THE INHERENT RIGHT OF THE HAUDENOSAUNEE TO
CRIMINAL JUSTICE JURISDICTION IN CANADA:
A PRELIMINARY INQUIRY

by

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**ABSTRACT**

The Haudenosaunee, or Six Nations of the Grand River, are the largest First Nations community in Canada and are located near the city of Brantford, Ontario. Currently, the Six Nations Band Council is examining the prospect of implementing a "parallel" criminal justice system.

In support of this initiative, this thesis analyzes the viability of implementing a parallel criminal justice system pursuant to the inherent right of self-government within the meaning of s. 35 (1) of the Constitution Act, 1982. The Supreme Court of Canada has established a four-step legal framework that all courts must utilize when assessing an Aboriginal rights claim. In conformity with existing judicial directives, anthropological, historical, and oral tradition evidence is applied to each of the four areas of inquiry to support the legal assertion that the Haudenosaunee have a constitutionally protected inherent right to develop and administer a system of criminal justice within their territorial boundaries.
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# TABLE OF CONTENTS

Approval ........................................................................................................................ ii
Abstract ........................................................................................................................ iii
Acknowledgements ........................................................................................................ iv
Table of Contents ........................................................................................................ v
List of Tables ............................................................................................................... viii

Introduction .................................................................................................................. 1

Chapter 1: A Political History of the Haudenosaunee .............................................. 5
Since Time Immemorial .............................................................................................. 5
16th and 17th Century ............................................................................................... 6
18th Century .................................................................................................................. 8
19th Century ................................................................................................................ 13
20th Century ................................................................................................................ 16

Chapter 2: Haudenosaunee Justice ......................................................................... 29
A Haudenosaunee World View ............................................................................... 29
The Great Law of Peace ............................................................................................ 33
The Regulation of “Criminal Acts” ......................................................................... 34
Specific Crimes ............................................................................................................. 37
Witchcraft ................................................................................................................. 37
Murder ...................................................................................................................... 38
Theft ........................................................................................................................ 40
Adultery ..................................................................................................................... 42
Sanctions .................................................................................................................... 43
Ostracization ............................................................................................................. 43
Execution .................................................................................................................. 43
Reparation .................................................................................................................. 44
Banishment ............................................................................................................... 45

Chapter 3: Review of Applicable Caselaw ............................................................... 47
Table 1: Overview Of An Aboriginal Rights Analysis .............................................. 48
Is There An Existing Aboriginal Right? ................................................................. 55
Characterization of the Claim ................................................................................. 58
Evaluation Of The Traditional Practice ................................................................. 59
Assessment Of Continuity Between Traditional Practice And Modern Activity 60
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Has The Aboriginal Right Claimed Been Extinguished Prior To The</td>
<td>70</td>
</tr>
<tr>
<td>Enactment Of Section 35 (1) Of The Constitution Act, 1982?</td>
<td></td>
</tr>
<tr>
<td>Does The Legislation In Question Have The Effect Of Interfering With</td>
<td>74</td>
</tr>
<tr>
<td>An Existing Aboriginal Right To The Extent That It Represents A Prima</td>
<td></td>
</tr>
<tr>
<td>Facie Infringement S. 35(1)?</td>
<td></td>
</tr>
<tr>
<td>Can The Infringement Be Justified?</td>
<td>76</td>
</tr>
<tr>
<td>Is Self-Government An Inherent Aboriginal Right?</td>
<td>80</td>
</tr>
<tr>
<td>Does An Aboriginal Right Exist Independently Of Aboriginal Title?</td>
<td>83</td>
</tr>
<tr>
<td>Will The Court Accept Oral History Evidence?</td>
<td>86</td>
</tr>
<tr>
<td>Chapter 4: Application of the Evidence</td>
<td>89</td>
</tr>
<tr>
<td>Characterization Of The Claim</td>
<td>89</td>
</tr>
<tr>
<td>Evaluation Of The Traditional Practice</td>
<td>90</td>
</tr>
<tr>
<td>Assessment Of Continuity Between The Traditional Practice And The</td>
<td>91</td>
</tr>
<tr>
<td>Modern Activity</td>
<td></td>
</tr>
<tr>
<td>Conclusion On Continuity</td>
<td>92</td>
</tr>
<tr>
<td>Extinguishment</td>
<td>94</td>
</tr>
<tr>
<td>Clear And Plain Intention</td>
<td>95</td>
</tr>
<tr>
<td>The Hudson's Bay Charter, 1670</td>
<td>95</td>
</tr>
<tr>
<td>The Royal Proclamation Of 1763</td>
<td>96</td>
</tr>
<tr>
<td>The Canada Jurisdiction Act, 1803</td>
<td>98</td>
</tr>
<tr>
<td>The Act For Regulating The Fur Trade, 1821</td>
<td>100</td>
</tr>
<tr>
<td>The Enfranchisement Act, 1869</td>
<td>103</td>
</tr>
<tr>
<td>The Indian Act, 1876</td>
<td>104</td>
</tr>
<tr>
<td>The Criminal Code, 1892</td>
<td>107</td>
</tr>
<tr>
<td>Surrender</td>
<td>112</td>
</tr>
<tr>
<td>The Two Row Wampum Or Fort Albany Treaty, 1664</td>
<td>114</td>
</tr>
<tr>
<td>Treaty Of Niagara, 1764</td>
<td>118</td>
</tr>
<tr>
<td>Constitutional Enactment</td>
<td>121</td>
</tr>
<tr>
<td>The British North America Act, 1867</td>
<td>122</td>
</tr>
<tr>
<td>The Manitoba Act And The Natural Resources Transfer Agreement</td>
<td>124</td>
</tr>
<tr>
<td>Conclusion On Extinguishment</td>
<td>126</td>
</tr>
<tr>
<td>Has The Inherent Right To Criminal Justice Jurisdiction Been Infringed</td>
<td>127</td>
</tr>
<tr>
<td>By Federal Or Provincial Legislation?</td>
<td></td>
</tr>
<tr>
<td>Is The Legislative Limitation Unreasonable?</td>
<td>127</td>
</tr>
<tr>
<td>Does The Legislation Impose Undue Hardship?</td>
<td>129</td>
</tr>
<tr>
<td>Does The Legislation Deny To The Holders Of The Right Their Preferred</td>
<td></td>
</tr>
<tr>
<td>Means Of Exercising That Right?</td>
<td>136</td>
</tr>
<tr>
<td>Conclusion On Infringement</td>
<td>139</td>
</tr>
<tr>
<td>Can The Infringement Be Justified?</td>
<td></td>
</tr>
<tr>
<td>Compelling And Substantial Legislative Objective</td>
<td>139</td>
</tr>
<tr>
<td>Is The Infringement Consistent With The Crown's Fiduciary Obligation To</td>
<td></td>
</tr>
<tr>
<td>First Nations?</td>
<td>142</td>
</tr>
<tr>
<td>Conclusion On Justification</td>
<td>146</td>
</tr>
<tr>
<td>Conclusion</td>
<td>151</td>
</tr>
<tr>
<td>Appendix 1: The Great Law of Peace</td>
<td>154</td>
</tr>
<tr>
<td>The Mohawks</td>
<td>155</td>
</tr>
<tr>
<td>Topic</td>
<td>Page</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Thanksgiving</td>
<td>155</td>
</tr>
<tr>
<td>Rights, Duties, Qualifications Of The Statesmen</td>
<td>157</td>
</tr>
<tr>
<td>Pine Tree Chief</td>
<td>161</td>
</tr>
<tr>
<td>The War Chiefs</td>
<td>161</td>
</tr>
<tr>
<td>The Clans</td>
<td>162</td>
</tr>
<tr>
<td>The Symbols</td>
<td>164</td>
</tr>
<tr>
<td>Adoptions</td>
<td>167</td>
</tr>
<tr>
<td>Emigration</td>
<td>168</td>
</tr>
<tr>
<td>Foreign Nations</td>
<td>168</td>
</tr>
<tr>
<td>Rights Of The People</td>
<td>171</td>
</tr>
<tr>
<td>Ceremonies</td>
<td>172</td>
</tr>
<tr>
<td>Installation Song</td>
<td>172</td>
</tr>
<tr>
<td>Protection Of The House</td>
<td>173</td>
</tr>
<tr>
<td>Funerals</td>
<td>173</td>
</tr>
<tr>
<td>Table of Authorities</td>
<td>176</td>
</tr>
</tbody>
</table>

**Table of Authorities**

- Legislation............................................... 176
- Regulations............................................... 177
- Treaties.................................................. 177
- Royal Charters And Proclamations............... 178
- Haudenosaunee Laws And Oral Histories......... 178
- Cases..................................................... 178
- Government Bills And Reports.................... 179
- Secondary Sources..................................... 181
LIST OF TABLES

Table 1: Overview of an Aboriginal Rights Analysis
INTRODUCTION

The Haudenosaunee,¹ or Six Nations of the Grand River,² are the largest First Nations community in Canada and are located near the city of Brantford, Ontario. They have an approximate membership of 21,600³ and their territory encompasses 20,000 hectares.⁴ They are one of the most progressive First Nations communities in the country, with ample community, legal, and educational support structures.⁵ Their elected Band Council consists of twelve Councilors and one Chief Councilor. The traditional hereditary government still maintains a deep-seated position of leadership and is appointed by the women who hold the hereditary Chieftainships.⁶

Since the point of first contact with Europeans, the Haudenosaunee have consistently maintained a position of sovereign nationhood, and have resisted any

¹ Haudenosaunee is the correct Iroquoian expression the Six Nations use to refer to themselves. In English it translates into 'People of the Longhouse'. Other expressions used to identify the Haudenosaunee include, Five Nations, Six Nations, Iroquois, the League, and the Confederacy.
² The Six Nations are a political Confederacy comprised of the Mohawk, Cayuga, Oneida, Onondaga, Seneca and Tuscarora Nations.
³ Canada, Indian and Northern Affairs Canada, Registered Indian Population by Sex and Residence (December 31, 2002) [http://www.ainc-inac.gc.ca/pr/sts/rip/rip02_e.pdf]. As of December 31, 2002 the Six Nations of the Grand River had a Band membership list totaling 21,618 individuals (February 14, 2003).
⁵ Ibid. Primary community support structures include employment services; a medical services facility; a day care centre; a senior citizens residence; a crisis intervention centre; drug and alcohol abuse services; welfare services; and a recreation centre. Legally oriented services include First Nations constables; child protection; correctional services counselling; and family violence counselling. Educational services include five elementary schools that integrate Aboriginal languages and First Nations' culture in their curricula; one post-secondary institution that emphasizes the development, promotion and retention of Haudenosaunee culture and languages; and a post secondary centre that manages and distributes funding for post secondary students attending institutions off territory.
attempts by foreign nations to supplant or encroach their internal affairs. Their position of self-governing autonomy also extends into the sphere of criminal justice jurisdiction. Currently, the Six Nations elected Band Council, in consultation with the Hereditary Council and other First Nations, is examining the prospect of implementing a "parallel" or "alternative" criminal justice system. In support of this initiative, this thesis will make a preliminary assessment of the viability of implementing a parallel criminal justice system pursuant to the inherent right of self-government within the meaning of s. 35 (1) of the Constitution Act, 1982. Thus, the scope of this inquiry will be focused primarily on the examination and evaluation of the existing legal requirements necessary for the Haudenosaunee to assert such a right.

