

# Only One Law:

## Indigenous Land Disputes and the Contested Nature of the Rule of Law

RYAN NEWELL\*

I	Introduction	42
II	The Contempt of Court Power	46
III	<i>Henco Industries Ltd v. Haudenosaunee Six Nations Confederacy Council</i>	49
IV	<i>Frontenac Ventures Corp. v. Ardoch Algonquin First Nation</i>	55
V	Contempt of Court and the Marginalization of Indigenous Law	59
VI	Injunctive Relief: Situating the Multidimensional Rule of Law	62
VII	Conclusion: Reconciliation and the Rule of Law	68

*On several occasions in recent years, Indigenous people in Ontario have erected blockades to defend disputed land from development by private third parties. Protests by the Haudenosaunee, the Ardoch and Shabot Algonquin and the Kitchenuhmaykoosib Inninuwug First Nations received significant media attention and brought the conflicting interests of Indigenous people and development corporations into stark relief. After Indigenous demonstrators defied injunctions ordering them to allow the*

---

\* Ryan Newell is a recent graduate of Osgoode Hall Law School. He is currently completing his articles at Sack Goldblatt Mitchell LLP. The inspiration for this article came in part from his experience of being welcomed as a visitor and supporter of the Haudenosaunee land reclamation in 2006 and 2007.

corporations onto the disputed territory, citations of contempt were made by Ontario courts in each of the above-listed disputes.

*This paper analyzes how the law of injunctions and the contempt of court power have interacted with the constitutionally protected rights of Aboriginal people in the context of direct action protests. More specifically, this paper examines the parameters of the rule of law as it has developed within the context of Indigenous land disputes. The decisions of the Ontario Court of Appeal in Henco Industries Ltd v. Haudenosaunee Six Nations Confederacy Council and Frontenac Ventures Corp v. Ardoch Algonquin First Nation are indicative of a positive turn towards a more nuanced and inclusive conception of the rule of law which allows for a more flexible application of the contempt power, at least at the stage of sentencing. However, the Court of Appeal's holding in Frontenac Ventures ultimately reinforces a singular conception of the rule of law during the contempt of court stage of the proceedings. Unfortunately, the conception of the rule of law as fleshed out by the Court of Appeal in Frontenac Ventures is not expansive enough to include a consideration of the Indigenous legal rationales for defiance of the respective courts' orders. This article reviews recent contempt and injunction jurisprudence in relation to Indigenous land disputes in order to trace some positive developments in the case law. While examining these developments, the article also uses these applications of the contempt power as case studies in some of the fundamental tensions in play in the relationship between Canadian law and Indigenous legal perspectives.*

## I Introduction

Mr. Lovelace says that while he respects the rule of law, he cannot comply because his Algonquin law is supreme. He says he finds himself in a dilemma. Sadly it is a dilemma of his own making. His apparent frustration with the Ontario government is no excuse for breaking the law. There can only be one law, and that is the law of Canada, expressed through this court.

—Cunningham A.C.J.S.C.,  
*Frontenac Ventures Corp v. Ardoch Algonquin First Nation*<sup>1</sup>

Contempt of court proceedings have occurred in Ontario courts on several occasions in recent years after conflicts erupted over land and resources between Indigenous peoples and non-Indigenous private interests. Members of

---

1 Quoted in 2008 ONCA 534 at para 40 (Superior Court decision unreported) [*Frontenac Ventures*].

the Ardoch Algonquin First Nation, the Haudenosaunee (Six Nations) and of the Kitchenuhmaykoosib Inninuwug First Nation (KI) have been cited in contempt following occupations of and blockades on disputed territory. In each of these cases, private corporations sought injunctive relief after Indigenous people stood in the way of their development plans. While the sentences of the people cited in contempt and the details underlying their respective nations' claims varied, each case raises common questions about the application of the contempt of court power and the unique status of Indigenous people in Canadian law. These struggles offer poignant examples of the tension at play inside Canadian courts between the maintenance of a singular rule of law and the development of the scope and content of constitutionally protected Aboriginal rights. The disputes shine light on the nature of the troubled relationship between Canadian law and Indigenous peoples' legal perspectives.

Aboriginal blockades, occupations and the contempt of court proceedings that have followed in their wake cannot be properly understood outside the history of Canadian colonialism and, more specifically, without considering the role that the legal system has played in the oppression and dispossession of Indigenous people. According to Mohawk scholar Patricia Monture, "all the oppression of Aboriginal Peoples in Canada has operated with the assistance and formal sanction of the law."<sup>2</sup> In other words, the Crown has consistently grounded its attempts to strip sovereign nations of their traditional territories and to assimilate Indigenous people into the broader Canadian society in law. Be it the imposition of the band council system onto sovereign Indigenous nations,<sup>3</sup> the institution of the residential school system,<sup>4</sup> or the prohibition against the retention of counsel to seek redress in Canadian courts,<sup>5</sup> the hallmarks of Canadian colonial policy can be located in law itself.

2 Patricia Monture, "Thinking About Aboriginal Justice: Myths and Revolution" in Richard Gosse, James Youngblood Henderson & Roger Carter, eds, *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich, 1994) 222 at 223.

3 *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, SC 1869 (32 & 33 Vict), c. 6, s. 10.* For an overview of the imposition of the band council system, see *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) [RCAP], chapter 9, section 7, online: <[http://www.collectionscanada.gc.ca/webarchives/20071211051222/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg23\\_e.html#78](http://www.collectionscanada.gc.ca/webarchives/20071211051222/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg23_e.html#78)>.

4 For a basic overview of the history of residential schools in Canada, see RCAP, *supra* note 3, chapter 10, online: <[http://www.collectionscanada.gc.ca/webarchives/20071124130216/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgm10\\_e.html](http://www.collectionscanada.gc.ca/webarchives/20071124130216/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgm10_e.html)>; Jennifer J. Llewellyn, "Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice" (2002) 52 UTLJ 253; Suzanne Fournier and Ernie Crey, *Stolen from Our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Vancouver: Douglas & McIntyre, 1997).

5 *Indian Act, 1927, RSC 1927, c. 98, s. 141.* For a short overview of the impact of this provision of the *Indian Act*, see RCAP, *supra* note 3, chapter 9, section 9.9, online: <[http://www.collectionscanada.gc.ca/webarchives/20071207032318/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg25\\_e.html#89](http://www.collectionscanada.gc.ca/webarchives/20071207032318/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg25_e.html#89)>.

While the above are all legislative examples of colonial policy, the history of Canadian common law demonstrates that courts have also been implicated in the dispossession of Indigenous people. In other words, Indigenous people have often found little redress in the Canadian courts. John Borrows has argued that much of the history of the Canadian common law has favoured non-Aboriginal legal sources over those of Aboriginal people: “This over-reliance on non-Aboriginal legal sources has resulted in very little protection for Indigenous peoples. Aboriginal land rights were obstructed, treaty rights repressed, and governmental rights constricted. This judicial discourse narrowed First Nations social, economic, and political power.”<sup>6</sup> This history of Canadian law continues to shape interactions between Indigenous people and the Canadian legal system today. A deep sense of distrust in Canadian legal and governmental institutions persists among many Indigenous people.<sup>7</sup>

Instances of Indigenous direct action and the subsequent contempt proceedings must be viewed with this context in mind.<sup>8</sup> Justice Sidney B. Linden noted in the *Report of the Ipperwash Inquiry* that Indigenous people had often used occupations as a last resort when other means had failed to bring about change.<sup>9</sup> Indigenous people have repeatedly felt compelled to employ direct action to protect lands after the avenues of Canadian law have been exhausted or negotiations have stagnated, in many cases leaving Indigenous claimants with little more than burdensome legal bills. While land claims and rights litigation and negotiation processes move along at a snail’s pace, private corporations continue to stake claims to develop valuable resources and infrastructure in ways that jeopardize Indigenous peoples’ relationship to the land for generations to come.

---

6 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 8.

7 *RCAP*, *supra* note 3, chapter 14, online: <[http://www.collectionscanada.gc.ca/webarchives/20071211052915/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg51\\_e.html](http://www.collectionscanada.gc.ca/webarchives/20071211052915/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg51_e.html)>: “With considerable historical justification, [Aboriginal people] argue that Aboriginal voices have been excluded from the Canadian narrative, that non-Aboriginal people have simply refused to recognize Aboriginal nationhood, and that at the core of Canada’s fundamental contradiction is a racism and ethno-centrism that rejects the viability and value of Aboriginal cultures. Laws and structures founded on assumptions of cultural superiority continue to form the basis of the relationship between our peoples.”

8 Throughout the article I use the term “direct action” to refer to blockades, occupations and other protest tactics employed by Indigenous people to assert their land rights and sovereignty in defiance of Canadian law. However, it should be noted at the outset that while such actions may constitute illegal activity according to Canadian law, Indigenous people always possess their own legal rationales for taking such actions. In this sense, it is somewhat of a misnomer to dichotomize “direct action” and “legal action.” The legal perspectives underlying instances of Indigenous protest will be further explored below.

9 Sidney B. Linden, *Report of the Ipperwash Inquiry: Policy Analysis*, vol 2 (Toronto: Queen’s Printer for Ontario, 2007) at 26.

Blockades and occupations are part of a history of Indigenous resistance to Canadian colonial policy.<sup>10</sup> In fact, Indigenous peoples' contemporary efforts to protect their land and assert their sovereignty form part of the "longest running resistance movement in Canadian history; indeed, one that predates the formation of Canada itself."<sup>11</sup> Desperate to have their voices heard and to disrupt business as usual at least temporarily, Indigenous people have initiated blockades on several occasions in the past 35 years. Rarely does a year go by without an instance of Aboriginal direct action making its way into Canadian news headlines. From the 1974 Ojibwa occupation of Anishinabe Park in Kenora,<sup>12</sup> to the 1990 Mohawk occupation of the proposed site for an expansion of a golf course at Oka,<sup>13</sup> to the 2001 Secwepemc blockade of a road leading to Sun Peaks ski resort,<sup>14</sup> Indigenous people across the country have employed these tactics repeatedly and, in doing so, captured considerable media attention. As long as there remain outstanding treaty disputes, unresolved Aboriginal rights and title claims, and strained relationships between Indigenous peoples and the federal and provincial governments in general, blockades and occupations are likely to recur.<sup>15</sup> When these direct actions do occur, a familiar sequence of legal proceedings in Canadian courts transpires. It is this sequence of legal proceedings that this paper takes as its focus.

