some local non-indigenous fishers, who claimed that indigenous lobster fishing out of season was jeopardizing the viability of the commercial fishery, set fire to property owned by indigenous fishers.

The other story involved a longstanding dispute over the ownership of land in the area of Caledonia, Ontario, several kilometres south of Hamilton. As Laura DeVries explains in her book, *Conflict in Caledonia: Aboriginal Land Rights and the Rule of Law* (UBC Press, 2011), this is a dispute whose roots extend back to before Confederation. But it was only in 2006 that the wider public became aware of its existence. A group of Six Nations protesters occupied a partially-completed housing development on land which they claimed and continue to claim by historical right, a right that has never been extinguished by the terms of a treaty or any other consent on their part or that of their forebears. Violence, arrests, stand-offs between the police

and members of the Six Nations people, court injunctions and negotiations involving both the Ontario and federal governments have taken place in the years since 2006. The conflict remains unresolved, as the latest round of violence and mutual recriminations in October of 2020 made clear.

At the heart of these two stories are profound disagreements about what the relationship of indigenous peoples to governments in Canada and to the non-indigenous population of the country ought to be. Both cases raise important questions about the rule of law, universally thought of as one of the pillars of democratic governance. Let's focus on the Caledonia land dispute.

Perhaps we should start with some widely accepted definitions of the rule of law. Here's one from the United Nations:

*The rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.* (<https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>)

And here's another from the Supreme Court of Canada's 1998 ruling on the constitutionality of Quebec secession:

*The rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from*

arbitrary state action. (<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do, at para 70>)

And here's a third from the *Stanford Encyclopedia of Philosophy*:

*The Rule of Law comprises a number of principles of a formal and procedural character, addressing the way in which a community is governed. The formal principles concern the generality, clarity, publicity, stability, and prospectivity of the norms that govern a society. The procedural principles concern the processes by which these norms are administered, and the institutions--like courts and an independent judiciary--that their administration requires.*

*... the Rule of Law is not just about government. It requires also that citizens should respect and comply with legal norms, even when they disagree with them. When their interests conflict with others' they should accept legal determinations of what their rights and duties are. Also, the law should be the same for everyone, so that no one is above the law, and everyone has access to the law's protection. (* <https://plato.stanford.edu/entries/rule-of-law/#RuleLawConcLaw>*)*

And finally, the rule of law is explicitly referred to in the very short preamble to the Constitution Act, 1982:

*Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law. (* <https://laws-lois.justice.gc.ca/eng/const/page-15.html#h-38>*)*

So, all of that may seem reasonably straightforward and without much ambiguity or other complications. In fact the understanding of the rule of law is anything but straightforward. Some of the complications arise from what it means to be a citizen of a

country, and therefore subject to its laws and the decisions of its governments and courts. This is evident in the case involving the land dispute in Caledonia.

When the Ontario Provincial Police attempted to remove the Six Nations protesters from the Caledonia housing development in 2006, a leader of the protesters had this to say: "Ontario Provincial Police officers mean nothing to us. We are governed only by the Great Law." When, after refusing to comply with an Ontario court injunction, the protesters were cited for contempt of court, the same Six Nations leader stated, "That's the Canadian court system, that's not us. That just has no bearing on why we are here." Another leader of the Six Nations protesters put it this way: "What part of WE ARE NOT CANADIAN, is it that they don't understand? And how do you get it through their thick skulls that the laws of Canada do not apply? We are a sovereign nation."(all quotations from DeVries, p.22)

As Laura DeVries observes, the rule of law means something different to people who believe that the laws are illegitimate: "For Canada," she writes, "Six Nations flags, protests, and picket signs constituted direct action against both the developers and the laws of Canada. For Six Nations, the continued issuance of building permits signalled a denial of its nationhood, law, and land rights..."(DeVries, p.24)

So whose understanding of the "rule of law" should we accept as the genuine article that ought to determine the outcome in a case such as that at Caledonia? When indigenous claims to sovereignty and land ownership clash with the claimed authority of the Canadian state to jurisdiction and with claims of legal title to land under Canadian law made by non-indigenous persons and corporations, what should happen?

This would once have seemed an odd question. I recall that in 1991, about a year after the long stand-off between the Canadian military and Mohawk Warriors--their self description-- at Oka, Quebec, I invited Alan Borovoy to talk to one of my classes. Borovoy was the General Counsel of the Canadian Civil Liberties Association, a position that he held between 1968 and 2009. He told my students that in the many talks that he had given at Canadian laws schools since what is widely referred to as the Oka Crisis

(<https://www.thecanadianencyclopedia.ca/en/article/oka-crisis>), he was struck by the fact that almost all the future lawyers and judges he spoke to believed that it was right for the Mohawk people to take up arms and to resist the authority of the Canadian state. Canada's foremost civil libertarian found this to be a shocking and even dangerous violation of the understanding of the rule of law that should prevail in a democracy.

In the years since then, the idea that considerations of social justice and the rights of indigenous peoples ought to cause us to reconsider what might be described as more traditional notions of the rule of law has gained considerable traction. The following interpretation from David Dyzenhaus, a professor of law and philosophy at the University of Toronto, represents an understanding of the rule of law that has become widespread in the legal community and in academe. Speaking of indigenous protests to stop the construction of the Coastal GasLink Pipeline in British Columbia, he writes:

*While these protests often involved acts of lawbreaking...there was no problem from a rule of law perspective. For these were acts of civil disobedience, that is, disobedience to particular laws in order to alert both the public and the political authorities to the fact that the law is*

*being used as an instrument of a great injustice which remains part of Canada's political and legal fabric. Moreover, the injustice to which they point is arguably that the Canadian state is not living up to the rule of law. Rather, it is enforcing a settler-colonial set of rules, thereby continuing to disrespect commitments the Crown once made.*(<https://www.law.utoronto.ca/news/civil-disobedience-and-rule-law-professor-david-dyzenhaus-lawyers-daily>)

Well, what do you think? Whose rule of law do you prefer?