Chapter 1 will examine the political history of the Haudenosaunee from the point of first contact with Europeans to their most current expressions of sovereign nationhood. The purpose of this section is two-fold. First, it will provide the context necessary to fully understand and evaluate the Haudenosaunee and their position on

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9 For the purposes of this thesis the type of "parallel" justice system expressed is that advocated for by the Royal Commission on Aboriginal Peoples, which is characterized as, the power to create criminal law within Aboriginal territories; jurisdiction to deal with a wide range of matters in the area of criminal law and procedure operative within Aboriginal territories; unimpeded authority over aspects of criminal law and procedure that fall into the core of Aboriginal jurisdiction; and, concurrent jurisdiction with the federal power over criminal law and procedure generally. This type of parallel system is much more comprehensive than existing Aboriginal justice initiatives that tend to be typified as small-scale; developed on an ad hoc basis; operating on limited budgets; and, under the shadow of a pilot project mentality. Canada, Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada (Ottawa: Minister of Supply and Services Canada, 1996) at 177-247.
sovereignty. Second, it will demonstrate continuity of criminal justice practices.\textsuperscript{10} The rationale used in this section assumes that Haudenosaunee complacency towards British interference into their sovereign affairs gives a reasonable indication of the probability of the Iroquois abandoning their internal social regulation practices. Conversely, the more resistance to British intrusion exhibited by the Haudenosaunee, the stronger the evidence of their desire to retain their traditional methods of criminal justice. It is important to note that although this evidence may not be sufficient to meet the specific legal standard required to demonstrate continuity, it certainly allows one to draw rational, sound conclusions on the matter, which is a primary function of this preliminary inquiry.

Chapter 2 will investigate traditional Haudenosaunee methods of social regulation and how their worldview, in conjunction with The Great Law of Peace, maintained an extremely cohesive society in which anti-social or criminal behaviour was a very rare occurrence. In order for a court to accurately assess the assertion of a Haudenosaunee inherent right to criminal justice jurisdiction, the appropriate historical and cultural context must be presented and this Chapter is designed to provide this information.

Chapter 3 will review existing Aboriginal rights case law relevant to the assertion of Aboriginal criminal justice jurisdiction. The Supreme Court of Canada has established a four-step legal framework that all courts must utilize when assessing an Aboriginal rights claim, and this section will closely examine that framework and its related principles.

Chapter 4 applies the framework and principles established by case law to the specific issue of Haudenosaunee criminal justice jurisdiction. The anthropological, historical, and oral tradition evidence outlined in Chapters 1 and 2 will be utilized to

\textsuperscript{10} In order to be considered an existing Aboriginal right, Canadian law requires an Aboriginal claimant to demonstrate continuity of a practice, custom, or tradition integral to the distinctive Aboriginal society. What this means is that there must be some continuous application and connection of the right that is being asserted, with a practice, custom, or tradition that was integral to that society before contact with Europeans. Essentially, if that practice, custom, or tradition was abandoned or altered to the extent that it can't be considered integral to the society, it is not considered an existing Aboriginal right. However, the courts have also distinguished between the abandonment and the suppression of Aboriginal rights, which will be discussed in Chapter 4.
support the legal assertion that the Haudenosaunee have an existing right to develop and administer a system of criminal justice within their territorial boundaries.

The final conclusion will reflect on some of the legally oriented issues discussed in the thesis, although it will also comment on one of the most important questions related to this subject matter, i.e., "Why are the courts being left to adjudicate the matter of Aboriginal criminal justice jurisdiction, when there is longstanding governmental recognition of the existing Aboriginal right to self-government"?
CHAPTER 1:
A POLITICAL HISTORY OF THE HAUDENOSAUNEE

Since Time Immemorial

Originally the Five Nations,\(^{11}\) or Haudenosaunee, occupied the area in what is now Montreal, and were subject to the domination of the Adirondacks, who were a very powerful warrior-oriented nation. The Haudenosaunee revolted against the Adirondacks, but were driven from their homes, and migrated to the lower shores of the Great Lakes, from the Hudson River on the east to the Niagara River on the west, and from the Great Lakes on the North to the Potomac River on the south.\(^ {12}\) From east to west, the Haudenosaunee territorial boundaries were home to the People of the Flint (Mohawks), the People of the Stone (Oneidas), the People on the Mountain (Onondagas), the People at the Landing (Cayugas), and the Great Hill People (Seneca).\(^ {13}\)

Initially, these nations were similar to other Aboriginal nations. Each was an independent body with similar dialects and similar customs, but there was no political alliance. The standard norm was each man and each nation to itself and they often warred amongst each other, as well as with surrounding First Nations. These practices only served to devastate any existing internal cohesion and create vulnerability to surrounding hostile nations, such as the Huron and Algonquin.\(^ {14}\) All this changed when the Peacemaker planted The Great Tree of Peace and provided the Haudenosaunee

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\(^{11}\) The original Five Nations Confederacy became the Six Nations Confederacy with the admission of the Tuscarora in 1724.


\(^{14}\) Ibid. at 17.
with The Great Law.\textsuperscript{15} The result was the creation of the most powerful and influential First Nation Confederacy in North America.\textsuperscript{16}

\textbf{16th and 17th Century}

First contact occurred in the fall of 1534 when Jacques Cartier sailed up the St Lawrence and came upon the Haudenosaunee settlement of Hochelaga, which was inhabited by several thousand Mohawks.\textsuperscript{17} The Mohawks peacefully greeted Cartier and prepared a feast for the 'strange' guests, who, fearing poison, declined the hospitality and returned to their fort near Stadacona. Cartier and company remained at the fort over the winter and the following spring returned to Britanny, not returning for six years.\textsuperscript{18}

In 1609, the Dutch, having established New Amsterdam at the mouth of the Hudson River, encountered the Haudenosaunee as they pushed northward.\textsuperscript{19} In the same year, Champlain with a party of Algonquian allies encountered an army of Mohawks near Crown Point. The Haudenosaunee and the Algonquian had long been enemies and a battle ensued. This was the focal point for a long-standing hostility between the Iroquois and the French that would last until 1763.\textsuperscript{20} In 1645, the Iroquois and Dutch entered into an alliance of peace and friendship with the \textit{Two Row Wampum Treaty}.\textsuperscript{21} The concept of this Treaty was developed by the Haudenosaunee so they could peacefully co-exist, conduct trade and share resources with the Dutch, and later, other European Nations such as the British. The \textit{Two Row Wampum} embodies the principles of sharing, mutual recognition, respect and partnership and is based on a


\textsuperscript{17} R. Wright, \textit{Stolen Continents: The New World Through Indian Eyes} (Toronto: Penguin Books, 1993) at 122.


\textsuperscript{21} For a more detailed examination of this Treaty please see the section on Surrender.
nation-to-nation relationship, which respects the autonomy, authority and jurisdiction of each nation.22 Both parties adhered to these principles until 1664 when the British defeated the Dutch and overtook New Amsterdam.23

The English were able to preserve the same friendly relations with the Iroquois that had been maintained by the Dutch.24 On September 24, 1664, representatives of the Five Nations and Britain's Colonel George Cartwright entered into a formal alliance similar to that between the Iroquois and the Dutch.25 This alliance was further solidified in the 1679 Albany Conference that ensured Haudenosaunee hunting and travel through Manahowc territory and the 1684 Albany Treaty that blocked English settlement in Iroquois-controlled Piedmont.26 These agreements also provided for British protection from the French within Iroquois territories.27

In 1692 the original treaty relationship that had been forged with the Dutch in the Two Row Wampum was formally extended to the British, but thereafter, became known as the Silver Covenant Chain.28 The Treaty was so named as a metaphor for the relationship, which was considered a silver chain that tied the British ship and the Iroquois canoe to the Tree of Peace. An actual silver chain was made to symbolize their agreement and the three links of that chain were said to represent peace, friendship, and forever, which was the basic theme of all Haudenosaunee treaties. The parties also agreed to meet regularly to polish the chain to restore their original friendship and to pass the treaty down from generation to generation, so that its intent would never be forgotten.29 It is important to note that treaty protocol during this period was always

24 Ibid.
27 Graymont, supra note 23 at 27.
29 What is important about the treaties? [http://sixnations.buffnet.net/Lessons_from_History/] (October 18, 2003).
conducted according to Haudenosaunee custom, and the British knowingly adopted and adapted each element of Haudenosaunee Council and treaty procedure.\(^{30}\)