The objective underlying this paper is twofold. First, I examine recent injunction and contempt jurisprudence as it relates to instances of Indigenous direct action in order to identify some encouraging trends in the development of the common law. Second, I analyze the contempt of court power as a case study of the fundamental tensions between the Canadian legal system and Indigenous nations and their systems of law. The decisions of the Ontario Court of Appeal in *Henco Industries Ltd v. Haudenosaunee Six Nations Confederacy Council*<sup>16</sup> and *Frontenac Ventures Corp v. Ardoch Algonquin First Nation*<sup>17</sup> are indicative of a positive turn towards a more nuanced and inclu-

---

10 RCAP, *supra* note 3, chapter 6, section 8, online: <[http://www.collectionscanada.gc.ca/webarchives/20071211050911/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg17\\_e.html#57](http://www.collectionscanada.gc.ca/webarchives/20071211050911/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg17_e.html#57)>. The RCAP summarized the history of Indigenous resistance to colonialism as follows: "Resistance at times took the form of passive non-cooperation (for example, with respect to the enfranchisement initiative), at times defiant continuation of proscribed activities (with respect to the potlatch and the sundance, for instance), and in more recent decades it has taken the form of vocal and organized opposition."

11 Leanne Simpson, "Oshkimaadiziig, the New People," in Leanne Simpson, ed, *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations* (Winnipeg: Arbeiter Ring, 2008) 13 at 13.

12 John Borrows, *Crown and Aboriginal Occupations of Land: A History and Comparison* (Toronto: Government of Ontario, 2005) at 24-25.

13 *Ibid* at 35-37.

14 *Ibid* at 47-51.

15 Linden, *supra* note 9 at 30-32.

16 82 OR (3d) 721 [*Henco (appeal)*].

17 *Frontenac Ventures, supra* note 1.

sive conception of the rule of law which allows for a more flexible application, at least at the injunction and sentencing stages of Indigenous land disputes. Yet despite the important movement evident in these decisions, by the time an Indigenous person has defied an order of a Canadian court to dismantle a blockade or to vacate a parcel of disputed territory, no room remains for a consideration of the Indigenous legal rationales underlying the alleged contemnor's conduct. At the stage of contempt proceedings, Canadian law maintains its monopoly on legitimacy, and Indigenous law is viewed as collateral at best. The failure of the courts to pay Indigenous law more than lip service while applying the contempt power evidences a more fundamental issue at the heart of Canadian law: the incapacity or unwillingness of Canadian courts to employ an authentically pluralistic conception of the rule of law.<sup>18</sup>

This paper begins with an overview of contempt law in Canada before turning to an analysis of the application of the power in the context of Indigenous land and sovereignty disputes with reference to two recent Ontario cases. I will highlight some of the encouraging trends in two recent decisions of the Court of Appeal. Here, I will place emphasis on the expansion of the common law's conception of the rule of law at the injunction stage of the legal process. I will then explore the ways in which the definition of the contempt power in the common law jurisprudence ultimately relies on a singular or one-dimensional conception of the rule of law. I will conclude by drawing connections between the rigidity of the contempt power and more fundamental problems in Canadian law as it relates to Indigenous people.

## II The Contempt of Court Power

The common law contempt of court power as it is currently exercised by Canadian courts "began as a natural vehicle for assuring the efficiency and dignity of, and respect for the governing sovereign."<sup>19</sup> According to one oft-cited common law scholar, rules dictating respect for the court and its procedure are "essential to the administration of justice," and as a result, the contempt of court power—if not in name then at least in substance—is as old as law itself.<sup>20</sup> While it is difficult to trace its origins with any degree of precision, it is clear that the contempt of court power derives from the divine status

---

18 I use the terms "pluralistic" and "multidimensional" rule of law interchangeably throughout the article. Legal pluralism has been defined as the "simultaneous existence within a single legal order of different rules applying to different situations." Andre-Jean Arnaud, "Legal Pluralism and the Building of Europe," cited in John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 8.

19 Ronald L. Goldfarb, *The Contempt Power* (New York: Columbia University Press, 1963) at 9-10.

20 Sir John C. Fox, *The History of Contempt of Court: The Form of Trial and the Mode of Punishment* (Oxford: Clarendon Press, 1972) at 1.

of the monarch.<sup>21</sup> When the orders of the King's courts were disobeyed, the contempt power was used to vindicate the monarch as the source of all political authority. Consequently, it "is closely linked, in its origins, with autocratic power."<sup>22</sup>

Many surveys of the contempt power start with a 1631 case in which Richardson C.J. of the Common Bench was nearly struck in the head with a stone thrown by an unnamed criminal defendant. Richardson C.J. responded promptly. The prisoner, who had just been convicted of a felony, had his right hand amputated, before being hanged in front of the court.<sup>23</sup> The contempt power is well encapsulated by Richardson C.J.'s impulse to vindicate the authority of the court after it had been denigrated. While the nuances of the contempt power have evolved since the 17th century—fortunately including a softening of the sentences imposed—the crux of the power remains fundamentally untouched: it is used to address conduct "calculated to bring a Court or a judge of the Court into contempt, or to lower his authority."<sup>24</sup>

Contempt of court is classified as either civil or criminal in nature. Civil contempt arises when a party's failure to respect the rules or an order of the court results in a private injury to another party. Criminal contempt arises when there has been public defiance of a court's authority. McLachlin J. (as she then was) articulated the distinction between criminal and civil contempt in this way:

Criminal contempt contains all the elements of civil contempt. In addition, the act of disobedience must have been undertaken in a public way; and the deliberate or reckless act of disobedience must have been undertaken with an intention that such a public act of disobedience would tend to depreciate the authority of the courts, or alternatively, with foresight that it might do so and indifference to whether it did so or not.<sup>25</sup>

The objective underlying sentencing for civil contempt is "coercive or persuasive" in nature, whereas sentencing for criminal contempt is aimed at punishing the contemnor.<sup>26</sup> The Canadian Judicial Council notes that civil contempt is "in some respects, criminal or quasi-criminal."<sup>27</sup> A person cited in civil contempt can face imprisonment or a fine, and the elements of the civil offence must be established beyond a reasonable doubt. To blur the bright line of the

---

21 Goldfarb, *supra* note 19 at 11-12.

22 Barry J. Cavanaugh, "Civil Liberties and the Criminal Contempt Power" (1977) 19 Crim LQ 349 at 350.

23 Jeffrey Miller, *The Law of Contempt in Canada* (Scarborough: Carswell, 1997) at 1.

24 *R. v. Gray*, [1900] 2 QB 36 at 40, quoted in *BCGEU v. British Columbia (Attorney General)*, [1988] 2 SCR.

25 *UNA v. Alberta (Attorney General)*, [1992] 1 SCR 901, 89 DLR (4th) 609 at paras 636-637.

26 *Frontenac Ventures*, *supra* note 1 at para 37.

27 Canadian Judicial Council, *Guidelines on the Use of Contempt Powers*, online: <[http://www.cjc-ccm.gc.ca/cmslib/general/Contempt\\_Powers\\_2001\\_with\\_Header.pdf](http://www.cjc-ccm.gc.ca/cmslib/general/Contempt_Powers_2001_with_Header.pdf)> at 13.

distinction even further, a person may be cited in criminal contempt in the course of a civil proceeding. Nonetheless, the Supreme Court of Canada and the Canadian Judicial Council maintain that the distinction between civil and criminal contempt is an important one.<sup>28</sup>

The contempt power is a part of the inherent jurisdiction of the superior court, protected from legislative and executive interference by s. 96 of the *Constitution Act*.<sup>29</sup> The space for the common law contempt jurisdiction with respect to criminal proceedings is carved out by s. 9 of the *Criminal Code*,<sup>30</sup> which disallows convictions under all other common law offences. References to the civil contempt power and the principles guiding its use are articulated in the *Rules of Civil Procedure*.<sup>31</sup>

Indigenous people who engage in direct action in defiance of a court's orders have very few defences available at law. According to the British Columbia Court of Appeal in *MacMillan Bloedel Ltd. v. Simpson*, there is no space in contempt law for the defence of necessity.<sup>32</sup> In that case, environmentalists had obstructed loggers' access to Clayoquot Sound in defiance of successive injunctions, resulting in the eventual arrest of more than 600 people. The protestors argued that they had no alternative but to violate the injunctions because the imminent logging threatened to cause grave damage to the forests they wished to protect. The court held that the defence of necessity was unavailable to the protestors for two principal reasons. First, the road blockaders had failed to apply to set aside or vary the court order which they defied. In the Court's view, the blockaders had a viable alternative to breaking the law which they had neglected to pursue. Second, "the defence of necessity can never operate to avoid a peril that is lawfully authorized by the law."<sup>33</sup> The legality of the corporation's logging interest prevented the operation of the defence of necessity in the circumstances. Similarly, there is no defence available on grounds of 'conscientious objection' to those facing a contempt citation for having disobeyed an order of a Canadian court. According to Jeffrey Miller, Canadian and American courts alike have consistently held that people who commit civil disobedience implicitly accept the legal consequences of their actions.<sup>34</sup>

The nuances of the contempt power are difficult to capture concisely. In order to give exhaustive meaning to the power, one must delve into "a moun-

28 *Ibid* at 10-13; *Poje v. British Columbia (Attorney General)*, [1953] 1 SCR 516 at 517.

29 Miller, *supra* note 23 at 23; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c. 11.

30 RSC 1985, c. C-46.

31 See, for example, *Rules of Civil Procedure*, RRO 1990, Reg. 194, rule 60.11.

32 *MacMillan Bloedel Ltd. v. Simpson* (1994), 90 BCLR (2d) 24, 89 CCC (3d) 217 (CA), aff'd [1995] 4 SCR 725 [*MacMillan Bloedel*].

33 *Ibid* at para 46.

34 Miller, *supra* note 23 at 128.



tain of case law.”<sup>35</sup> However, for the purposes of this article it is sufficient to understand the rationale underlying the power, the basic distinction between criminal and civil contempt, the inherent jurisdiction of superior courts to apply it and the dearth of relevant defences available to Indigenous protestors. With this general overview of the contempt power as a backdrop, I turn to examine how the power has been applied in the context of two recent Ontario land disputes.

