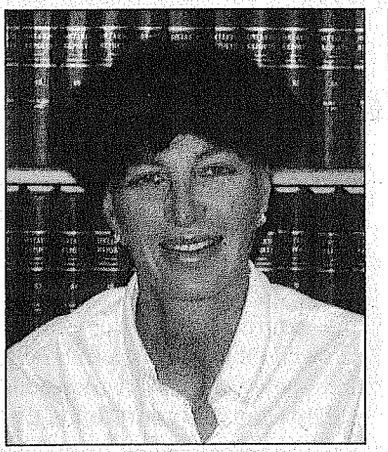
COMMENTARY: "Rule of Law" concept should apply to all parties in Caledonia



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By Kate Kempton and Maggie Wente

The Aug. 8 decision of Justice T. David Marshall in *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* [2006] O.J. No. 3285 about the dispute between Six Nations, developers, and the government made headlines across the country and sparked a foam-bath of controversy when Marshall called for an end to negotiations in the land dispute until the blockades were taken down and the "Rule of Law" respected by the Aboriginal protestors. This Rule of Law is that we are *all* to be governed equally by law no matter who we are and that the law cannot be arbitrary.

But it isn't his pronouncement that the parties should stop negotiating the land claim (until the blockade ends) that provokes the most disquiet. When the appeal of this decision is heard Sept. 25 by the Ontario Court of Appeal it will be important that what is of most importance here is properly considered and presented.

It is Justice Marshall's one-sided application of the Rule of Law to Aboriginal peoples, while failing to hold the Crown to the same standard, that is of most importance and risks most harm. Justice Marshall wouldn't be alone in this. Courts are just beginning to appreciate the reality of how it is we came to be "Canada" and what we did to Aboriginal peoples in order to pose as this land of law and order, wealth and opportunity. But few cases are so bold in their use of the heavy-laden term "the Rule of Law". And this causes concern.

It is possible that in Caledonia, as in many other situations involving Aboriginal peoples, it is the Crown's original breach of the Rule of the Law — in taking Aboriginal lands and ways of life it had no right to take — and its continuing breach in failing to rectify these injustices, that is the cause of the dispute. It is the Crown, far more so than Aboriginal peoples, that must be called to account. It is the Crown against whom injunctions and contempt orders should often lie.

Historical research reveals that when European settlers and their governors first came here, their (which is now Canada's) law correctly recognized indigenous peoples as distinct self-governing societies, and nation-to-nation relationships based on equal respect ensued. This is the basis of treaty-making. The Crown understood it had no right to impose its laws or ways on indigenous peoples here. But when settlers started to outnumber the Aboriginal people, and when the Aboriginal people (like the Six Nations) were no longer needed as military allies against the French and Americans, the Crown radically altered its policies and practices, including its laws of Parliament. This was not based on precedent, but for pragmatic reasons: to meet the demands of the European settlers, often for more land, by taking away from Aboriginal peoples. Much of this taking was without right, which in other contexts we would simply call theft. It was a taking of lands, economies, cultures, ways of life, hope, and sometimes, a reason to live.

This taking without colour of right is in defiance of the Rule of Law — of the Crown's and Canada's own constitutional law. While much such defiance is historical, let us not forget it still happens across Canada today and is very much a live and pressing issue.

Unless courts apply the Rule of Law to the Crown in its dealings with Aboriginal peoples, and look at a dispute in its full context, then there will be little justice in our courts. The failure to do so brings the administration of justice into disrepute, more than the lack of enforcement of contempt orders against a few Aboriginal protestors.

Aboriginal peoples and the Crown are, according to the Supreme Court of Canada, supposed to be governed by a relationship of reconciliation. The Crown has a duty to reconcile with Aboriginal peoples by rectifying these historical injustices.

This special government-to-government relationship with Aboriginal peoples is not a relationship non-Aboriginal Canadians share with the Crown. Thus, any ruling by the court in this case to vacate the contempt orders against the Aboriginal parties is not likely to provoke Caledonia residents, or anyone else, into thinking one can simply avoid court orders and not pay parking fines, as Justice Marshall opined.

Ontario and Canada have expressed intentions to reconcile here. Where reconciliation is afoot, which is far too rare, courts have a duty to honour this. To fail to do so would, again, bring the administration of justice into disrepute. The Court of Appeal in an Aug. 25 judgment assisted this reconciliation, at least for a month pending the appeal of Justice Marshall's decision, by ordering a temporary stay of his injunction order. Marshall had ordered that the injunction granted against the Aboriginal protestors – requiring their removal of the blockade/protest from the property – to the benefit of property developer and owner Henco, was to be applied to the province as the new property owner, essentially requiring the province to kick the protestors off the land even though the province had decided they may remain. The Court of Appeal also noted that "the rule of law ... has many components" and suggested that Justice Marshall's application of the rule of law in his injunction order was ill-founded. Let us hope the Court of Appeal is able to understand that a fundamental component of the Rule of Law is its application to the Crown, and that this has been honoured more in the breach to date — a fact which has to change.

If we want people – including Aboriginal peoples – to respect Canada's legal system, then a more contextual and factually accurate Rule of Law must be applied.

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