

The Face of Aboriginal Sovereignty Versus the Rule of Law in Caledonia

by Gary McHale (14:25 min)

1) Introduction – 2.0 minutes

On January 30, 1649 Oliver Cromwell had King Charles beheaded - proving a fundamental legal concept which is that no one is above the law. Gone are the days when people were not subject to the law because of their blood line or station within society. No longer did the McHale clan battle with the McGregor clan and force their views of crime and punishment on each other.

There was a time when individual noblemen could punish members of a family for the crimes of others, or even a whole town. It didn't matter what the law said because they were above the law.

Today whether you are the Prime Minister of Canada or the person on the street the Rule of Law means you are Equally subject to the law and also Equally protected by the law.

Throughout the world wherever people have been victimized by the state the solution has been the establishment of the Rule of Law.

For example, the systematic killing of Jewish people by Nazi Germany has not produced a group of people who see all Germans as evil or see Germany as a nation that needs to be attacked.

For 60 years we have witnessed Jewish people respecting the Rule of Law in seeking the prosecution of Nazis and not the persecution of Germans. We have not seen groups of Jewish men roaming the streets with masks carrying baseball bats and beating people because they or their ancestors were victimized during WWII.

Justice and the Rule of Law go hand in hand to ensure peace between groups and allows conflicts to be resolved in court - not by the Rule of Thugs in the streets.

2) Rule of Law - United Nations - 1.5 minutes

The idea that all people are subject to and, therefore, all people must respect the Rule of Law is not a Canadian idea nor something exclusive to Britain. The Core belief of the United Nations can be described as:

Promoting the rule of law at the national and international levels is at the heart of the United Nations' mission. Establishing respect for the rule of law is fundamental to achieving a durable peace in the aftermath of conflict, to the effective protection of human rights, and to sustained economic progress and development. The principle that everyone – from the individual right up to the State itself – is accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, is a fundamental concept which drives much of the United Nations work.

[end quote]

It is the breakdown of the Rule of Law that creates the climate for acts of genocide - whether that be in Bosnia or in the Congo or Rwanda. When one group believes it is above the law and will not be held accountable then all sorts of vile crimes are committed against others.

The Rule of Law ensures independent adjudication and removes the option of individual or group interpretation and enforcement of the Law. Gone are the days where an individual, a family, a clan or a race can arbitrarily decide what the law says.

3) United Nations and Aboriginal Self-government - 1.5 minutes

Article 3 of the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* states:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

In the Preamble of this declaration we read the following:

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,...

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

In the document regarding the Rights of Indigenous People we see the promotion of equality of all people with no special rights or privileges allotted any one group

Any view that Aboriginal traditions, customs or spirituality is superior is considered by the UN as racist, etc. – as is the case for anyone claiming white are superior.

The United Nations has recognized and continues to recognize that Aboriginal people are citizens within the state which is why the state has a duty to ensure Equality for Aboriginal people.

4) **Canadian Constitution and Charter of Rights and Freedoms - 2 minutes**

The Preamble to the Charter of Rights is in perfect harmony with the principles of the United Nations with respect to the Rule of Law in recognizing that all people, including aboriginals, carry the responsibility of respecting the law:

“Whereas **Canada is founded on the principles** that recognize the supremacy of God and the **rule of law.**”

Section 35 of the Canadian Constitution states:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

A Constitution is the way Governments institute the fundamental divisions of power and the rights of their citizens. The mere fact that section 35 exists demonstrates that the Canadian Government has authority over aboriginal people which is recognized by the United Nations.

The Supreme Court of Canada has ruled that, "Section 35 clearly refers to the protection of Indian rights as of April 17, 1982. The insertion of the word 'existing' can only be said to have been deliberately effected to achieve that result... the reference in s. 25 [Charter of Rights and Freedoms] to the Royal Proclamation of 1763 cannot, by inference, move the clock back over 200 years, nor was it intended so to do."

Section 15.(1) of the Charter of Rights and Freedoms states:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 27 states:

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

It is the courts, not individuals, who determine the meaning of the Law. If everyone was free to determine for themselves how they would interpret the Law then society would quickly break down into chaos – exactly as we have seen in Caledonia.

5) **Aboriginals and the Criminal Code of Canada** - 2 minutes

Some question whether Aboriginals are subject to the Canadian Criminal Code. This question has been clearly answered by courts in every province in Canada as well as by the Supreme court of Canada.

In the case of *R. v. David* [2000] we read the following:

Mr. David's claim, essentially a claim for full aboriginal Mohawk sovereignty, is not a novel one. It is a proposition that has been considered by Canadian courts on numerous occasions. It has never been accepted and I am certainly bound to reject it as well. Canadian sovereignty is a legal reality recognized by the "law of nations". Claims such as has been advanced in this case by Mr. David do not make that reality less real.

The Supreme Court of Canada in *R. v. Sparrow* [1990] ruled:

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which **the Royal Proclamation of 1763 bears witness**, there was from the outset never any doubt that **sovereignty and legislative power**, and indeed the underlying title, to such lands **vested in the Crown**.