**18th Century**

After 1697, with the end of King William's War, the Haudenosaunee could no longer depend upon British support against the French. The abandonment by their British allies forced the Iroquois to seek further treaties of peace and friendship with both, which the Haudenosaunee were able to achieve.\(^{31}\) On August 4, 1701, the Iroquois became signatories to "Le Grande Paix," or "The Great Peace," a treaty meant to end the decades of bloody conflict between the French, their Indigenous allies, and the Iroquois confederacy. The terms of the Treaty required the French to recognize the independent sovereignty of each signatory First Nation and in return, those nations pledged peace and goodwill. The treaty was signed by the French governor, de Callière, and was marked by the leaders of 39 First Nations. Essentially, this compact required the Iroquois to remain neutral in any future wars between England and France, and in return, the French would initiate a procedure of trade with the Five Nations, recognize the Iroquois right to the beaver-hunting territory and refrain from invading Haudenosaunee territories. Importantly, this treaty virtually ended the Amerindian-French wars and set a precedent of negotiation, which lasted well into the 1800's.\(^{32}\)

Shortly before the Haudenosaunee became signatories to The Great Peace Treaty, they had sent a delegation to Albany to conduct negotiations with the British. The result of those negotiations was the Nanfan Treaty of 1701\(^{33}\) or 'A DEED FROM THE FIVE NATIONS TO THE KING, OF THEIR BEAVER HUNTING GROUND'. In this accord, the Iroquois surrendered land to the north and northwest of Lake Erie, which they had conquered some eighty years previously. In return, the English were to protect and guarantee hunting within the boundaries stipulated, to the Haudenosaunee, their

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\(^{31}\) Graymont, *supra* note 23 at 27.

heirs and descendants, forever. Apparently the French had allied themselves with the former Indigenous inhabitants of the area and were planning on building a fort in the territory. However, the Iroquois cleverly prevented French expansionism and ensured their own continued use of the area.\textsuperscript{34}

During the next three inter-colonial wars of the eighteenth century\textsuperscript{35} the Haudenosaunee Confederacy generally preserved a position of neutrality, although individual nations strengthened their alliances with both European powers for the benefit of their societies. For instance, some Mohawks fought alongside the British, and some Seneca alongside the French, during both Queen Anne's and King George's Wars.\textsuperscript{36} However, during the French and Indian War, the Iroquois were reluctant to support either side. A longstanding association with the British still existed, although the French defeat of General Braddock in July of 1755 was especially impressive to the Haudenosaunee, who were content to delay any active participation in the war until a clear victor began to emerge.\textsuperscript{37} By 1759, it became apparent to the majority of Iroquois that the English would prevail, and all but the Seneca joined the British in the expedition against Niagara.

With the defeat of France and their subsequent withdrawal from Canada, the Confederacy was left with little choice but to ally themselves with the English. In April of 1762 Sir William Johnson, the British superintendent of Indian affairs, held a congress with the Six Nations at Johnson Hall. Here, he presented the Haudenosaunee with a large belt of wampum that was meant to reaffirm "the Antient (sic) Covenant Chain" and promised that the English would keep it "entire and unbroken" so long as the Iroquois remained faithful allies of the King.\textsuperscript{38} In response, the Seneca asked forgiveness for their previous attachment to the French and swore future loyalty to the British.

\textsuperscript{33} *Nanfan Treaty*, 1701.
\textsuperscript{34} *Graymont*, supra note 23 at 27.
\textsuperscript{35} *Queen Anne's War*, 1701–1713; *King George's War*, 1744-1748; *French and Indian War*, 1754-1763.
\textsuperscript{36} *Graymont*, supra note 23 at 29.
\textsuperscript{37} Ibid. at 30.
\textsuperscript{38} S. W. Johnson, *Sir William Johnson Papers*, vol. III at 670-717.
In 1763 England’s King George III issued a *Royal Proclamation*\(^{39}\) that set aside huge tracts of land, reserving them as Aboriginal hunting grounds, and prohibited grants or purchases of this land, or settlement on it, without a licence. The document reflected the existing nation-to-nation relationship between the British Crown and First Nations and defined the issue of criminal justice jurisdiction.\(^{40}\) The primary intent of the *Proclamation* was clearly directed at protecting Indian possession or use of land reserved to them, however, the Seneca who harbored some historical hostility towards the English were not appeased. Some of them would soon join Chief Pontiac in the failed 1763-64 war against the English, after which, they were required to once again take hold of the Covenant Chain at the congress of Niagara in 1764.\(^{41}\)

By 1768 the land policies enunciated by the *Royal Proclamation* had consistently been disregarded by settlers and land speculators, so British officials met with Iroquois leaders at Fort Stanwix in order to ratify a new arrangement. In return for a guarantee of their traditional homelands in western New York, the Iroquois surrendered their claims south of the Susquehanna and Ohio rivers, which were not occupied by the Six Nations, but home to the Delaware, Mingo and Shawnee.\(^{42}\)

For the next several years the Haudenosaunee enjoyed a period of relative calm and autonomy, with little interference from the British apart from a more concerted effort to convert them to the Christian faith.\(^{43}\) By 1775 they were once again placed in the difficult position of choosing a side with which to ally. The American colonies and the British Crown were preparing for conflict, and both were representing themselves as the legitimate heirs of the traditional Iroquois-English alliance. During the early stages of this confusion the Confederacy arrived at a temporary solution by declaring neutrality.\(^{44}\)

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\(^{39}\) *Royal Proclamation*, 1763.

\(^{40}\) For a more detailed account of the *Royal Proclamation* please see the section on legislative extinguishment.

\(^{41}\) *Johnson, supra* note 38 vol. XI at 141.


\(^{43}\) *Graymont, supra* note 23 at 33-47.

\(^{44}\) Ibid. at 48.
However, they were eventually drawn into the Revolutionary War, with some of the Six Nations allying themselves with the British and others with the Americans.45

The Mohawks, having long been staunch allies of the British, first gained guarantees from Sir Guy Carlton, Commander of the British forces, that any losses, including land, would be compensated.46 On November 30, 1782 the Preliminary Articles of Peace between Great Britain and the United States were concluded. The Articles did not include any protection of Iroquois land, but in fact transferred ownership of those lands to the United States as far west as the Mississippi River.47

The Haudenosaunee were incensed with Britain's casual disposition of their land without a word of consultation. Speaking through Captain Aaron Hill, they boldly told General Maclean, commander at Niagara, that they:

...were a free People subject to no Power upon Earth and that they were the faithful allies of the King of England, but not his subjects. Accordingly the King had no right whatever to grant away to the States of America, their rights or properties without a manifest breach of all justice and Equity, and they would not submit to it.48

On October 22, 1784 some delegates of the Haudenosaunee Confederacy met with representatives of the United States and concluded the Treaty of Fort Stanwix. The agreement contained provisions regarding the return of prisoners of war, land cessions, and the delivery of 'goods' for the 'comfort' of the Six Nations.49 Shortly thereafter, the Iroquois held a Confederacy Council at Buffalo Creek and promptly refused to ratify the Treaty. They denied that the delegates were authorized to cede such large tracts of land, and therefore, decided to request the return of the deeds given to the Americans. The Americans refused.50

45 F. Jennings, W.N. Fenton, M.A. Druke & D.R. Miller, The History and Culture of Iroquois Diplomacy (Syracuse: Syracuse University Press, 1985) at 73.
46 Ibid.
47 Graymont, supra note 23 at 259.
48 Ibid. at 260.
49 Treaty of Fort Stanwix, 1784.
Several months before the conclusion of the Fort Stanwix Treaty, the Haudenosaunee members who remained loyal allies to the British Crown sought to ensure that the land compensation guarantees given by Sir Guy Carlton were upheld. Led by Chief Joseph Brant, they entered into negotiations with British General Frederick Haldimand for territories that were reasonably close to their traditional homelands, but outside the jurisdiction of the United States. By this point, the Confederacy had little trust in either the British or Americans, and wanted to ensure their Iroquois brethren in the United States were close by in times of emergency. The negotiations resulted in General Haldimand purchasing a substantial tract of land along the shores of the Grand River from the Mississauga Peoples. Subsequently, the Iroquois were granted this land "Six Miles deep from each Side of the River beginning at Lake Erie, and extending in that Proportion to the Head of the said River, which them & their Posterity are to enjoy forever."52

By 1785, over 1,800 Iroquois from all of the Six Nations, as well as numerous Delawares, Nanticokes, Tuteloes, Creeks and Cherokees had settled in their new territories.53 Although the Confederacy was now separated by a border imposed by foreign powers, the Council Fire still burned and The Great Law still remained the foundation on which their societies would continue to function.54

51 Graymont, supra note 23 at 284.
19th Century

Once the Grand River Haudenosaunee had settled in their new territory the ancient Confederacy began to replicate itself in conformity with the mandates of The Great Law. Fifty condoled chiefs were appointed by Clanmothers,\(^55\) Pine Tree Chiefs were selected, and a new Council Fire was established and tended by the local Onondagas. Life had become somewhat peaceful and the people focused their energies on building and maintaining their community.\(^56\)

By 1812 the Iroquois were once again courted by the British and Americans as allies for yet another war. In reply to these overtures the Haudenosaunee stated, "We do not seek war, and we may not fight against our brethren, but if our homes are attacked we will defend them." Many contemplated siding with the Americans because of the prevailing belief that Upper Canada would ultimately fall to the United States. In the end, most declared their neutrality\(^57\) although they did act in defence of their new territory once the Americans had invaded. In particular, the Iroquois are noted for their actions in the battle of Queenston, in which they were recognized for the "great measure due to them" and fully shared in "the honours of the brilliant affair."\(^58\)

After the British defeated the Americans in the Battle of Stoney Creek the Haudenosaunee returned to their homes to get on with the demands of daily life. Shortly

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\(^{55}\) A Condolence Council is a Haudenosaunee mourning ritual and would always occur when an existing Confederacy Chief died. The ritual would begin with the arrival of a messenger from a condoling, or "Clear-Minded" community, who would make their presence and peaceful intentions known. Members of the mourning community would welcome the messenger and they would then perform the requickening ritual together. This would be followed by an exchange of stories and wampum, as well as other ceremonial practices that were meant to show sorrow for the deceased Chief; wipe away bad blood; reestablish bonds; and restore the mourning community to good spirits. After the condoling ceremonies were concluded, the new Chief, who had been selected by the women of the Clan who own the name and title of the Chieftainship, would be installed. The Iroquois also used the Condolence Ceremony to mourn non-Iroquois allies and conducted their treaty negotiations according to ritual structures adapted from the Condolence Council. R. A. Williams, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Routledge, 1999) at 55.