### III *Henco Industries Ltd v. Haudenosaunee Six Nations Confederacy Council*

The Haudenosaunee Confederacy has long held that it exists in a nation-to-nation relationship with the Crown.<sup>36</sup> This intergovernmental treaty relationship was first symbolized with the *Gus Wen Tah* or Two-Row Wampum, an agreement initially made between the Dutch and the Haudenosaunee in the early 17th century.<sup>37</sup> The purple and white wampum belt symbolizes two sovereign societies existing side by side in peace, friendship and respect. Subsequent to the Dutch, the British also sought an alliance with the Haudenosaunee on the same nation-to-nation basis and adopted the Two-Row Wampum to represent and solemnize their agreement.<sup>38</sup>

Before the American Revolution, the Six Nations lived in villages in the territory that would become New York State.<sup>39</sup> Worn weary by the end of the war, the British, in the negotiations that ensued, “conceded everything south of the Great Lakes to the Americans—although most of that vast region actually belonged to Indians, including the Six Nations.”<sup>40</sup> From the perspective of the Six Nations, the Crown had failed to uphold the principles at the heart of the Two-Row Wampum. They felt betrayed and pressured the Crown to repay them for territory lost as a result of the drawing of the American border. Sir Fredrick Haldimand, then Governor of Quebec, purchased a piece of land from the Mississauga First Nation and made the following proclamation on October 25, 1784: “I do hereby in His Majesty’s name authorize and permit

35 David Coveney, “Contempt of Court: Bulwark of Freedom or Lynch-Pin of Tyranny?” (1974) 13 West Ont L Rev 157 at 157.

36 I use the terms “Haudenosaunee” and “Six Nations” to refer to the group of Indigenous nations which forms the Iroquois Confederacy. The Haudenosaunee Confederacy is made up of the Onondaga, Mohawk, Oneida, Seneca, Cayuga and Tuscarora Nations.

37 Laura DeVries, *Conflict in Caledonia: Aboriginal Land Rights and the Rule of Law* (Vancouver: University of British Columbia Press, 2011) at 84.

38 *Ibid.* For more information on the nature of the Two-Row Wampum, see Borrows, *supra* note 18 at 75-76.

39 Ronald Wright, *Stolen Continents: The “New World” Through Indian Eyes Since 1492* (Toronto: Penguin, 1991) at 114-115.

40 Alan Taylor, “The Divided Ground: Upper Canada, New York, and the Iroquois Six Nations, 1783-1815” (2002) 22 *Journal of the Early Republic* 55 at 58.

the said Mohawk Nation, and such other Six Nations as wish to settle in that Quarter to take possession of, & Settle upon the Banks of the River commonly called *Ours* (Ouse) or Grand River ... which them & their posterity are to enjoy for ever.”<sup>41</sup>

Mohawk leader Joseph Brant led a group of 1,500 Haudenosaunee people to relocate to the new territory.<sup>42</sup> This swath of land, which encompassed 950,000 acres at the time that Haldimand made his promise,<sup>43</sup> follows the meandering path of the Grand River from its source to Lake Erie. In the subsequent decades, the Haldimand Tract was gradually eaten away by settler encroachment, questionable sales and leases, and unlawful Crown grants,<sup>44</sup> such that the Six Nations of the Grand River reservation is currently one 16th of the original Haldimand territory.<sup>45</sup> Between 1976 and 1994, the Haudenosaunee made dozens of land claims for fragments of the Haldimand Tract under the Specific Claims Policy. As of 2006, more than 10 per cent of the land claims made against the government of Canada and Ontario related to the Six Nations of the Grand River.<sup>46</sup> In 1995, the Six Nations Elected Council launched a lawsuit, seeking a “general accounting” for the manner in which the Crown had managed and disposed of the property and assets promised in the Haldimand Proclamation.<sup>47</sup> The suit was placed in abeyance in 2004 when negotiations with the federal government began, and reactivated in 2009 after the Six Nations grew dissatisfied with the progress of the negotiation process.<sup>48</sup>

In 1992, Henco Industries acquired a piece of the Haldimand Tract bordering on the town of Caledonia and, in 2005, the developer registered its subdivision plan with the province.<sup>49</sup> Henco’s acquisition represented a small portion of one of the several land claims that the Six Nations had filed in the preceding decades. The site of the proposed subdivision was included in a claim concerning the manner in which the Crown had dealt with the Hamil-

---

41 Cited in Charles M. Johnston, *The Valley of the Six Nations: A Collection of Documents on the Indian Lands of the Grand River* (Toronto: University of Toronto Press, 1964) at 51.

42 J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, 3d ed (Toronto: University of Toronto Press, 2000) at 98.

43 *Henco (appeal)*, *supra* note 16 at para 14.

44 A comprehensive analysis of this complicated history is beyond the scope of this paper. See generally Six Nations Lands and Resources Development, “Land Rights: A Global Solution for the Six Nations of the Grand River,” online: Six Nations of the Grand River <<http://www.sixnations.ca/SNGLobalSolutions-Web.pdf>>.

45 Michael Coyle, “Addressing Aboriginal Land Rights in Ontario: An Analysis of Past Policies and Options for the Future—Part I” (2005) 31 Queen’s LJ 75 at 115.

46 *Ibid.*

47 Six Nations Lands and Resources Development, *supra* note 44 at 10.

48 *Ibid.*

49 Canada Broadcast Corporation, “CBC News in Depth: Caledonia Land Claim,” online: *CBC News* <<http://www.cbc.ca/news/background/caledonia-landclaim/historical-timeline.html>>.

ton-Port Dover Plank lands.<sup>50</sup> Having warned the developer about the disputed title of the land and concerned that waiting to achieve resolution through legal channels would allow yet another fragment of the territory to be developed against their wishes, a small group of Six Nations people began occupying the 52 hectare property on February 28, 2006.<sup>51</sup> The protestors erected blockades on the entrance roads of the subdivision and began camping out.<sup>52</sup> On March 3, 2006, Henco obtained interim injunctive relief against the Confederacy Council,<sup>53</sup> the individual protestors, as well as against Jane and John Doe. Those named in the injunction were ordered to cease interference with Henco's operations and to dismantle barricades.<sup>54</sup> When the Sheriff attempted to deliver Matheson J.'s order to the demonstrators, he was met with resistance. After being handed the order, Dawn Smith, one of the persons named in the court order, lit it on fire while television cameras captured the spectacle on film.<sup>55</sup> On March 9, Matheson J. made his March 3 order permanent.<sup>56</sup>

Henco's contempt motion was heard by a different judge of the superior court, Marshall J., on March 16 and 17, 2006. While the respondent Haudenosaunee protestors did not file any evidence, Smith appeared before the court and submitted that "her people had never relinquished title to North America," informing the motions judge that "she did not recognize the court's jurisdiction."<sup>57</sup> Marshall J. held that all the elements for contempt of court had been established: (1) the terms of the injunction ordering that the protestors leave the disputed land were clear and unambiguous; (2) the protestors had been given proper notice of the order; (3) the protestors, by their continued presence on the land, had blatantly and unapologetically breached the terms of the order; and (4) the protestors possessed the requisite intention to do the acts prohibited by the injunction.<sup>58</sup> Marshall J. held that the public manner in which the protestors had defied the court's order required that they be cited in

---

50 Linden, *supra* note 9 at 28.

51 "Developer warned," *The Hamilton Spectator* (9 March 2006) A06.

52 Kate Harries, "Pressure mounts on Mohawk protesters at construction site," *The Globe and Mail* (29 March 2006) A13.

53 I have referred to two different Six Nations governing bodies: the Elected Council and the Confederacy Council. The Elected Council is the governing body created by the government of Canada through the imposition of the *Indian Act* structure in 1924. The Confederacy Council is the 'traditional' governing body of the Haudenosaunee. The historical details and political nuances underlying this distinction are too complex to adequately address here. See Wright, *supra* note 39 at 320-327.

54 *Henco (appeal)*, *supra* note 16 at para 20.

55 *Ibid* at para 22.

56 *Ibid* at para 25.

57 *Ibid* at para 26.

58 *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, 2006 CarswellOnt 8116 at para 15-31 (Sup Ct J) (WL) [*Henco (contempt)*].

civil as well as criminal contempt: “They could not have but known that such defiance would harm the court’s enforcement of its orders generally.”<sup>59</sup>

Marshall J. acknowledged that the case, at its most fundamental, related to the Six Nations’ grievance with respect to the Haldimand Tract. However, in a manner that falls in line with the principles of contempt law to be explored below, Marshall J. only superficially engaged with the validity of the defendants’ claim: “The Mohawk people feel that they have been unfairly treated in regards to the *Haldimand Land Grant*. I can say nothing today of the validity of that claim.”<sup>60</sup> Marshall J. told the Six Nations defendants that they had no right to stand in the way of Henco Industries, imploring them to “turn and walk away.”<sup>61</sup> The contemnors, both those named in the injunction and those unknown, were sentenced to thirty days in jail, but their sentences were suspended such that if they obeyed the terms of injunction for a period of six months they would not have to serve any jail time. The Attorney General of Ontario brought a motion to amend the March 17 order, and on March 28, Marshall J. issued a new order of contempt and warrant of arrest for all of those blockading Douglas Creek Estates in contravention of the injunction.<sup>62</sup>

The Haudensaunee protestors did not turn and walk away. Before dawn on April 20, 2006, the Ontario Provincial Police (OPP) raided the encampments and arrested 21 people. Within hours of the raid, hundreds of Haudensaunee people and their allies flooded back onto the disputed land, making the police retreat. Additional barricades were erected on surrounding railways and highways, and a bridge was burned down.<sup>63</sup> Negotiations between the Haudensaunee and the federal and provincial governments began weeks later. In June 2006, Ontario announced its plan to purchase the disputed land from Henco.<sup>64</sup> While tensions would certainly flare up again,<sup>65</sup> and the Haudensaunee continue to adamantly assert their entitlement to the Haldimand Tract and the need to engage on a nation-to-nation basis with the Canadian state,<sup>66</sup> the events immediately following April 20, 2006, were among the most explosive of the protracted struggle.

---

59 *Ibid* at paras 27-28.

60 *Ibid* at para 32.

61 *Ibid* at para 38.

62 *Henco (appeal)*, *supra* note 16 at para 33.

63 *Ibid* at para 35.

64 April Lindgren, “Price tag for Caledonia land: \$12.3m,” *National Post* (23 June 2006) A10.

65 Peter Edwards, “Natives end highway blockade: ‘Ongoing dialogue’ between police, protesters reopens portion of Highway 6,” *Toronto Star* (30 April 2008) A23.

66 Disputes over the ongoing development of land within the Haldimand Tract continue to arise. The Haudensaunee and their allies continue to call on the governments of Canada and Ontario to engage in good faith negotiations to resolve the countless outstanding claims. See, for example, Daniel R. Pierce, “Hundreds take part in Caledonia peace march,” *Simcoe Reformer* (29 April 2012) online: <<http://www.niagarafallsreview.ca/2012/04/28/400-take-part-in-caledonia-peace-march>>.