In *R. v. Francis* [1988] the Supreme Court of Canada ruled that New Brunswick's Provincial Highway Traffic laws were enforceable even on Native Reserves.

The Superior Court of Ontario in the case of *R. v. Francis* [2007] heard an application filed by an Aboriginal, seeking to have his criminal charge dismissed because the offences took place within the ancestral territory of the Mohawk Nation on Cornwell Island. The Application was ruled "Frivolous and vexatious and not capable of succeeding" and was summarily dismissed.

This issue of whether Aboriginals are subject to the criminal code has been settled by the courts.

6) Inherent Problem with Six Nations Logic - 2 minutes

There is a practical problem of the argument that Six Nations are not subject to the Criminal Code because they are a sovereign nation.

First, citizens of any country, even the United States, are subject to the Criminal Code if they commit a crime in Canada. When a Canadian commits a crime in the USA he is not prosecuted by the Canadian Government - because he has not committed a crime in Canada. This is basic international law.

According to some the Haldimand Tract is not in Canada and therefore the Criminal Code of Canada does not apply.

Because of this believe some think they have the right to hospitalize dozens of OPP officers; destroy a power station; burn down a bridge; assault and hospitalize residents and media people; dig up a highway; pollute the environment with tire fires and threaten individuals and their property.

If one accepts this reasoning, then surely the opposite is equally true. After all, the Rule of Law and treaty rights are a two way street.

If the Haldimand Tract is not Canadian soil – and therefore not subject to the Criminal Code of Canada - then both Natives and non-Natives within the Haldimand Tract cannot be prosecuted by the Canadian Government.

Based on this logic any non-Native or group of non-Natives from Caledonia who decides they have had enough and want to by-pass the Courts would be free to pick up weapons and attack Native people without any prosecution by the Canadian Government.

Furthermore, based on their argument that Six Nations and Canada are allies who are exempt from one another's laws, even Six Nations would not have the authority to prosecute these criminals.

Surety we do not want groups of thugs roaming the street in a lawless territory.

7) Rule of Law and Caledonia 2 minutes

Many Six Nations Protesters agree with the Ipperwash Inquiry recommendations and also with the Ontario Court of Appeal ruling that overturned Judge Marshall's ruling. But once again people cannot be allowed to pick and choose which parts of the ruling they agree with while throwing out the rest.

The same Ontario Court ruling that overturned Judge Marshall's ruling about the Douglas Creek Estates is also the ruling that states:

The Province owns Douglas Creek Estates... If the protesters cause a nuisance or other disturbance affecting neighbouring lands or residents of Caledonia, then action may be required... I accept that negotiations are not a substitute for individual responsibility for criminal acts.

On Aug. 3, 2008 Superior Court Judge J. Henderson ruled the following:

I also find that the actions of the HMF [Haudenosaunee Men's Fire] amount to both criminal and civil misconduct. Their actions have interfered with the property rights of Voortman and can be characterized as nuisance, trespass, extortion, intimidation, and inducing breach of contract...

Before I conclude I would like to emphasize the rule of law. All people in Canada are governed by the rule of law as confirmed in the preamble to the *Charter of Rights and Freedoms*. That is, all people in Canada are required to obey the law. As a corollary, all people in Canada are entitled to know that every other person in Canada will be required to obey the law. If any person in Canada does not obey the law, the courts will enforce the law. In that way the public has some assurance that they can live in peace without fear of those who might choose to disobey the law.

The rule of law means that the HMF will be required to obey any court order, just as any person in Canada would be required to obey a court order. The assertion of an aboriginal right does not permit any person, aboriginal or otherwise, to break the law.

Closing - 2 minutes

Within my life span we have witnessed civil rights progress that has taken Black people from being lynched to being elected as President of the United States.

Generations of abuse by both the State and by the White public came to a head in the 1950s - 60s, and two views emerged as to how Blacks could establish their human rights within a racist society.

Malcolm X called for an armed revolution to overthrow the evil white man.

Martin Luther King Jr. had a dream of Equality where one day a person would not be judged by the Colour of his Skin but by the content of their character, where the "truth is self-evident: that all men are created equal."

The only people who roamed the streets in his era with their faces covered as they committed violence were members of the KKK and Dr. King was not going to follow in their footsteps.

Dr. King had great respect for the Rule of Law which is why he demanded protection by the Law. The fruits of Dr. King's approach to historical injustices lifted Black people up to the point that one is now elected as president. Dr. King's approach not only changed a nation it also changed the hearts of millions.

The United Nations believes the Rule of Law is vital for peace and that Aboriginals in Canada are citizens of Canada and thus Canada has a duty to them.

The Canadian Constitution recognizes Aboriginal Rights and Treaties which the Supreme Court has ruled on – many times in their favour.

The Rule of Law exists not just to protect non-Natives but also Native people. God forbid the day ever comes when a group of non-Natives believes they have the right to systematically attack Native People. If it does happen then what will Native People cry out?

That people are not subject to the Law, or will they demand that the Rule of Law be enforced to protect them and their children?

Thank you.

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