\(^{56}\) *Wright, supra* note 17 at 315.

\(^{57}\) *Snow, supra* note 20 at 163.

before the War of 1812, Chief Joseph Brant had recognized the need for the Iroquois to adapt to the rapidly changing world. The Grand River territory was not sufficiently large to provide sustenance from game alone, so more reliance would have to be placed on agriculture. Brant surmised that bringing non-Indian farmers into proximity with Iroquois farmers would provide the latter with the skills and values they would need for the 19th century. Therefore, Brant began the practice of selling and leasing Grand River territory to Europeans, which ultimately resulted in the loss of 350,000 acres. Now that farming was an integral part of their lives, the Haudenosaunee returned to their livelihood with little interference for the next several years.\(^{59}\)

In 1841 the Grand River Chiefs recognized that the late Chief Brant’s land policies were leading to the gradual alienation of virtually all of their territory. In response to the crisis, they agreed to surrender most of their remaining land to be held in trust by the Dominion government, who then evicted all non-Indians from the territory and secured its boundaries for the future.\(^{60}\)

The mid 1800s also saw the Confederacy struggle with some difficulties in the appointment of hereditary Chiefs. The Seneca and Oneida populations were somewhat sparse and therefore unable to provide the required number of hereditary leaders mandated by The Great Law. However, the Confederacy overcame this difficulty, and filled all 49 positions, by assigning Chieftainship names to lineages that had not traditionally held them.

The necessity of filling the Chieftainships at this point was extremely crucial to the Iroquois in two important aspects. First, the continued formation of the League ensured that their traditional internal practices would be respected and upheld. Secondly, the League would continue to have a nation-to-nation relationship with the Dominion government, which recognized the Confederacy at the Grand River as the appropriate group to speak for all Iroquois.\(^{61}\)

\(^{59}\) Snow, supra note 20 at 164.

\(^{60}\) Ibid. at 165.

\(^{61}\) Ibid. at 177.
With the traditional governance structure firmly entrenched in the new territory, the function of the Confederacy Chiefs now required some reorientation. In the pre-contact era, the Council's authority was focused principally on external affairs and matters of war and peace, but the existing reality now required them to take the additional role of a local government and regulate the internal affairs of the community. However, the added responsibilities did not affect the Council's mandate to continue to act as the delegated authority of a sovereign people. They still continued to emphasize the importance of their 'international' role in any relations with the Dominion and, later, Canadian governments.62

After the implementation of the 1876 Indian Act,63 conflicts within the Confederacy arose over the type of government that would be most beneficial to the community. The Act endorsed the abolishment of traditional forms of governance in favour of an elected system. A majority of Onondaga Chiefs wanted to reassert the traditional League structure in the face of Canadian domination, while the Mohawks believed that adopting some provisions within the Indian Act might work to their advantage.64 The Onondagas held strong to tradition and "adamantly opposed federal legislation"65 that would impede their autonomy. In contrast, the Mohawks were willing to adopt new procedures and policies in Council "as long as their control over local affairs was not endangered".66 The Mohawks had increasingly assumed the role of middlemen between the Onondagas and the Superintendent of Indian Affairs, holding a somewhat more moderate position on government regulations.

Traditionally-based Council deliberations often took inordinate periods of time and often prompted the Superintendent to threaten the Chiefs with the prospect of an elected system if they did not proceed in a more efficient manner. In response, the Mohawks, who wanted to ensure the Council remained an autonomous form of local government, would then attempt to expedite the process through the self-appointed role

62 Noon, supra note 19 at 18.
63 Indian Act, S.C. 1876, c. 34.
64 Snow, supra note 20 at 182.
66 Ibid.
of facilitator. However, the Mohawks' moderate position on procedural matters did not equate to a concession on their attitude towards Haudenosaunee sovereignty. In fact, when any Dominion legislation threatened to diminish their power or jurisdiction, "the Mohawks were even more vociferous than the Onondagas in asserting their objections." 

By 1899 the Confederacy set about to further emphasize the legitimacy of their traditional political processes and sovereignty with the creation of a written version of the original Five Nations' Constitution or Great Law. The document was drafted under the direction of Chiefs John Gibson, Jacob Johnson, John Elliott and Hilton Hill with an assessment review carried out by Albert Cusick. The manuscript received final approval from the Chiefs in 1900, and although its construction may not have repaired the existing divisions in regard to Council procedure, it was certainly a powerful symbol regarding the Leagues' unwavering consensus on matters of internal sovereignty, and the enduring applicability and authority of The Great Law.

20th Century

In the late 19th and early 20th Century the Dominion government, through provisions of the Indian Act, began a concerted effort to compel elected forms of government in the majority of First Nations communities situated in Canada. The traditional Iroquois Councils at Tyendinaga, Kahnawake, and Akwesasne had all been overthrown by 1900, but those at Grand River still appointed their Council leaders in the traditional manner and continued to assert their sovereign authority within their boundaries. In 1909, their status as a self-governing people was reaffirmed by the Minister of the Interior, Frank Oliver, who maintained:

It is the policy of the Canadian Government, as I understand it, to recognize its relations with the Six Nations Indians of the Grand River as being on a different footing from those with any of the other Indians of Canada. The Six Nations Indians of the Grand River came to Canada

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67 Ibid. at 176.
68 Ibid. at 171.
69 Snow, supra note 20 at 184.
70 Wright, supra note 17 at 320.
under special treaty as allies of Britain, and the policy of the Canadian government is to deal with them having that fact always in view.

The system of tribal government which prevailed among the Six Nations on their coming to Canada was satisfactory to the Government at that time, and so long as it is satisfactory to the Six Nations themselves so long it will remain satisfactory to the Government of Canada.\(^{71}\)

However, the legitimacy of the Confederacy Council would soon be challenged by a minority of Christian Haudenosaunee who advocated a change to an elected system of governance. Apparently the Dominion Indian Department was also working in concert with the 'Christian democrat' faction in order to dissolve the Council in the name of electoral reform.\(^{72}\) The League observed these actions as a serious threat to their existence and once again set about to renew their claims of sovereignty. In 1919 the Council appointed a Status Committee headed by Cayuga Chief Deskaheh to defend against the aggressive Dominion threat.\(^{73}\) In the autumn of 1920 the Council hired London Ontario lawyer AG Chisholm to draft a petition asking for a reference to the Supreme Court of Canada. The claim was based on the contention that actions taken by Dominion government under the Indian Act were a violation of the Six Nations right to internal self-government and \textit{ultra vires} Canada. However, under the existing \textit{Supreme Court Act} the case could not be heard without leave from the Governor in Council, who was deemed to act on the advice of the Canadian Prime Minister. In practice, however, the Prime Minister relied on recommendations from the Indian Department, which was effectively a party in this case.\(^{74}\) Based on a judiciously worded memo from Duncan Campbell Scott, Deputy Superintendent of Indian Affairs, which advised that the reference would be of 'no advantage' to the Indian administration, the petition was rejected by an Order in Council and the Six Nations were declared British subjects.\(^{75}\)

\(^{71}\) Canada, F. Oliver, Minister of the Interior to Chief J.S. Johnston, Deputy Speaker, Six Nations Council, 5 April 1909.

\(^{72}\) Wright, supra note 17 at 320.

\(^{73}\) Ibid. at 321.


\(^{75}\) Canada, National Archives of Canada, RG10, vol.2285, file 57,169-1A pt 2.
Subsequent to the dismissal of their petition, the Council replaced Chisholm with George Decker, a lawyer from Rochester, New York. They drafted a second petition asking for the protection of the British Crown from Dominion laws ‘manifestly designed to destroy our Government’.\footnote{Canada, National Archives of Canada, RG10, vol. 2285, file 57,169-1A pt 2.}

The League also made an appeal for simple justice, stating:

The Six Nations of the Grand River, with sorrow in their hearts, come to complain of wrongs done us in the name of the Dominion Government. We complain because the Ministry of the Interior has ceased to recognize our rights in the Grand River Retreat. The Ministry has devised and prevailed on the Dominion Government to enforce on our people, one by one, [Canadian] citizenship…and thus to open our domain, without our consent, to piecemeal purchase by outsiders…We have no shield of our own with which to oppose the Power of Canada coming against us in our own homes. To prevent so great a wrong we offer the simple justice of our cause.\footnote{Canada, National Archives of Canada, RG10, vol. 2286, file 57,169, 10 May 1921.}

Receiving no adequate resolution from the Governor General, Deskaheh then departed to England in order to secure British protections from Dominion aggression, which, had been guaranteed in the many treaties concluded with their historic allies. Winston Churchill, colonial secretary of the time, dismissed the Iroquois delegation\footnote{Wright, supra note 17 at 322.} stating, "The matters submitted lie within the exclusive competency of the Canadian Government".\footnote{Deskaheh and Six Nations Council, \textit{The Redman’s Appeal for Justice} (Brantford: Wilson Moore, 1924) at 22.}

On 4 December 1922, Charles Stewart, the new Superintendent of Indian Affairs accompanied by Duncan Campbell Scott, traveled to Ohsweken to negotiate the appointment of a tribunal to resolve the ongoing discord. The result of the meeting included an acceptance by the Confederacy in regard to tribunal member selection and the appointment of seven constables to collaborate with the Ontario police on the question of liquor control.\footnote{Canada, National Archives of Canada, RG10, vol.1745/63-32 pt 16, 5 Dec 1922.} However, before the Council could formally confirm their acceptance of the negotiations, the Grand River territory was subjected to a three-day
raid by the newly created Royal Canadian Mounted Police, accompanied by Inland Revenue Officers, who claimed to be looking for illicit alcohol. At some point during the raid shots were fired, which halted any further negotiations and resulted in the construction and staffing of an RCMP detachment within yards of the Council House at Ohsweken.