After the sale of the property was finalized in early July 2006, Henco brought a motion to dissolve the outstanding injunctions.<sup>67</sup> The Province of Ontario, as the new property owner, had made a political choice—no doubt motivated by the resistance that erupted in response to the raid of April 20, 2006—to allow the protestors to remain on the disputed land. Nonetheless, Marshall J. refused to unconditionally dissolve the injunction. His reasons began as follows:

I am reading this judgment in open court because it is a matter of such importance to the communities and to this court. Ladies and gentleman we speak of the Rule of Law. This case deals with an issue that is arguably the preeminent condition of freedom and peace in a democratic society. It is upheld wherever in the world there is liberty. The Rule of Law is a principle not well known to people, but this case shows its importance, not just to the communities involved here but also the Rule of Law should be appreciated by all Canadians. *The Rule of Law for our purposes can be simply stated. It is the rule that every citizen from the prime minister to the poorest of our people is equally subject to and must obey the law. It is a rule of general application. Whenever it is broken—even in a small way, we say there is injustice. We see the unfairness. It is a rule that is woven into every part of our social contract to live peacefully together. Even a small tear in the cloth of our justice system spoils the whole fabric of society.*<sup>68</sup>

Marshall J.'s preoccupation with a singular conception of the rule of law is palpable throughout his reasons, which at some points drift into the realm of hyperbole. Marshall J. claimed that he had the jurisdiction to suspend the land claims process “until the barricades are removed from Douglas Creek Estates and the rule of law restored to that property.”<sup>69</sup> Departing considerably from the Supreme Court’s Aboriginal treaty and rights jurisprudence, which has repeatedly emphasized the importance of negotiation over litigation in the context of such disputes,<sup>70</sup> Marshall J. suggested that the government negotiators should walk away from the table until the injunction had been enforced.<sup>71</sup> He ordered that the injunction obtained by Henco would bind Ontario as the new property owner and that it would not be dissolved until after the contempt citations had been disposed of.<sup>72</sup> The Attorney General appealed the order to the Court of Appeal.

---

67 In fact, it was a term of the agreement of sale that Henco seek an order dissolving the injunctions. *Henco (appeal)*, *supra* note 16 at para 49.

68 *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* (2006), 82 OR (3d) 347 (Sup Ct) at paras 1-5 [*Henco (dissolution)*].

69 *Ibid* at para 83 [emphasis added].

70 See, for example, *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at para 207 [*Delgamuukw*].

71 *Henco (dissolution)*, *supra* note 68 at para 88.

72 *Ibid* at para 101.

By way of unanimous judgment, the Court of Appeal allowed the appeal in part. Writing for the Court, Laskin J.A. held that to compel Ontario to enforce the injunction obtained by Henco constituted an unjustifiable interference with the government's property rights.<sup>73</sup> Consequently, the injunction was to be dissolved effective July 5, 2006.<sup>74</sup> Although the Court of Appeal lacked the jurisdiction to overturn the contempt convictions because none of the defendants had appealed, Laskin J.A. concluded in *obiter dicta* that the contempt convictions were fundamentally flawed because they were made in violation of basic procedural fairness guarantees.<sup>75</sup> Nonetheless, the Court held that the motion judge's decision to order the Attorney General to take carriage of the contempt proceedings was a proper exercise of his discretion and could be upheld subject to the stipulation of three conditions.<sup>76</sup> The necessary conditions and the reasons for their imposition will not be explored in this article.

For the purposes of this paper, the two most significant aspects of the Court of Appeal's judgment are found in its general concluding remarks. First, the Court emphasized that negotiation is the most effective means of addressing the claims of Indigenous people.<sup>77</sup> Laskin J.A. pointed out that specific aspects of Marshall J.'s reasons were "unfortunate and at odds with the Supreme Court of Canada's jurisprudence."<sup>78</sup> Second, the Court took the view that the rule of law is more complex than the conception of the constitutional principle reflected in the lower court's reasons. Laskin J.A. started out by acknowledging the importance of "vindicat[ing] the court's authority and ultimately ... uphold[ing] the rule of law. The rule of law requires a justice system that can ensure orders of the court are enforced and the process of the court is respected."<sup>79</sup> However, according to Laskin J.A., the rule of law encompasses much more than obedience to court orders. The rule of law has multiple dimensions, including "respect for minority rights" and "reconciliation of Aboriginal and non-Aboriginal interests through negotiations."<sup>80</sup> Marshall J. had failed to "adequately consider these other important dimensions of the rule of law."<sup>81</sup> The implications of this broadened understanding of the rule of law will be explored further below.

---

73 *Henco (appeal)*, *supra* note 16 at para 74.

74 *Ibid* at para 148.

75 *Ibid* at paras 123-128.

76 *Ibid* at para 147.

77 *Ibid* at paras 135-139.

78 *Ibid* at para 135.

79 *Ibid* at para 141.

80 *Ibid* at para 142.

81 *Ibid* at para 143.

#### IV *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*

The Ardoch Algonquin First Nation (AAFN) is an Anishnabek community located in eastern Ontario, about 100 kilometers north of Kingston. The history of dispossession of the Omàmiwinini or Algonquin people—like that of the Haudenosaunee—is long, complicated and, ultimately, beyond the scope of this article. A brief overview is necessary to understand the basic parameters of the dispute and the contempt proceedings that followed. Treaties have never been signed with the Algonquin people living in the southern Ottawa Valley.<sup>82</sup> Beginning in the late 18th century, as greater numbers of settlers moved into their territory, the Algonquins insisted that treaties be negotiated to resolve disputes over land,<sup>83</sup> but treaties were never signed and negotiations for a modern-day treaty agreement continue today. The Algonquin relationship with the Crown is further complicated by the fact that their claim to possession overlaps with that of other First Nations.<sup>84</sup> The Algonquins assert that their lands were improperly ceded to the Crown through the Williams Treaties in 1923, agreements made with the federal and provincial Crown by Mississauga and Chippewa First Nations.<sup>85</sup>

Reserves were created in Quebec and Ontario starting in the late 19th century to which some Algonquin people relocated from their traditional territories. One such federally recognized reserve is Golden Lake, located to the west of Ottawa. Yet many Algonquin family groups continue to live scattered throughout the southern Ottawa River watershed.<sup>86</sup> Unlike the Golden Lake Algonquins, the Ardoch and Shabot Obaadjiwan communities are not organized under the *Indian Act*,<sup>87</sup> so that many AAFN members are not recognized as status “Indians.”<sup>88</sup> In 1992, the AAFN was established to give formal organizational structure to a group of Algonquin families that had lived in community for many years.<sup>89</sup> In the years that followed, the AAFN developed

---

82 B. Koschade and E.J. Peters, “Algonquin Notions of Jurisdiction: Inserting Indigenous Voices into Legal Spaces” (2006) 88 *Geografiska Annaler Series B: Human Geography* 299.

83 M. Huitema, “*The Land of Which the Savages Stood in No Particular Need*”: *Dispossessing the Algonquins of Southeastern Ontario of Their Lands, 1760–1930* (MA Thesis, Queen’s University, 2000) [unpublished] at 96.

84 Graham Mayeda, “Access to Justice: The Impact of Injunctions, Contempt of Court Proceedings, and Costs Awards on Environmental Protestors and First Nations” (2010) 6 *JSDLP* 143 at 148; Susan B. DeLisle, *Coming out of the Shadows: Asserting Identity and Authority in a Layered Homeland; The 1979–1982 Mud Lake Wild Rice Confrontation* (MA Thesis, Queen’s University, 2001) [unpublished] at 66–69.

85 Mayeda, *supra* note 84 at 148.

86 Huitema, *supra* note 83 at 100–101.

87 Paula Sherman, *Dishonour of the Crown: The Ontario Resource Regime in the Valley of the Kii Sibi* (Winnipeg: Arbeiter Ring, 2008) at 16.

88 Robert Lovelace, “An Algonquin History,” online: Ardoch Algonquin First Nation <<http://www.aafna.ca/history.html>>.

89 *Ibid.*

“Guiding Principles” which articulate the nature of the Algonquins’ relationship with their land base. It was on the basis of these principles that a series of legal and direct actions occurred throughout the 1980s and 1990s,<sup>90</sup> including the AAFN’s stand against the destruction of wild rice beds and its assertion of hunting and harvesting rights in traditional territories.<sup>91</sup>

In 1983, the Algonquins of Golden Lake launched a claim alleging that Aboriginal title to 3.4 million hectares of land in the Ottawa Valley had never been surrendered.<sup>92</sup> Negotiations between the Golden Lake First Nation and the provincial and federal governments began in 1991 and in 1992, respectively.<sup>93</sup> After tension developed between the Algonquins of Golden Lake and the AAFN, the AAFN formally withdrew support for the Golden Lake claim in 1994.<sup>94</sup> Negotiations continue between the province and 10 Algonquin communities, including the Golden Lake First Nation.<sup>95</sup> As of 2009, a negotiation framework agreement had been reached to guide ongoing discussions.<sup>96</sup> The AAFN was not a party to this agreement.

After non-Aboriginal Sharbot Lake resident Frank Morrison discovered that a series of trees on his property had been flagged in 2006, he contacted Ontario’s Ministry of Northern Development and Mines. He was informed that a uranium exploration company had staked the claims.<sup>97</sup> Knowing that they lived on disputed territory, Gloria Morrison, Frank’s wife, informed the AAFN and Shabot Obaadjiwan First Nation of the exploratory activities in November of 2006. In total, 30,000 acres had been staked by a small mining exploration company called Frontenac Ventures. The majority of the land staked was traditional Algonquin territory, and yet the Algonquins had not been notified, let alone consulted, about the development plans.<sup>98</sup> The AAFN made multiple attempts to inform the province and Frontenac Ventures of their

---

90 See, for example, *Lovelace v. Ontario*, 2000 SCC 37. In that case, Robert Lovelace, on his own behalf and on the behalf of the Ardoch Algonquins and of several other non-band and Métis communities, challenged the decision of the province to distribute profits derived from Casino Rama exclusively to First Nations communities registered under the *Indian Act*. His appeal was dismissed by the Supreme Court of Canada.

91 Sherman, *supra* note 87 at 18-19.

92 Coyle, *supra* note 45 at 115.

93 For additional information about the history and current state of the ongoing negotiations, see Ministry of Aboriginal Affairs, “Algonquin Land Claim,” online: <<http://www.aboriginalaffairs.gov.on.ca/english/negotiate/algonquin/algonquin.asp>>.