Subsequent to the RCMP raid and the imposition of Dominion criminal justice enforcement into Haudenosaunee territory, the Confederacy resolved to present their case to the newly formed League of Nations in Geneva, Switzerland. Deskaheh and Council lawyer George Decker, prepared a brief entitled: *The Redman's Appeal for Justice: The Position of the Six Nations That they Constitute an Independent State.* The document itself asserts a clear statement of internal sovereignty, overviews the historical nation-to-nation relationship with the British Crown and lists several ongoing grievances including:

The Dominion Government is now engaged in enforcing upon the people of the Six Nations certain penal laws of Canada, and, under cover thereof, the Dominion Government is violating the Six Nation domain and has wrongfully seized therein many nationals of the Six Nations and cast them into Canadian prisons, where many of them are still held.

and,

All the measures aforesaid have been taken without the consent of the Six Nations, and under protest and continued protest of the duly constituted Council thereof...

In addition, the document also described the RCMP invasion of Haudenosaunee territory in the following manner:

To the manifest end of destroying the Six Nations Government, the Dominion Government did, without just or lawful cause, in or about December of the year 1922, commit an act of war upon the Six Nations by making an hostile invasion of the Six Nations domain, wherein the Dominion Government then established an armed force which it has since maintained therein, and the presence thereof has impeded and impedes

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81 *Woo, supra* note 74 at 7.
82 *Wright, supra* note 17 at 322.
83 *Redman's Appeal for Justice, supra* note 79 at para. 11.
84 Ibid. at para. 13.
the Six Nations Council in the carrying on of the duly constituted government of the Six Nations people, and is a menace to international peace.\textsuperscript{85}

As a remedy for the alleged injustices, the Confederacy appealed to the League of Nations to protect and secure their independent right of home rule; appropriate indemnity for the said aggressions; a just accounting of Six Nations trust funds; provision to cover the right of recovery of trust funds; freedom of transit across Canadian territory; protection for the Six Nations under the League of Nations in the event that Britain will not extend such protection; and suspension of all aggressive practices by the Dominion of Canada upon the Six Nations peoples.\textsuperscript{86}

In preparation for their trip to Europe, the Confederacy demonstrated their autonomy by creating Six Nations passports that were subsequently accepted and authenticated by Switzerland as legally valid international documents.\textsuperscript{87} According to the tenets of the League of Nations, any nonmember required a member nation to sponsor their affairs. Deskaheh first approached the Netherlands, with whom the Haudenosaunee had first established diplomatic relations in the early 1600s. However, with Canada still a part of the British Empire, the Foreign Office in London prevented the Netherlands from presenting the Six Nation's petition through a process of 'diplomatic embarrassment'.\textsuperscript{88}

In response to this setback, Deskaheh and Decker distributed copies of the petition to all remaining member nations. On September 27, 1923 delegates of Estonia, Ireland, Panama and Persia all signed a letter requesting a communiqué of the Six Nations' petition to the League of Nations' Assembly.\textsuperscript{89} After being informed that the matter could not be addressed because the Assembly's session was almost concluded, the Persian delegate forwarded a telegram asking for consideration by the League's Council. However, the request was rejected on the grounds that no Canadian delegate was present and the matter was put over for another year. Britain then utilized the

\textsuperscript{85} Ibid. at para 15.
\textsuperscript{86} Ibid. at para 20 (1)-(6)(b).
\textsuperscript{87} Noon, supra note 19 at 59.
\textsuperscript{88} Woo, supra note 74 at 8-9.
\textsuperscript{89} League of Nations, file 31340/28075, 27 Sept 1923.
interruption to exert diplomatic pressure on the countries that had supported the Haudenosaunee. Over the following months the previously sympathetic governments withdrew their support, suggesting that their representatives at the League had acted without proper instructions.90

While Deskaheh was in Geneva advocating for the Haudenosaunee, the Dominion government was conspiring to overthrow the Confederacy Council and replace it with an elected Indian Act government. A Royal Commission, headed by Colonel Thompson, was appointed to investigate Six Nations' affairs. However, the Confederacy refused to acknowledge the powers of the Commission and the Chiefs refused to give testimony. In his final report, Thompson accused the Council of mismanaging public affairs, and also reported the existence of 'flagrant immoralities' throughout the territory.91 This purportedly gave the Dominion government grounds to depose the Council and on September 17, 1924 Prime Minister MacKenzie King and Governor-General Lord Byng of Vimy signed an Order-in-Council mandating the replacement of the Haudenosaunee Council with a Band Council elected under Canada's Indian Act. On October 7, 1924 the RCMP forced their way into the Ohsweken Council House and read a decree dissolving the traditional Confederacy government. They then seized historic documents relevant to Iroquois sovereignty, raided the homes of wampum keepers and confiscated the sacred belts.92

Indian Act elections were held on October 21, 1924, and of the total Six Nations population of 4,500, only 26 ballots were cast. Apparently, all of those elected to Band Council belonged to the 'Christian Democrat' minority, who had effectively voted themselves into power.93 With their legitimacy now undermined, the Confederacy Council still continued to hold regular meetings at the Grand River Onondaga Longhouse, but they were no longer able to conduct business as usual. The Dominion government had control of their trust funds, which they dispensed to the Band Council.

90 Woo, supra note 74 at 9.
91 Noon, supra note 19 at 64.
92 Wright, supra note 17 at 324.
93 Ibid. at 325.
With no access to the resources needed to effectively address community needs, the League could no longer function as an effective form of local government.\textsuperscript{94}

Although the League was now relegated to a form of symbolic traditional leadership not recognized by the Dominion, they still continued to advocate for Haudenosaunee sovereignty. The literature regarding the Six Nations during the mid-1900s is quite sparse; however, there are important recorded instances of the people’s support of the Traditional Council and their resistance to the imposition of Dominion jurisdiction. For instance, during the census of 1941, the Dominion government was attempting to enroll members of the Six Nations as loyal subjects of His Majesty’s government. Supporters of the Confederacy refused to participate in the census on the grounds that they were not subjects of His Majesty but citizens of the Six Nations of the Grand River. Consequently, four individuals were charged with violations of the \textit{Census Act} and subsequently tried and found guilty by a Magistrate’s Court in Brantford. When the accused refused to pay the fines imposed, all were sentenced to jail.\textsuperscript{95}

The number of votes cast in Band Council elections during this period give a good indication of the populations’ rejection of the elective system. By the late 1940s, the vote represented "somewhat less than ten percent of the voting population of the reservation".\textsuperscript{96}

In 1959, the Confederacy staged a countercoup in an attempt to restore their legitimate government. They were successful in gaining control of the Ohsweken Council House, but the RCMP soon ousted them, utilizing clubs to expedite their objective.\textsuperscript{97}

In the same year the Confederacy sought a legal injunction to restrain Clifford E. Styres, Chief Councilor of the elected Band Council and R. J. Stallwood, Superintendent of the Six Nations Indian Agency, from surrendering 3.05 acres of Grand River territory. They challenged the validity of the Orders-in-Council that approved the surrender and further argued that:

\begin{itemize}
\item \textsuperscript{94} \textit{Woo}, \textit{supra} note 74 at 9.
\item \textsuperscript{95} \textit{Noon}, \textit{supra} note 19 at 61.
\item \textsuperscript{96} Ibid. at 65.
\item \textsuperscript{97} \textit{Wright}, \textit{supra} note 17 at 325.
\end{itemize}
...the Six Nations Indians, not being subjects of the Crown, it was *ultra vires* the powers of the Parliament of the United Kingdom to enact section 91(24) of the *B.N.A. Act*, whereby the legislative authority of the Parliament of Canada is made to extend to all matters coming within the classification "Indians, and Lands reserved for the Indians" insofar as the said Six Nations Indians are concerned. If this be so the plaintiff then states that it is *ultra vires* the powers of the Parliament of Canada to enact the *Indian Act*, R.S.C. 1952, c. 149 insofar as the said Six Nations Indians are concerned and that likewise the Orders in Council already referred to and made pursuant to the *Indian Act* are likewise *ultra vires* insofar as the Six Nations Indians are concerned.98

In his somewhat brief decision, Justice King concluded:

> In my opinion, those of the Six Nations Indians so settling on such lands, together with their posterity, by accepting the protection of the Crown then owed allegiance to the Crown and thus became subjects of the Crown. Thus, the said Six Nations Indians from having been the faithful allies of the Crown became, instead, loyal subjects of the Crown.

and,

> I am of the opinion that the Six Nations Indians are entitled to the protection of the laws of the land duly made by competent authority and at the same time are subject to such laws. While it might be unjust or unfair under the circumstances for the Parliament of Canada to interfere with their system of internal Government by hereditary Chiefs, I am of the opinion that Parliament has the authority to provide for the surrender of Reserve land, as has been done herein, and that Privy Council Order P.C. 6015 is not *ultra vires*.99

Although the ruling in this decision does conclude that the Haudenosaunee became subjects of the Crown with their acceptance of Crown protection, the ruling basically reflects the prejudicial judicial reasoning of the courts during this time period.100 Under the existing principles of law in relation to First Nations' legal rights, this ruling would undoubtedly be considered a mistake of law. As previously discussed, under current jurisprudence any treaty or other document which purportedly extinguishes an Aboriginal right requires a clear and plain intention to do so and any ambiguities must be

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99 Ibid.
100 M. Leonardy, *First Nations Criminal Jurisdiction in Canada: The Aboriginal right to peacemaking under public international and Canadian constitutional law* (Saskatoon: Native Law Center, University of Saskatchewan, 1998) at 181.
resolved in favour of the First Nation. A plain reading of the *Haldimand Grant* certainly does not exhibit any such clear and plain intention to extinguish any Haudenosaunee right. The relevant clause states:

> Whereas His Majesty having been pleased to direct that in consideration of the early attachment to his cause manifested by the Mohawk Indians, and of the loss of their settlement which they thereby sustained - that a convenient tract of land under his protection should be chosen as a safe and comfortable retreat for them and others of the Six Nations.

For comparative purposes, similar provisions in the Royal Proclamation, 1763, which also applied to the Iroquois read, "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection".

When evaluating these two clauses it is quite apparent that they have very similar aims and purposes. Both set aside land for First Nations connected in some way to the British Crown, who, because of that connection are under the protection of the Crown. The *Royal Proclamation* is considered an affirmation of existing Aboriginal rights and not to have extinguished any such rights. The *Haldimand Grant*, with similar wording and intent, cannot be considered an agreement with the clear and plain intent to extinguish Haudenosaunee sovereignty or internal self-governing practices. The Iroquois certainly didn't understand that to be the case, and if there is any intent to extinguish rights, that intent is certainly not 'clear and plain'.

In September 1977 the Haudenosaunee once again returned to Geneva, Switzerland. Several non-governmental organizations of the United Nations had called for papers that described the conditions of oppression suffered by Native peoples, with supportive oral statements to be given to the U.N. Commissions. The traditional Six Nations Council prepared and sent a delegation with three papers that offered an abbreviated analysis of Western history, and called for a consciousness of the Sacred Web of Life in the Universe. The three documents were entitled, "Introduction and Spiritualism: The Highest Form of Political Consciousness"; "The Obvious Fact of Our

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Continuing Existence: Legal History of the Haudenosaunee; and, "Policies of Oppression in the Name of Democracy: Economic History of the Haudenosaunee". Each of the papers hold important and profound messages regarding Iroquoian and European histories and ideologies, however, the second and third essays convey strong ideas concerning Haudenosaunee sovereignty and how the Haudenosaunee understand the expression of that concept. The following excerpts are primary examples of those expressions:

The Haudenosaunee are a distinct people, with our own laws and customs, territories, political organization and economy. In short, the Haudenosaunee, or Six Nations, fits in every way every definition of nationhood.

We have always conducted our own affairs from our territories, under our own laws and customs. We have never, under those laws and customs, willingly or fairly surrendered either our territories or our freedoms. Never, in the history of the Haudenosaunee, have the People or the government sworn allegiance to a European sovereign. In that simple fact lies the roots of our oppression as a people, and the purpose of our journey here, before the world community.

Now we find ourselves in Geneva, Switzerland, once again. For those of us present, and the many at home, we have assumed the duty of carrying on our peoples' struggle. Invested in the names we carry today are the lives of thousands of generations of both the past and the future. On their behalf, also, we ask that the Non-Governmental Organizations join us in our struggle to obtain our full rights and protection under the rules of international law and the World Community.104

and,

The citizens of the Haudenosaunee are a separate people, distinct from either Canada or the United States. Because of this, the Haudenosaunee refuses to recognize a border drawn by a foreign people through our lands.

The Haudenosaunee vigorously objected to the Citizenship Act and maintains to this day that the People of the Longhouse are not citizens of Canada or the United States, but are citizens of their own nations of the League.

We, the Haudenosaunee, have clear choices about the future. One of the choices which we have faced is whether to become Westernized, or to remain true to the Way of Life our forefathers developed for us. We have stated our understanding of the history of the changes that have created the present conditions. We have chosen to remain Haudenosaunee, and within the context of our Way of Life, to set a course of liberation for ourselves and the future generations.\(^\text{105}\)

In 1982 the Haudenosaunee became active participants at the Working Group on Indigenous Populations and in 1984 participated in an international congregation of Indigenous Peoples in Panama, where they assisted in the development of the *Declaration of Principles of Indigenous Rights*,\(^\text{106}\) which is a comprehensive doctrine on Indigenous Peoples' rights to self-determination. Haudenosaunee delegates were also present at the 1989 General Conference of the International Labour Organization of the United Nations where they lobbied to the U.N. to protect Indigenous peoples and their lands from colonial exploitation, as well as the 1992 Earth Environmental Summit where they petitioned the U.N. to declare 1993 as the 'International Year for the Indigenous Peoples'.\(^\text{107}\)

In 1999 the federal government, the Ontario provincial government, and the Six Nations-elected Council co-sponsored an initiative to establish a "Tribal court" on Six Nations' territory. Court operations would be managed and administered principally by qualified Haudenosaunee individuals, although there would not be any significant change in traditional Canadian criminal justice system practices and procedures. The community was engaged through information meetings and regular updates through local media, and approval or rejection of the project would be determined by way of community referendum. Throughout the community consultation process the elected Council remained neutral on the issue, preferring to let the community base its decision on the information disseminated to them. However, the hereditary Council lobbied extensively against the scheme as they considered it an unwelcome intrusion of foreign


jurisdiction on sovereign territory. In the end, the Haudenosaunee people overwhelmingly rejected the endeavor for many of the reasons the Confederacy had articulated: A provincial court would continue the imposition of foreign values, practices, and jurisdiction that had routinely been utilized to oppress and dispossess the Haudenosaunee for centuries.\textsuperscript{108}

To this day, the Haudenosaunee continue to assert their unwavering position as independent sovereign peoples. The Longhouses remain the time-honored location for hereditary Council meetings and members of that Council are still appointed according to the mandates of The Great Law. Although not recognized by the Canadian state as the formal political leadership of the community, the hereditary Chiefs, Clanmothers, Pipe Carriers and Faithkeepers still retain positions of leadership and are highly influential in community affairs.\textsuperscript{109} The existing elected Council also maintains a firm stance on Haudenosaunee sovereignty and rights. For example, in response to the proposed \textit{First Nations Governance Act},\textsuperscript{110} elected Chief Roberta Jamieson unreservedly declared:

Because of certain events of the 1920s, our community has both a traditional government with long historic ties to the British Crown, and an elected council recognized pursuant to the \textit{Indian Act}. Over the years, differing perspectives have caused contention, and it is our challenge and opportunity to reconcile issues and concerns amongst ourselves. Our children are taught both systems of governance in our schools. How do we explain to them that the Parliament of Canada is planning to pass legislation that will not recognize the existence of traditional governance and which makes repugnant impositions on the elective system?

It is with sadness and firm resolve that our peoples are forced to return to this table, once again, now in the 21st Century, to repeat what has already been stated over and over again – the federal government has no right to intervene in the affairs of the Six Nations of the Grand River.

The peoples of Six Nations have a long historical relationship with the Crown based on peace and friendship. It is a special relationship of trust as defined in the \textit{Royal Proclamation} of 1763, the Haldimand Proclamation of 1784, through Orders in Council (June 24, 1803) & legislation (Feb. 17, 1830), by our Two Row Wampum, and our Silver

\textsuperscript{108} Traditional Oral Teachings, supra note 54.
\textsuperscript{109} Ibid.
\textsuperscript{110} Canada, Bill C-7, \textit{First Nations Governance Act}.
Covenant Chain. Six Nations traditional people continue today as the guardians of this heritage.

We, as sovereign peoples, defended the Crown two centuries ago even when we knew it would cost us the lives of our people. We kept our word and history records that our people died fulfilling our promises to the Crown. We stood as allies with the Crown. And we did so under our own flag from Six Nations as allies. Our people were instrumental in securing the integrity of the boundaries of this country on more than one occasion.

History and law sustain us in our position that we are allies of the Crown. We are not subjects of the Crown. We are a sovereign self-determining people. To those who will say we cannot be sovereign in Canada, the fact is, we are – and as such, we continue to be interlinked inextricably with Canada’s future.111

The above history of Haudenosaunee political relations confirms three important factors. First, it is clear that the Confederacy entered into treaty relationships of peace and alliance with the Dutch, English, and French. Secondly, after the English defeat of the French, the Haudenosaunee continued to preserve their relationship as sovereign allies with the British, with little interference into one another’s internal practices until the late 1800’s. Lastly, the Six Nations have always maintained a position of national sovereignty and have consistently resisted any attempts by the Crown to intrude into their internal sphere of jurisdiction.

With the political history of the Haudenosaunee and their positions on sovereignty now established, Chapter 2 will provide a more detailed examination of their internal affairs with an explanation of the Haudenosaunee worldview, The Great Law of Peace, and traditional social regulation practices, all of which are the foundations of a society that remained essentially free of 'criminal' behaviour for centuries.

CHAPTER 2: HAUDENOSAUNEE JUSTICE

In order to gain a true evidentiary understanding of why and how the Haudenosaunee used certain methods for controlling anti-social or criminal behavior, one must have the appropriate context of that society's world-view and cultural/spiritual practices. Without this context one will undoubtedly perceive social control methods through one's own cultural lenses. In order to avoid such misrepresentations or false conclusions, I will begin with a very basic\textsuperscript{112} illustration of traditional Haudenosaunee perspectives of material and spiritual reality, with a focus on matters that help to explain Haudenosaunee social control practices in relation to anti-social or criminal behavior.

Please keep in mind that this evidence is based upon my traditional Haudenosaunee (Six Nations of the Grand River)\textsuperscript{113} oral teachings in conjunction with the publications of early European explorers, historians and anthropologists. Therefore it may not be in complete accordance with other Haudenosaunee Nation or traditionalist understandings, as cultural variations do exist. I make no claim to be speaking for all Haudenosaunee peoples, or for an Aboriginal perspective in general.