94 Lovelace, *supra* note 88. Additional details about the history and current state of the relationship between the AAFN and the Algonquins of Golden Lake proved to be difficult to locate.

95 Ontario Ministry of Aboriginal Affairs, “Update on the Algonquins of Ontario Land Claim Negotiations,” online: <<http://www.aboriginalaffairs.gov.on.ca/english/negotiate/algonquin/update.asp>>.

96 Government of Ontario, “Agreements Reached to Advance Negotiation of Eastern Ontario Land Claim,” online: <<http://news.ontario.ca/maa/en/2009/08/agreements-reached-to-advance-negotiation-of-eastern-ontario-land-claim.html>>.

97 Peter Gorrie, “High-stakes battle over mining rights; Century-old law giving prospectors right to drill on private land unites natives and non-natives,” *Toronto Star* (12 May 2008) A4.

98 Sherman, *supra* note 87 at 19.



concerns.<sup>99</sup> After receiving no response to their correspondence, members of the AAFN, the Shabot Obaadjiwan and non-Aboriginal supporters blocked access to an intended site of exploratory drilling on June 28, 2007, a national day of Aboriginal protest.<sup>100</sup> The Indigenous people were outraged that land subject to their unresolved claim would be mined by a private corporation with full authorization under Ontario's *Mining Act*.<sup>101</sup> The non-Aboriginal settlers<sup>102</sup> shared the Indigenous peoples' concerns about the environmental degradation and impact on human health associated with mining uranium.<sup>103</sup> In particular, the blockaders were concerned that the tailings produced by uranium mines would contaminate local water supplies.<sup>104</sup>

In response to the blockade, Frontenac Ventures swiftly initiated legal action, claiming \$77 million in damages and seeking an injunction to remove the protestors from the access road. The AAFN did not participate in the injunction proceedings. According to Paula Sherman, the Indigenous blockaders chose not to participate in the injunction proceedings because the necessary "political solution" was not available through the litigation process: "Our goal was not to negotiate for a part of the proceeds from exploration, but to challenge the right of the Province to issue mineral claims and permits on lands that were covered under a comprehensive claim and which had never been surrendered or sold to the Crown."<sup>105</sup>

On August 27, 2007, Thomson J. granted an interim injunction which restrained the AAFN and the Shabot from interfering with the mining exploration program.<sup>106</sup> When the protestors refused to comply, the corporation initiated civil contempt proceedings in September 2007; these were adjourned until November 2007. Frontenac Ventures sought further injunctive relief, asking for an order prohibiting the AAFN, Shabot and any other associated parties from interfering with any of the corporation's "legitimate activities on the subject property."<sup>107</sup> Again, the AAFN did not participate in the hearing. Cunningham A.C.J.S.C. issued a second interlocutory injunction on September 27, 2007.<sup>108</sup>

---

99 *Ibid* at 22.

100 Gorrie, *supra* note 97.

101 RSO 1990, c. M14.

102 According to Graham Mayeda, *supra* note 84 at 150, the non-Aboriginal participants referred to themselves as "settlers" in order "to acknowledge the colonial context in which they have come to own property on the Algonquin's traditional territory."

103 Roy Macgregor, "Settlers and natives, united against the government," *The Globe and Mail* (3 December 2007) A2.

104 For further details about the myriad environmental concerns of the blockaders, see generally Sherman, *supra* note 87.

105 *Ibid* at 23.

106 *Frontenac Ventures*, *supra* note 1 at para 17.

107 *Ibid* at para 19.

108 *Ibid* at para 20.

The blockade of the disputed territory continued in defiance of the court's orders.

On the suggestion of Cunningham A.C.J., Frontenac Ventures and the AAFN commenced a 12-week period of mediation, requiring an adjournment to the contempt proceedings. According to AAFN Family Head Sherman, the talks were "flawed from the beginning."<sup>109</sup> After Frontenac Ventures and Ontario pressured the AAFN to allow continued exploration work as a precondition to ongoing consultation, the AAFN gave up on the prospect of achieving resolution through negotiation and walked away from the discussions.<sup>110</sup> Frontenac Ventures revived its contempt motion in February 2008. On this occasion, the AAFN participated in the proceedings, conceding that they had defied the injunctions. The evidence and submissions of the AAFN defendants were limited to the issue of sentence. Robert Lovelace, an AAFN member and spokesperson, testified that "uranium exploration on the subject lands would violate Algonquin law, which imposed a 'moratorium' on such activity."<sup>111</sup> On February 13, 2008, Cunningham A.C.J.S.C. cited the AAFN defendants in civil contempt of court. Harold Perry, a 78-year-old AAFN contemnor, purged his contempt immediately following the citation by undertaking to abide by the September 27, 2007, court order. Lovelace and Sherman were sentenced to six months in jail and fines of \$25,000 and \$15,000, respectively, on February 15, 2007.<sup>112</sup> Sherman subsequently purged her contempt by providing her own undertaking to comply with the order, and the custodial portion of her sentence was discharged.

Lovelace, who declined to purge his contempt, appealed his sentence to the Court of Appeal. The other AAFN defendants appealed the fines that had been imposed. MacPherson J.A., writing for another unanimous panel of the Court of Appeal, held that Lovelace's sentence had been "too harsh."<sup>113</sup> Importing the Supreme Court's analysis in *R. v. Gladue*,<sup>114</sup> MacPherson J.A. held that background factors particular to Aboriginal contemnors should be considered at the stage of sentencing.<sup>115</sup> MacPherson J.A.'s recognition of the relevance of *Gladue* to Lovelace's sentencing was based on three considerations: "The estrangement of aboriginal peoples from the Canadian justice system, the impact of years of dislocation, and whether imprisonment would be meaningful to the community of which the offender is a member."<sup>116</sup> Among the relevant background factors that the motions judge had failed to consider were the

---

109 Sherman, *supra* note 87 at 24.

110 *Ibid.*

111 *Frontenac Ventures*, *supra* note 1 at para 27.

112 *Ibid* at para 29.

113 *Ibid* at para 66.

114 *R. v. Gladue*, [1999] 1 SCR 688, 133 CCC (3d) 385 [*Gladue*].

115 *Frontenac Ventures*, *supra* note 1 at para 54.

116 *Ibid* at para 57.

ongoing Algonquin land claim and negotiations and the fact that the *Mining Act* failed to institute a process for consultation with First Nations people.<sup>117</sup> MacPherson J.A. concluded that jail time was unnecessary and that a \$1,000 fine would have been sufficient.<sup>118</sup> As has been noted by several criminal law scholars, MacPherson J.A.'s expansion of the *Gladue* analysis to the sentencing of Aboriginal contemnors is a significant development,<sup>119</sup> but it is not the focus of this article. Instead, I am interested in exploring the implications of the Court of Appeal's development of a multidimensional conception of the rule of law which was initially identified in *Henco*. Before doing so, I will take a step back to provide some more legal context for these applications of the contempt power.

## V Contempt of Court and the Marginalization of Indigenous Law

Under the common law of contempt, it is no defence that the court order was incorrect, unreasonable or even unconstitutional.<sup>120</sup> As long as a court order has not been overturned on appeal, it is to be complied with under all circumstances.<sup>121</sup> After a protestor has disobeyed a court's order to vacate a disputed piece of land or to remove barricades from an access road and appears for a contempt hearing, courts do not consider the surrounding circumstances or the constitutional validity of the initial injunction when deciding whether a contempt citation should be made. To do so would permit a collateral attack on the initial injunction. As demonstrated in *British Columbia (Attorney General) v. Mount Currie*,<sup>122</sup> courts refuse to interrogate a motions judge's jurisdiction to issue the initial injunction in the course of the contempt proceeding. *Mount Currie* offers a poignant illustration of how the "collateral attack" doctrine marginalizes Indigenous peoples' legal perspectives during contempt proceedings.

More than 50 members of the Lil'wat Peoples' Movement were arrested for blocking a road in order to prevent logging on "unceded Indian territory" in

---

117 In 2009 Ontario's *Mining Act* was amended to require those that acquire interests under the statute to undergo a process of consultation with affected First Nations people. See *Mining Act*, RSO 1990, c. M14, s. 78.2. For further analysis of the 2009 amendments, see Mayeda, *supra* note 84 at 150-152.

118 *Frontenac Ventures*, *supra* note 1 at para 66.

119 Jonathan Rudin, "Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs" (2009) 54 *Crim LQ* 447 at 460. See also Kent Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2009) 54 *Crim LQ* 470; Brent Knazan, "Time for Justice: One Approach to *R. v. Gladue*" (2009) 54 *Crim LQ* 431.

120 Miller, *supra* note 23 at 95.

121 As was pointed out by the Court of Appeal in *Frontenac Ventures*, the AAFN did not appeal either of the injunctions granted by the two motions judges. As a result, the Court held that it was "thus not for this court to address the merits of either order." *Supra* note 1 at para 47.

122 *British Columbia (Attorney General) v. Mount Currie* (1990), 54 BCLR (2d) 129 (Sup Ct) [*Mount Currie*].

contravention of an injunction.<sup>123</sup> MacDonald J. cited the Indigenous blockaders in contempt of court, holding that the “issue of Indian sovereignty may not be raised or argued in these contempt proceedings. That issue is not an exception to the collateral attack doctrine in the case of a superior court of general jurisdiction such as this.”<sup>124</sup> While it was open to the Lil’Wat contemnors to raise the issue of their sovereignty at the injunction stage, they were precluded from doing so at the contempt proceedings. According to MacDonald J., to allow such a challenge of the Supreme Court of British Columbia’s jurisdiction at the contempt stage would be to destabilize a principle “fundamental to the maintenance of this court’s authority.”<sup>125</sup>

During the proceedings that occurred in the *Henco* and *Frontenac Ventures* cases, the Indigenous protestors presented challenges to the capacity of Canadian courts to arrive at just resolutions of the underlying disputes. The AAFN declined to participate during the injunction stage of the proceedings because of its members’ belief that “the Ontario court system was incapable of providing a solution that protected [their] homeland from irresponsible development.”<sup>126</sup> One of the Haudenosaunee people named in the injunction, Dawn Smith, appeared before the court during the contempt proceedings not to lead evidence but to inform the court that the Haudenosaunee did not recognize the court’s jurisdiction and that “her people had never relinquished title to North America.”<sup>127</sup>

The Indigenous people who engaged in direct action in each of these cases possessed their own legal rationales which conflicted with the Canadian legal order and challenged the singularity of the rule of law relied upon in the contempt proceedings. The Haudenosaunee began the reclamation of Douglas Creek Estates to ensure that future generations would have a sufficient land base. The legal claims launched by the Six Nations and the subsequent negotiations had been ineffective at suspending development on the disputed territory. The Haudenosaunee Great Law of Peace, or *Kaianerekowa*,<sup>128</sup> required them to stand in the way of continuing encroachment, and it was in this context that the occupation of Douglas Creek Estates began. While an in-depth exploration of the “complex and sophisticated” Haudenosaunee legal tradition is beyond the scope of this article,<sup>129</sup> it is important to recognize that the Six Nations people repeatedly asserted that their efforts to stop the development of Douglas Creek Estates were grounded in an allegiance to their

---

123 *Ibid* at para 4.