A Haudenosaunee World View

When comparing and contrasting a Haudenosaunee worldview with a Euro-Canadian outlook or perspective, the fundamental difference is a holistic/contextual or cyclical/circular understanding, versus linear/time-bound understanding. In a Haudenosaunee world all things have been placed here through the will or direction of


\textsuperscript{113} \textit{Traditional oral teachings}, supra note 54.
the Creator or The Master of Life, and therefore, all things have a distinct purpose and are of equal value, although they may have different forms and functions. Every material object (such as rocks, trees, or water) and non-material energy (such as wind) has a spirit or life-force that allows it to exist. It is through this spirit or life force that all things are integrally connected. Those things that take a similar form (such as humans and other mammals) have a somewhat deeper existence connection because they share similar experiences and understandings. No one thing or force has a greater inherent value or any more beneficial purpose to serve, as all things exist in order for all other things to exist.

Human beings have been gifted with life to ultimately evolve spiritually through the material experience. The experiences one will encounter in life are either of one's own creation (the law of free will), another person's creation (that person's free will), through the will of the Creator (spiritual law), or different combinations of the three. Experiences do not happen by coincidence. All occurrences have purpose and meaning. When one creates one’s own experiences, one is responsible and accountable for the ultimate outcome of that experience, as everyone is responsible for his or her own will and actions. When the Creator wills certain events in a person's life in order to forward their personal growth or provide them with assistance in something, that person is responsible for how they respond to the event, but they are also given additional assistance from their Spirit Guides, who are with the individual constantly. If one is subjected to an experience through the will of another person, the impact of that event will be taken into account through spiritual law, and if the outcome of the experience is not within the divine plan of that individual, Spirit Guide intervention will occur to change the outcome to be in accordance with the divine plan. An individual’s divine plan is full

114 The Haudenosaunee Creation Story gives a full account of how the Earth and all things on it came into being through the actions of Sky Woman and the left and right-handed twins. The Master of Life is responsible for all things on Earth because it is ultimately through the life-giving force of the Master of Life that things may exist. For one account of the Creation Story see H. Hertzberg, The Great Tree and the Longhouse (New York: Macmillan & Company, 1996) at 16.

115 Spiritual law is contextual and takes all matters and outcomes into account.

116 Spirit Guide help and intervention is a somewhat complex matter, which I will attempt to clarify. If an individual is independently acting with free will, Spirit Guides are not allowed to intervene in that individual's choices without the individual's consent or request. Spirit Guides cannot independently break the law of free will. In this instance all that is required for assistance is a request and permission to intervene. If an individual is subjected to an experience based upon external factors not of their free will, and the outcome is not within the individual's divine plan,
of many different experiences, some of which may be extremely difficult to endure, but are definitely in the interest of their personal growth and evolution. When a person views their experiences through this spiritual framework, life takes on a completely different meaning and is appreciated through a very different perspective.

While viewing life through a spiritual framework, one must also interact and exist in the material world. The physical realities of the world are observed as operating in a cyclical manner. The days, the seasons, life and death all run in a cycle or repeat themselves. The concept of time is also included in this context. Each day or each moment is not viewed as a linear concept with an end, but only the continuation of the cycle. A new day could be said to be the same day repeating itself, but with changing physical realities occurring throughout that cycle of day and night. The changing physical realities are also acting within their own cycle, which is integrally linked to the day/night cycle. In order for this cyclical reality to continue, there must be a diametric opposite to what is occurring at any given moment. Day/night, life/death, warm/cold are all examples of this concept; neither can exist without the other. The opposite is not conceived as negative in a Haudenosaunee understanding. These realities just are. They exist as necessities of creation and for the continuation of material existence.

The concept also applies to human beings. Awake/asleep, hungry/full, happy/sad, are suitable examples, but there is a factor that allows humans a measure of control over their experience. That factor is free will. Free will allows humans to make choices that release them from acting in a purely instinctual or impulsive manner. Being gifted with free will conveys a responsibility to use it in a commendable manner. Doing so involves treating all things with honor and respect. Other people's well-being is as important, if not more so, than one's own. Personal desires and gratification are not paramount objectives. In meeting one's material needs there is some act of gratitude towards the material object (i.e. food, medicinal plants) and the Creator for those needs being met. Duties and responsibilities to others (human and non-human), as opposed to personal needs and rights, are the foremost factors to be considered.

Spirit Guides will intervene to modify the outcome to ultimately correspond with the divine plan. To add further to this, Spirit Guides will not always intervene, even if asked, as the outcome may be in accordance with the divine plan. One is never really sure when intervention will occur, if at all, and on occasion severe consequences from an act of free will or external forces will still ensue. This is one of the reasons why life is called The Great Mystery.
If one does not use free will in an honourable manner, they are significantly out of balance with one or more of the four aspects\textsuperscript{117} that constitute the whole of an individual, and they must do what is necessary to re-balance themselves. Re-balancing often requires some form of mental, emotional, physical, and spiritual sacrifice. A Cleansing (Sweatlodge) Ritual and fasting/prayer/meditation are examples of this type of sacrifice. These may be considered as fairly significant forms of suffering, but the suffering is sacrificial, and a way of making personal amends for one’s negative or hurtful actions. It is an attempt to put things back into balance (personal and external) and establish a clear and integral connection to the spiritual realm.\textsuperscript{118}

The result of continued ritual sacrifice is a deeper insight into oneself and others (healing), and a complete understanding of how vitally important the inter-connection and inter-dependency one has with all material entities truly is. This in turn affects material reality through the dramatic change in a person’s perceptions and actions. Persons who are acting in inappropriate or hurtful ways are considered fully responsible for taking the necessary action to restore their balance (or ask for help and guidance if they don’t know how). If they choose not to, they will remain in conflict with spiritual and natural law, which eventually leads to serious consequences.

To give a further clarification or understanding to the above perceptions of spiritual and material reality, it is important to note that these realities co-exist. All things are comprised of a life force or spiritual energy, which gives the appearance of material form. In the physical world both the spiritual and material exist together and as a part of one another. The material cannot exist without spiritual energy as its foundation. Human beings are simultaneously spiritual and material entities, as are all other material existences. In the material world people are “humans being” and in the spiritual world they are “being human.” It is this understanding of material and spiritual connection that

\textsuperscript{117} The four aspects of an individual include mental, physical, emotional and spiritual.

\textsuperscript{118} Those who have engaged in such sacrificial rituals (including me) can attest to the powerful spiritual connection that develops through the experience. Please note that sacrificial rituals are not the only way to gain spiritual insight and connection, but for the purposes of healing someone significantly out of balance, they may be the most effective means because of their intensity.
forms the basis of the Haudenosaunee world perspective and in conjunction with The Great Law, the basis for a mutually respectful way of life within their societies.  

**The Great Law of Peace**

The most significant and influential event in Haudenosaunee history was the founding of The Great Law of Peace, which was bestowed upon the Haudenosaunee by Tekanawita [hereinafter "The Peacemaker"] in order to advance a cooperative and peaceful coexistence between and within the Five Nations. Before this implementation of The Great Law the Haudenosaunee lived in a similar manner to other First Nations. Each nation was an independent body with similar dialects and similar customs, but there was no political alliance. The standard norm was each person and each nation to itself.

It was during this period that the Haudenosaunee often warred amongst each other, as well as with surrounding nations. In addition they engaged in blood feuds amid their own people, within their own nations, killing each other for any slight offence, as an individual’s life was not valued. Such acts resulted in a family member seeking revenge for the murdered loved one. This situation became perpetual, as once a person was killed, his or her family members would not rest until they extracted vengeance. Ultimately, some families would be completely eradicated.

In response to this internal violence and strife, the Creator sent The Peacemaker to convince the Haudenosaunee to accept The Great Law of Peace and implement one of the most powerful political alliances on the North American continent.

Many historians have attempted to date the origin of The Great Law, but there is little consensus on the matter. European historians assign a date of anywhere from 1440

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119 Traditional oral teachings, supra note 54.
120 See Appendix 1.
121 The Haudenosaunee refer to Tekanawita as The Peacemaker in keeping with the longstanding tradition of respect.
to 1600. In contrast, the late Chief Jake Thomas, an oral reciter of The Great Law and Haudenosaunee historian, asserted that it is over 2000 years old. The most recent historical and scientific analysis by Dr. Barbara Mann and Jerry Fields of the University of Toledo gives an exact date of August 31, 1142. Although there remains disagreement on the date of its founding, all historians agree that The Great Law existed as a principal regulating element within Haudenosaunee society.

The Regulation of “Criminal Acts”

Although The Great Law is detailed and lengthy it is founded on three basic principles:

1. Righteousness, which means justice practiced between men and nations.

2. Health, which means soundness of mind and body and the peace that comes from them.

3. Power, which means the authority of law and customs backed by such force as is necessary for justice.

Application and adherence to these principles and other Articles of The Great Law, in combination with their specific material/spiritual perspective provided the foundation for Haudenosaunee methods of restraining anti-social behavior. The interdependence that developed among the Five Nations subsequent to The Great Law was a primary factor relating to this accomplishment. From this perspective, the welfare and interests of society as a whole became a paramount consideration. This in turn resulted in members of society developing relationships based upon equality, respect, and regard.

The concept of individual rights was in complete contrast to our current understanding. Each person retained a significant measure of such rights, but those

125 Traditional oral teachings, supra note 54.
127 See Appendix 1.
128 Wallace, supra note 124 at 15.
rights and privileges never exceeded one's duties and responsibilities to others.\textsuperscript{130} Upon examining The Great Law it is apparent that duties and responsibilities outnumber individual rights. This directive kept societal members focused on acts cohesive to living in unity with one another as opposed to seeking gain for oneself through the assertion of personal rights.\textsuperscript{131} When members were focused on the best interest of others within the Clan or society, the catalysts of criminal behavior, such as greed or vengeance, had much less opportunity to develop and emerge.\textsuperscript{132}

One of the major factors that kept individuals content with this form of social organization was the practice of consensual decision making among the Statesmen.\textsuperscript{133} At first glance this may appear to be only unanimity among the influential of a hierarchical society, but that was not the case. Statesmen or Chiefs were required to make decisions that were in the best interest of the people, as well as what was in the best interest of the coming seven generations. Those who did not were deposed.\textsuperscript{134} Through designated individuals such as War Chiefs or Clanmothers, all members of society had the opportunity to be heard on matters of national importance and any individual who dissented would have their opinion properly considered.\textsuperscript{135} If unanimity could not be reached the matter would not become national policy.\textsuperscript{136} This procedure allowed all individuals to have a significant influence on societal matters, which in turn helped to develop an integral and meaningful connection of equality with the whole of the collective, which directly influenced a person’s decisions to act in a manner that was in the best interest of all.