124 *Ibid* at para 53.

125 *Ibid* at para 34.

126 Sherman, *supra* note 87 at 25.

127 *Henco (appeal)*, *supra* note 16 at para 26.

128 Excerpted in John J. Borrows and Leonard I. Rotman, eds, *Aboriginal Legal Issues* (Markham: Lexis Nexis, 2007) at 36-37.

129 Borrows, *supra* note 18 at 73.

own law. Haudenosaunee protestor Janie Jamieson stated only days after the reclamation of Douglas Creek Estates, known in Mohawk as Kanonhstaton (“the protected place”), began: “Ontario Provincial Police officers mean nothing to us. We are governed by the Great Law.”<sup>130</sup> Months after the beginning of the land reclamation, the Haudenosaunee Confederacy Council described the legal foundations for its land rights and responsibilities as follows:

The Haudenosaunee, and its governing authority, have inherited the rights to land from time immemorial. Land is a birthright, essential to the expression of our culture. *With these land rights come specific responsibilities that have been defined by our law*, from our Creation Story, the Original Instructions, the Kaianeren:kowa (Great Law of Peace) and Kariwio (Good Message) .... [A] ccording to our law, the land is not private property that can be owned by any individual. In our worldview, *land is a collective right. It is held in common, for the benefit of all. The land is actually a sacred trust, placed in our care, for the sake of the coming generations. We must protect the land. We must draw strength and healing from the land. If an individual, family or clan has the exclusive right to use and occupy land, they also have a stewardship responsibility to respect and join in the community’s right to protect the land from abuse. We have a duty to utilize the land in certain ways that advance our Original Instructions. All must take responsibility for the health of our Mother.*<sup>131</sup>

Thus it was a sense of legal duty and responsibility that gave rise to Haudenosaunee efforts to thwart the development of Douglas Creek Estates, a small fraction of the Haldimand Tract which the Six Nations sought to protect for the use of future generations.

Similar priorities underlay the Ardoch Algonquins’ actions. The AAFN were induced into action by the community’s Guiding Principles. Among the primary objectives listed in the AAFN’s foundational document is “the protection of the environment both locally and globally in keeping with the sacred responsibility to the earth.”<sup>132</sup> The “Principles of Development” also emphasize the ecological priorities that lie at the core of AAFN law: “Algonquin people should regard the land as a living creature and should interfere as little as possible with its expressions.”<sup>133</sup> At his contempt proceeding, Lovelace testified that Algonquin law prevented him from following the order of the court to allow Frontenac Ventures to begin drilling. Furthermore, Lovelace informed the Court that Ontario law conflicted with Algonquin law in two

---

130 Mike Pearson, “Natives shut down home construction,” *Grand River Sachem* (10 March 2006) 1, cited in DeVries, *supra* note 37 at 22.

131 Haudenosaunee Confederacy Council, “Haudenosaunee Confederacy Land Rights Statement—Adopted in Council, November 4, 2005,” online: <<http://turtleisland.org/news/news-sixnations.htm>> [emphasis added].

132 Ardoch Algonquin First Nation, “Guiding Principles of the Ardoch Algonquin First Nation,” online: <<http://www.aafna.ca/mission.html>>.

133 Ardoch Algonquin First Nation, “Principles of Development,” online: <[http://www.aafna.ca/principles\\_dev.html](http://www.aafna.ca/principles_dev.html)>.

fundamental ways: (1) by issuing mining permits allowing development prohibited under Algonquin law; and (2) by criminalizing Algonquin protestors for attempting to conserve the land and water of their traditional territories.<sup>134</sup> As mentioned above, Sherman has written that the AAFN protestors had lost faith in the Ontario court system to deliver a conception of justice that would reflect the priorities articulated in Algonquin law.<sup>135</sup> It was this lack of faith in the Canadian legal system that led the AAFN to begin its blockade. By applying the contempt power in ways that further marginalized Indigenous legal perspectives, the courts in each of these situations only further alienated the contemnors and their respective communities.

## VI Injunctive Relief: Situating the Multidimensional Rule of Law

In *Henco*, the Crown in right of Ontario had purchased the land in question and did not intend to enforce the injunction obtained by Henco Industries. Marshall J. was the target of the Court of Appeal's criticism because he overstretched the principles of contempt law and sought the enforcement of his injunction, even after the party to whom it had been granted wished to dissolve it.<sup>136</sup> However, if a private party's property interests were still impacted by the occupation of Douglas Creek Estates, what utility would the Court of Appeal's nuanced rule of law have been to the Haudenosaunee protestors who continued to occupy the disputed land in violation of the injunction? How would the additional dimensions of the rule of law—for example, “respect for minority rights” and “reconciliation of Aboriginal and non-Aboriginal interests through negotiations”—have aided the Six Nations blockaders?<sup>137</sup>

To a certain extent, this question was answered in *Frontenac Ventures*. According to the Court of Appeal in that case, the motions judge did not err in his single-mindedness about one dimension of the rule of law at the stage of sentencing an Indigenous contemnor.<sup>138</sup> Rather, the Court of Appeal held that the relevant dimension of the rule of law at the sentencing stage of a contempt proceeding—even in the context of a case involving Indigenous peoples' land rights and sovereignty assertions—was “ensuring that orders of the court are enforced.”<sup>139</sup> While the *Gladue* analysis should have formed part of the motion judge's assessment of the proper sentence, Cunningham A.C.J.S.C. was

---

134 Sherman, *supra* note 87 at 26.

135 *Ibid* at 25.

136 Hazel Hill, one of the participants in the Six Nations land reclamation at Douglas Creek Estates, stated that Marshall J. was “trying to hang onto some fictional power over this whole land reclamation when common sense should tell him that his part was over the day Henco was bought out.” Quoted in DeVries, *supra* note 37 at 21.

137 *Henco (appeal)*, *supra* note 16 at para 142.

138 *Frontenac Ventures*, *supra* note 1 at para 42.

139 *Ibid*.

correct to focus on ensuring that the court's power was respected. Instead, the Court in *Frontenac Ventures* clarified that the multidimensional rule of law as articulated in *Henco* is relevant exclusively to a court's assessment of whether to grant a party injunctive relief in situations where Aboriginal or treaty rights may be adversely impacted.<sup>140</sup> That MacPherson J.A. came to this conclusion appears curious when the *obiter* in *Henco* is closely scrutinized. In *Henco*, Laskin J.A. seemed to make it clear that other dimensions of the rule of law were relevant not merely at the injunctions stage of the analysis but also during the application of the contempt power. After listing other dimensions of the rule of law, Laskin J.A. stated: "It seems to me that in focusing on vindicating the court's authority through the use of the contempt power, the motions judge did not adequately consider these other important dimensions of the rule of the law." Thus the Court's holding in *Frontenac Ventures* that the rule of law remains one-dimensional at the stage of a contempt proceedings—with the exception of the *Gladue*-informed sentencing analysis—represents a retreat from the *dicta* in *Henco*. Implicit in *Frontenac Ventures* is a reliance on the "collateral attack" doctrine.<sup>141</sup> At the stage of a contempt proceeding, courts remain focused on one dimension of the rule of law, while all other considerations are still viewed as collateral.

Acknowledging that the Supreme Court has repeatedly stressed the importance of reconciliation in the context of Aboriginal rights analysis, the Court of Appeal stated:

Injunctions sought by private parties to protect their interests should only be granted where *every effort* has been made by the court to encourage consultation, negotiation, accommodation and reconciliation among the competing rights and interest. Such is the case *even if the affected [A]boriginal communities choose not to fully participate in the injunction proceedings*.<sup>142</sup>

When granting an interlocutory injunction, a court orders a party to do something or to refrain from doing something before all evidence has been adduced and assessed at a trial. The impetus underlying interlocutory injunctive relief is "the need to fashion an order that ensures effective relief can be rendered at the final trial."<sup>143</sup> The object is to stop the greater harm before it occurs, since waiting until the case is heard on its merits could prove too late.<sup>144</sup> To successfully obtain an injunction, the applicant must convince a court that three conditions have been satisfied: (1) there is a serious issue to be tried; (2) there

---

140 *Ibid* at para 43; *Henco (appeal)*, *supra* note 16 at para 143.

141 *Mount Currie*, *supra* note 122.

142 *Frontenac Ventures*, *supra* note 1 at para 46 [emphasis added].

143 Jeffrey Berryman, *The Law of Equitable Remedies* (Toronto: Irwin Law, 2000) at 14.

144 *Platinex Inc. v. Kitchenumaykoosib Inninuwug First Nation*, [2007] 3 CNLR 181 at para 156 (Ont Sup Ct) [*Platinex 2*].

would be irreparable damage caused if an injunction was not issued; and (3) the balance of convenience favours the granting of an injunction.<sup>145</sup>

The Court of Appeal's direction in *Frontenac Ventures* that injunctions should only be granted after all avenues of negotiation have been exhausted is a welcome one. Indigenous people have consistently had difficulty convincing courts to grant injunctions to prevent the development of disputed lands.<sup>146</sup> While this article is primarily focused on private parties' use of injunctions and contempt proceedings to remove Indigenous protestors who are obstructing development on disputed land, the multidimensional conception of the rule of law elucidated in *Frontenac Ventures* has the potential to improve the prospects of Indigenous parties seeking injunctions to prevent development. The stage of the three-step injunction test at which Indigenous people have frequently faced the most difficulty is the "balance of convenience." The Supreme Court of Canada acknowledged in *Haida Nation* that "the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to 'lose' outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns."<sup>147</sup> The Court of Appeal's holding in *Frontenac Ventures* that courts are required to employ a multidimensional rule of law that privileges reconciliation through negotiation when considering whether to grant injunctive relief can function as a counterbalance to the relative strength of private parties' interests at the "balance of convenience" stage.

In *Canadian Forest Products Inc. v. Sam*, Dillon J. relied on *Frontenac Ventures* for the proposition that when private parties seek injunctions which may adversely affect Aboriginal rights, "a careful and sensitive balancing of many important interests should occur and terms carefully considered."<sup>148</sup> In that case, members of the Wet'suwet'en nation set up a blockade to prevent logging on land to which it asserted Aboriginal title. The plaintiff corporation, Canfor, sought injunctive relief against the blockaders. Members of the Wet'suwet'en counterclaimed for an injunction to prevent the extension of logging roads and logging activity on their traditional territories. They succeeded in persuading the Court that irreparable harm would be done if an injunction was not granted to prevent logging on the disputed territory. Dillon J. held further that the balance of convenience favoured the Wet'suwet'en although Canfor held a forest licence which allowed the company to harvest

---

145 *RJR MacDonald*, [1994] 1 SCR 311, 111 DLR (4th) 385.

146 Alan Donovan and Mariana Storoni, "The Protection of Aboriginal Rights and Title Through Injunction and Judicial Review," *The Continuing Legal Education Society of British Columbia* (2004), online: Donovan and Company <<http://www.aboriginal-law.com/articles/protection-of-rights.htm>>.

147 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 14 [*Haida Nation*].

148 2011 BCSC 676 at para 75 [*Canfor*].



a massive amount of timber annually for a term of 15 years. This recent case of the Supreme Court of British Columbia illustrates the transformative potential that a multidimensional rule of law can have in injunction proceedings between Indigenous protestors and corporate interests.

Another excellent example of a motions judge wrestling with the competing interests of a private party and an Indigenous group at the injunction stage can be found in the meandering procedural history of *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation*. This case illustrates both the potential and the limitations of the expanded conception of the rule of law in *Henco* and *Frontenac Ventures*. The basic structure of the conflict bears a strong resemblance to the disputes explored above. Kitchenuhmaykoosib Inninuwug (KI) is an Ojibwa-Cree First Nation located several hundred kilometers north of Thunder Bay. In 1929, KI's predecessor, Trout Lake Band, signed on to Treaty 9. In 2000, KI fielded a Treaty Entitlement Claim, alleging that "it was entitled to a reserve based upon its current population, rather than on the population of its predecessor band in 1929."<sup>149</sup> The KI did not claim a particular parcel of land but a tract to be determined through negotiations with the provincial and federal governments.<sup>150</sup> Platinex, a mining exploration company, possessed mining rights to a portion of KI traditional territories. Platinex suspended its exploratory drilling plans in February 2006 after being confronted by KI members on the disputed territory. Like the Wet'suwet'en and unlike the AAFN and the Haudenosaunee, the KI sought and successfully obtained injunctive relief to temporarily prevent Platinex from proceeding with its plans. In July 2006, Smith J. decided that the KI might suffer irreparable harm if its traditional territories were mined. Citing *Haida Nation*,<sup>151</sup> Smith J. held that the Crown had failed to fulfill its duty to consult with KI and that if Platinex was granted an injunction, the duty would be "meaningless and send a message to other resource development companies that they can simply ignore Aboriginal concerns."<sup>152</sup> Significantly, Smith J. also held that the "public interest" in "maintaining the integrity of the consultation process" tipped the balance of convenience in favour of KI. About six months before the Court of Appeal's decision in *Henco* and two years before *Frontenac Ventures*, Smith J. demonstrated the potential for a conception of the rule of law that accounts for constitutionally protected Aboriginal rights to counteract the tendency of courts to privilege private, non-Indigenous interests at the "balance of convenience" phase in injunctions proceedings. Smith J. granted a five-month injunction on two conditions: first, that KI return any property

---

149 *Platinex 2*, *supra* note 144 at para 49.

150 *Ibid* at para 56.

151 *Haida Nation*, *supra* note 147.

152 *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation*, [2006] 4 CNLR 152 (Ont Sup Ct) at para 110 [*Platinex 1*].

removed from Platinex's drilling camp; and second, that KI organize a "consultation committee" tasked with "developing an agreement to allow Platinex to conduct its two-phase drilling project at Big Trout Lake but not necessarily on land that may form part of KI's Treaty Entitlement Claim."<sup>153</sup> In February 2007, Smith J. ordered that the injunction be extended. Negotiations between the parties continued during the following few months but failed to produce an agreement. The parties were just too far apart. After hearing new evidence in May 2007,<sup>154</sup> Smith J. held that the balance of convenience favoured Platinex, since further obstruction of its drilling operation would likely put it out of business. Furthermore, KI had failed to proffer adequate evidence to demonstrate that the drilling operation would cause irreparable harm to its treaty rights.<sup>155</sup> The KI motion for an interlocutory injunction was dismissed. Smith J. issued an interim declaratory order, imposing a two-week deadline before which the parties had to negotiate a consultation protocol and timetable. The Court further ordered that Platinex could begin the first phase of its exploration program on June 1, 2007.<sup>156</sup> After the parties were unable to reach an agreement within the timeline imposed, Smith J. issued another order imposing a consultation protocol, timetable and Memorandum of Understanding on May 22, 2007.<sup>157</sup> Again, negotiations failed to produce a resolution that was mutually acceptable to the disparately situated parties. On October 25, 2007, Smith J. issued yet another order demanding that KI members allow Platinex access to the drilling site. On November 6, 2007, a crowd of KI members prevented Platinex from starting its exploration program. On December 14, 2007, Smith J. cited eight KI members in contempt of court.<sup>158</sup> In his reasons for sentencing the KI contemnors to jail time, Smith J. stated:

The most significant aggravating factor to be considered in the cases before the court is the public and open declaration by the contemnors that the order of this court or of any court will not be respected or obeyed if it allows exploration or drilling on its traditional land. All have adopted the position of Chief Morris and all have stated that they will continue to defy the orders of this court. It is this public and open defiance of the rule of law and order of this court that is the most disturbing aspect of this case and which comes perilously close to criminal contempt. I find that incarceration is the only appropriate sanction. All contemnors lack the ability to pay a fine.<sup>159</sup>

---

153 *Ibid* at para 139.

154 *Ibid* at para 68.

155 *Ibid* at paras 169-170.

156 *Platinex 2*, *supra* note 144 at para 188.

157 *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] 3 CNLR 221 (Ont Sup Ct) [*Platinex 3*].

158 *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation*, [2008] 2 CNLR 301 (Ont Sup Ct) [*Platinex 4*] at para 1.

159 *Ibid* at paras 48-50.

The contemnors were sentenced to six months in jail. Five elected KI leaders and one community member spent approximately two months in jail and were released on consent. At the contemnors' sentencing appeal, *Platinex* informed the court that it did not oppose the appeal since "no good purpose would be served by keeping the appellants in jail any longer."<sup>160</sup>

In the complicated procedural history of the dispute between KI and *Platinex*, we can observe a judge making earnest attempts at fostering the reconciliation of Indigenous and non-Indigenous interests. Smith J. evidenced a strong understanding of the multidimensional rule of law that the Ontario Court of Appeal first described in *Henco* and fleshed out two years later in *Frontenac Ventures*.<sup>161</sup> Smith J.'s attempts to creatively employ his inherent jurisdiction to keep the parties at the negotiating table and to construct a process that would give effect to the Crown's duty to consult are laudable. Indeed, when the sentences of the KI contemnors were appealed to the Court of Appeal, MacPherson J.A. remarked that both parties "were very appreciative of the efforts made by Smith J. to resolve this case."<sup>162</sup> That said, *Platinex* also demonstrates the limitations of the multidimensional rule of law. While Canadian courts can use their power to facilitate negotiation, they cannot force the parties to agree on a mutually beneficial course of action. In many of these cases, a mutually acceptable course of action is exceedingly difficult or even impossible to identify. The Haudenosaunee and the AAFN were fundamentally opposed to the proposed development activity of the other party. While KI did entertain the possibility of the commercial development of parts of their traditional territory, months of court-ordered negotiation and consultation were unable to lay the groundwork for a mutually satisfactory agreement.<sup>163</sup> Often an Indigenous group and the corporation sitting across the table will have diametrically opposed interests. Canadian courts can only go so far to address the inherent disparities of bargaining power that exist between Indigenous people, corporations and the Crown. The Supreme Court has made it clear that the duty to consult does not amount to an Aboriginal veto power,<sup>164</sup> and *Platinex* demonstrates that when talks break down, the private party which holds a concrete legal interest to the disputed territory—whether it be a fee simple or a mining lease—will often prevail against the assertion of a treaty entitlement or Aboriginal title.<sup>165</sup>

---

160 *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation*, 2008 ONCA 533 [*Platinex (appeal)*] at para 3.

161 As mentioned above, to Smith J.'s further credit, the procedural history of the KI case took place before the release of the Ontario Court of Appeal's decision in *Frontenac Ventures*.

162 *Platinex (appeal)*, *supra* note 160 at 7.

163 See *Platinex 4*, *supra* note 158 at 14.

164 *Haida Nation*, *supra* note 147 at para 48.

165 As was the case in *Henco*, after the contempt proceedings failed to effectively resolve the KI dispute, the Crown was forced to resort to other means. The Ontario government bought out

## VII Conclusion: Reconciliation and the Rule of Law

The Ontario Court of Appeal's articulation of a more nuanced conception of the rule of law in *Henco* and *Frontenac Ventures* is a welcome development in the realm of injunction proceedings as they relate to Indigenous peoples. If applied thoughtfully, the formulation of a broadened rule of law will surely encourage courts to engage more thoroughly with the Indigenous interests underlying similar conflicts before granting injunctive relief to private parties intending to develop on disputed land as demonstrated in the *Platinex* and *Canfor* cases.<sup>166</sup> Following *Henco* and *Frontenac Ventures*, Indigenous applicants who choose to pursue injunctive relief through the Canadian legal process are also likely to have better luck convincing courts to order in their favour in the context of similarly structured disputes. Likewise, the Court's application of the *Gladue* principles at the stage of sentencing contemnors stands as a welcome attempt on the part of the Court to account for the unique relationship of Indigenous peoples to the Canadian legal system. The *Gladue* analysis can certainly serve to soften the blow of a contempt citation for many Indigenous protestors.

However, despite these positive developments in the common law as it relates to Indigenous land disputes, these judgments also indicate that the rule of law continues to be narrowly conceived at the stage of contempt proceedings. While courts have begun to explore the unique relationship of Indigenous people to the Canadian legal system at the injunction stage, the common law has not yet embraced a genuinely pluralistic conception of the rule of law in relation to the contempt of court power. In short, Indigenous legal rationales and perspectives continue to be marginalized. The Supreme Court's jurisprudence defining the rights protected by s. 35 has repeatedly emphasized reconciliation as their purpose. For example, in *R. v. Van der Peet*, the Court held that "the only fair and just reconciliation is ... one which takes into account the Aboriginal perspective while at the same time taking into account the perspective of the common law."<sup>167</sup> As noted above, one of the dimensions of the rule of law according to the Court of Appeal in *Henco* is the "reconciliation of Aboriginal and non-Aboriginal interests through negotiations."<sup>168</sup>

---

Platinex's interest in the disputed land in December 2009 for \$5 million. See Karen Mazurkewich, "Losing Ground," *Financial Post Magazine* (April 2010) 20. At the time of this writing, KI was in conflict with a different junior mining exploration company, God's Lake Resources. See Shawn Bell, "Repeating the past: KI in mining battle on traditional land," *Wawatay News* (13 October 2011), online: *Wawatay News Online* <[http://wawataynews.ca/archive/all/2011/10/13/repeating-past-ki-mining-battle-traditional-land\\_21927](http://wawataynews.ca/archive/all/2011/10/13/repeating-past-ki-mining-battle-traditional-land_21927)>.

166 For an even more recent example of a First Nation successfully receiving injunctive relief against a private corporation, see *Wahgoshig First Nation v. Her Majesty the Queen in Right of Ontario et al.*, 2011 ONSC 7708.

167 *R. v. Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*] at para 50.

168 *Henco* (appeal), *supra* note 16 at para 142.

Thus the process of reconciliation has been granted privileged status by Canadian courts tasked with resolving claims based upon Indigenous peoples' land rights and sovereignty. But what exactly does reconciliation mean? Just how far is the Canadian legal system willing to bend?

If Canadian courts are serious about fostering genuine reconciliation, the rule of law must be further expanded to account for Indigenous peoples' legal perspectives. Allowing for such an expansion would require courts to widen what is "cognizable to the Canadian legal and constitutional structure."<sup>169</sup> Some scholars have argued that such an undertaking would not threaten but actually strengthen the constitutional structure.<sup>170</sup> The Aboriginal rights jurisprudence of Canadian courts is replete with references to the need for the principles of the common law to be adapted when considering the claims and interests of Indigenous people. Constitutionally protected Aboriginal rights have been defined as *sui generis*,<sup>171</sup> or "structurally outside all legally defined categories, a species that heads its own genus."<sup>172</sup> According to James (Sa'ke'j) Youngblood Henderson, the Supreme Court's adoption of the concept of *sui generis* to describe Aboriginal and treaty rights arises from a "realization that the extraordinary sources of Aboriginal legal traditions and jurisprudence were beyond their legal training and experience."<sup>173</sup> According to John Borrows, the *sui generis* doctrine "suggests the possibility that Aboriginal rights stem from alternative sources of law that reflect the unique historical presence of Aboriginal peoples in North America."<sup>174</sup> In a number of the cases explored above, Canadian courts have shown an increasing willingness to recognize the unique legal and constitutional status of Indigenous people when considering whether to grant an injunction to temporarily prevent development on disputed territory or to order the removal of Indigenous protestors. However, the decision of the Court of Appeal in *Frontenac Ventures* also represented an unfortunate retreat from the *dicta* in *Henco*. By declaring that the multi-dimensional conception of the rule of law was only relevant at the injunction stage of the proceedings, the Court of Appeal ultimately reinforced the rule of law's singularity. Once an order of a Canadian court has been defied, all other considerations—including the Indigenous legal rationales underlying the defiance—remain collateral.

Rigid applications of the contempt power will often only serve to undermine the policy objective underpinning the power's existence. If the rationale

169 *Van der Peet*, *supra* note 167 at para 49.

170 Mark D. Walters, "The Morality of Aboriginal Law" (2006) 31 *Queen's LJ* 470 at 519; Borrows, *supra* note 18.

171 *Simon v. The Queen*, [1985] 2 SCR 387 at para 33; *R. v. Badger*, [1996] 1 SCR 771 at para 78.

172 James (Sa'ke'j) Youngblood Henderson, "Constitutional Vision and Judicial Commitment: Aboriginal and Treaty Rights in Canada" (2010) 14 *Australian Indigenous Law Review* 24 at 31.

173 *Ibid.*

174 Borrows, *supra* note 6 at 9.

for applying the contempt power is the restoration of respect for the Canadian legal system's legitimacy, the contempt citations analyzed above proved patently ineffective. The case of the Haudenosaunee offers a rich example of the misapplication of the contempt power, leading to a diminution of respect for a singular rule of law. The Six Nations protestors were evidently not compelled to obey the injunction after the April 20, 2006, OPP raid. In fact, support for the land reclamation swelled to new levels in unabashed defiance of the Court's orders. The lack of genuine consideration for the Haudenosaunee Great Law and for the fundamental issues at the heart of the dispute only further alienated the Indigenous protestors whose faith in the legal process had already worn thin. In this context, Marshall J.'s application of the contempt power failed to garner increased respect for the Canadian legal system.

The irony that certain applications of the contempt power will often only frustrate the court's goals by further alienating Indigenous people from the Canadian legal system is a manifestation of a larger problem in Canadian law. Borrows writes:

When Indigenous laws are not recognized and harmonized, Indigenous peoples experience conditions that resemble a legal vacuum. When their own laws are not recognized and harmonized, it creates chaos and makes the legal systems ineffectual for them. As a result there is a mounting crisis in the rule of law within Indigenous communities because it pays so little attention to their values and participation.<sup>175</sup>

The contempt proceedings that arise in response to Indigenous land disputes offer rich sites for an analysis of the broader dynamics in Canadian law that Borrows has identified. The dilemma faced by Robert Lovelace as described in this paper's epigraph—a respect for the Canadian rule of law but ultimate allegiance to Algonquin law as paramount in the event of conflict—is a palpable one. In contrast to the patronizing contention made by Cunningham A.C.J., the dilemma is surely not one of Lovelace's own making.<sup>176</sup> At its most basic, the dilemma confronted by Lovelace and all Indigenous people compelled to assert title, rights or treaty claims through direct action is created by the imposition of a colonial legal order onto sovereign Indigenous nations. Lovelace's dilemma stems from the "legal vacuum" created when Indigenous law is marginalized and Canadian law's monopoly on legitimacy goes unquestioned.

If the contempt of court power is to serve its purpose in the context of Indigenous peoples' land protests and to bolster a conception of the rule of law that speaks to Indigenous people, then it must be developed to account for the legal rationales that Indigenous people rely on when employing di-

---

175 Borrows, *supra* note 18 at 208.

176 *Frontenac Ventures*, *supra* note 1 at para 40.

rect action to halt development on disputed lands. Given that the power is constitutionally protected as part of superior courts' inherent jurisdiction,<sup>177</sup> the burden falls on judges to develop the common law of contempt to encompass a truly pluralistic view of the rule of law. For Canadian judges to acknowledge Indigenous legal perspectives as relevant considerations even after an Indigenous protestor has defied a court's order to vacate or remove barricades from disputed land, a significant reformulation of the principles of contempt jurisprudence is clearly required. Before citing Indigenous protesters in contempt, courts must endeavour to understand and to demonstrate respect for the legal principles that compel Indigenous people to defy their orders. Courts must more thoroughly appreciate the "colonial legal legacy" that continues to shape Aboriginal rights jurisprudence.<sup>178</sup> Courts must not only acknowledge the strained relationship between Indigenous communities and the Canadian legal system but also recognize the ways that applications of the contempt power can either serve to exacerbate or to mitigate this dynamic. Courts must contend with the reasons underlying lack of faith among many Indigenous people in the dispute resolution processes of the Canadian justice system. Perhaps most fundamentally, the judiciary must confront and move past Eurocentric notions about the inferiority of Indigenous law that continue to permeate Canadian society.

Fundamental changes in the relationship between Indigenous nations and non-Indigenous Canadian society are necessary. The burden of building just relationships between Indigenous nations and non-Indigenous societies surely cannot fall exclusively on the shoulders of the courts. That the case law has repeatedly encouraged negotiation as an alternative to litigation stems from the recognition that judges are often poorly situated to engage in the sort of balancing they are asked to perform. By no means is this dynamic unique to contempt of court proceedings. Judges find themselves in similar positions whenever Aboriginal rights and sovereignty claims come before them, as noted in recent commentary about the Aboriginal title case *Tsilhqot'in Nation v. British Columbia*:<sup>179</sup> "[W]hen claims such as this come to court, judges are faced with the task of trying to achieve reconciliation of competing interests ... but are unable to do so, given the constraints of the law and the inappropriate adversarial context in which judges are obliged to make their decisions."<sup>180</sup> In the contempt proceedings analyzed above, we can observe judges "trapped between an aspiration for reconciliation ... and a requirement to follow the

---

177 *Constitution Act, 1982*, *supra* note 29, s. 96.

178 James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, 2006) at 231.

179 2007 BCSC 1700, [2008] 1 CNLR 112.

180 Kent McNeil, "Reconciliation and Third-Party Interests: *Tsilhqot'in Nation v. British Columbia*" (2010) 8 *Indigenous LJ* 7 at 10.

legally established rules.”<sup>181</sup> Thus significant barriers exist to achieving the kind of transformative social change that is necessary to build just relationships between Indigenous and non-Indigenous societies through litigation in the Canadian court system.

Nonetheless, courts continue to have a crucial role to play. There is little doubt that Indigenous land disputes like the ones explored above will continue to arise. As they do, courts will be given opportunities to give broadened meaning and significance to a principle that, while foundational to the Canadian constitutional order, cannot afford to be static. As land disputes arise and the familiar sequence of legal proceedings outlined ensues, “Canadian courts could also act to facilitate healthier interactions.”<sup>182</sup> Just as Linden J. recognized that Indigenous blockades require unique policing strategies if tragedies like the 1995 murder of Dudley George at Ipperwash are to be avoided,<sup>183</sup> Canadian courts must similarly recognize that the contempt of court power must be modified to address the unique status of Indigenous people in Canadian law. As Indigenous land disputes throw the tenuous nature of a singular rule of law into sharp relief, the Ontario Court of Appeal’s movements towards an expanded definition of the rule of law should be built upon with an eye for legal pluralism. As long as courts continue to maintain that there is “only one law,” just relationships between Indigenous and non-Indigenous societies on Turtle Island will be impossible to foster.

---

181 Dwight G. Newman & Danielle Schweitzer, “Between Reconciliation and the Rule(s) of Law: *Tsilhqot’in Nation v. British Columbia*” (2008) 41 UBC L Rev 249 at 250.

182 Borrows, *supra* note 18 at 206.

183 Linden, *supra* note 9 at 182-193.