Another feature that kept anti-social behavior in check was fervent disdain of ambition for personal power. All people in the society were considered equal, and none were compelled to do anything because of a higher personal authority. The women, who

\textsuperscript{129} Williams & Nelson, supra note 30.
\textsuperscript{130} W.B. Newell, Crime and Justice Among the Iroquois Nations (Montreal: Caughnawaga Historical Society, 1965) at 35.
\textsuperscript{131} Williams & Nelson, supra note 30.
\textsuperscript{132} Traditional oral teachings, supra note 54.
\textsuperscript{133} See Appendix 1, Articles 5,6, 8& 9.
\textsuperscript{134} Ibid. Article 59
\textsuperscript{135} Ibid. Articles 93, 95&96.
\textsuperscript{136} Morgan, supra note 12 at 106-107.
held the Chieftainship titles, chose the Chiefs based upon personal honesty, integrity and good character.\textsuperscript{137} Statesmen retained their positions by the continuation of honesty, integrity and adherence to The Great Law.\textsuperscript{138} Their reward was the honor and esteem of the people. Those who dishonored their position through personal ambition were punished with removal and community ostracization.\textsuperscript{139} This practice facilitated the development and definition of acceptable values within Haudenosaunee society. Honesty, integrity, generosity and other qualities considered beneficial to all, were the standards for which individuals were expected to strive. Holding the Chiefs (who were intended to be mentors) to the strictest measure of these values sent an unmistakable message to society in regard to the behavior expected from its members. Those who violated these norms would often be ostracized, which was considered one of the harshest sanctions that could be imposed.\textsuperscript{140}

The Clan system prescribed by Articles 42-54 of The Great Law also acted to regulate delinquent behavior. Under this system the lineal descent of the people is through the female line. All of a woman's children became members of her Clan. All people of the same Clan were directly accountable to each other and forbidden to marry.\textsuperscript{141} Further, all members of the same Clan were considered relations, even if from another nation within the League. Therefore, a person's parents were not of the same Clan, a spouse was from a different Clan, and a spouse's parents were of different Clans. All Haudenosaunee members of the same Clan were obliged to treat one another with hospitality and kindness. Not to do so was considered a grave misdeed. In addition, each individual was also intricately linked to other Clans through their mother's father, their own father, or a spouse and their family. In this manner, an individual could undoubtedly be connected to all Haudenosaunee Clans directly or indirectly through their mother, father, spouse, or other relations. If one were to commit a crime against another, there was a good possibility that the victim would be either a relation, or the relation of someone close to the offender. This placed an obligation on all people to treat

\textsuperscript{137} See Appendix 1, Article 53.
\textsuperscript{138} Ibid. Articles 25&27.
\textsuperscript{140} Morgan, \textit{supra} note 12 at 324.
\textsuperscript{141} Williams & Nelson, \textit{supra} note 30.
each other with respect or suffer the consequences of public, or, even worse familial indignation.\textsuperscript{142}

**Specific Crimes**

Although crime was rare in Haudenosaunee societies, it did occur. When transgressions of The Great Law did take place, there were definite penalties to ensure justice was carried out. The three principles of Righteousness, Health and Power mandated by The Peacemaker all endorsed the concept of justice. Justice, under these principles, is ensuring that the essence of The Great Law (peace and unity) prevails within society. When an individual committed an act against this divine mandate, the people ensured that justice was done in accordance with The Great Law and their world perspective in order to deter\textsuperscript{143} the offender and others from committing such grievous acts.\textsuperscript{144}

The following is an account of the four anti-social or criminal acts that were known to have existed in Iroquois societies,\textsuperscript{145} and how they were dealt with to ensure they remained rare occurrences.

**Witchcraft**

Witchcraft was considered an offence against the whole of the nation. It was considered a matter of national consequence as any individual might be the next victim.\textsuperscript{146} Witches and wizards were believed to have the power to make people violently ill and eventually cause death. They also were able to transform into birds or animals to escape pursuers. If cornered they could shape-shift into rocks or rotten logs to evade

\textsuperscript{142} Traditional oral teachings, supra note 54.
\textsuperscript{143} Deterrence in this context does not necessarily mean applying highly punitive sanctions in order to deter out of fear. It also includes a rehabilitative component through the rebalancing of the individual.
\textsuperscript{144} Traditional oral teachings, supra note 54.
\textsuperscript{145} Morgan, supra note 12 at 325.
\textsuperscript{146} Newell, supra note 130 at 47-48.
capture.\textsuperscript{147} If caught, a witch could be sentenced to death. A council was called and the witch arraigned before it in the presence of the accuser. Any witch who confessed and promised to mend their ways would be set free. If they denied the accusation, witnesses were called and evidence given. If the evidence of guilt was to the satisfaction of the council, which was often the case, the accused would be sentenced to death. Volunteers from within the nation would then carry out the penalty.\textsuperscript{148}

The Great Law doesn’t speak directly to the practice of witchcraft, but individuals engaging in such acts as causing sickness and death were certainly in violation of the core principles of peace and unity. Death may seem a harsh penalty, but it was only imposed upon the unrepentant. If the Haudenosaunee were to remain united in peace, they had to ensure The Great Law remained the guiding principle of life. The accused would always be spared execution if they confessed and pledged to amend their behavior. Such a pledge would require the individual to engage in a process of rebalancing through some consistent form of ceremonial self-sacrifice. Only after this had occurred would the individual be unconditionally accepted back into the community. As with other anti-social acts, the harshest penalties were reserved for the unrepentant. Those who were remorseful and willing to abide by The Great Law were typically forgiven for their misdeeds.\textsuperscript{149}

**Murder**

Murder was considered a serious offence and The Great Law refers to it in Article 20, which speaks of murder being committed by a Chief. Such an act was considered a matter of national importance since the Chiefs were considered the mentors of society. Such action by a Statesman could not be tolerated and any who committed such an act were deposed and banished (often permanently) from the League. Hereditary Chieftainship titles would then be bestowed upon a sister family, as the title was never intended to have any association with bloodshed. This continued to hold true in a situation of war. All Chiefs were required to renounce their titles temporarily in order to


\textsuperscript{148} *Morgan*, supra note 12 at 321-322.

\textsuperscript{149} *Traditional oral teachings*, supra note 54.
take part in any warfare campaign.\textsuperscript{150} Statesmen generally were held to a stricter standard in regard to delinquent acts, firstly because they were representatives of The Great Law, and secondly because Haudenosaunee societies utilized the practice of teaching acceptable conduct by example.

Murder committed by individuals other than Chiefs was treated differently. It was considered a private concern for which the Statesmen had no authority to impose a punishment or grant a pardon. Punishment or pardon was always a matter for the families and Clans to determine.\textsuperscript{151} If a murder occurred between different families or Clans, the Council of each Clan would meet to discuss a settlement. If it occurred within a specific Clan the members of that Clan would settle the issue.

There were two defined sanctions available as a remedy. The first was execution of the offender by a member of the victim's Clan. The second was the acceptance of a belt of white wampum given by the offender to the victim's family. This act was meant to forever eradicate the memory of the offence and symbolically demonstrate that the accused was willing to confess the crime and make atonement. In addition, it was a petition for forgiveness from the victim's family and Clan. If wampum was accepted, one hundred yards was required for the death of a man and two hundred yards for the killing of a woman.\textsuperscript{152} Wampum during this period was extremely labor intensive to produce, therefore the imparting of the above amounts, which were of considerable value, was intended to "put things right".

In the situation of a death that would fall under contemporary common law classifications of second-degree murder or manslaughter, members of the victim's Clan would always make extensive efforts to effect reconciliation between the aggrieved immediate family and the offender. If the offender were to be executed in these circumstances, there was always the prospect that this type of private retaliation could lead to the rampant blood feuds that existed before the founding of The Great Law. A

\textsuperscript{150} See Appendix 1, Article 90.
\textsuperscript{151} G.H. Loskiel, \textit{History of the Mission of the United Brethren among the Indians of North America} (London: 1794) at 133.
\textsuperscript{152} Chadwick, supra note 58 at 55.
return to this state of violence and chaos was not considered an option, so clemency was the usual result.\textsuperscript{153}

Cases of premeditated murder rarely received the same compassion. Such acts were not tolerated within Haudenosaunee society and the customary sanction was execution. A member of the victim's Clan would be appointed to carry out the sentence, a duty that they could accept or refuse. If they did agree and the offender had fled, they were required to complete it, regardless of the time or distance required to do so.\textsuperscript{154}

The rationale for executing offenders in situations of premeditated murder was not primarily one of revenge. The utmost purpose in demanding the life of the wrongdoer was to satisfy the spirit of the victim who could not find peace among the departed ones (spirit world) until the soul of the offender joined him/her.\textsuperscript{155} All members of society knew that execution was the prescribed sanction for this offence, and most who were condemned to it readily met their fate without fear.\textsuperscript{156} Executing a friend or Clan/Nation member was not an act that most individuals would look forward to or enjoy. The principal aim of capital punishment was to “put things right” with the victim and re-establish the principles of peace and unity mandated by The Great Law. Achieving both would ensure the blood feuds of the past did not again become a divisive factor within the League.

\textbf{Theft}

The Great Law addresses the issue of theft in Article 107. The Article, entitled “Protection of the House” forbids anyone from entering another’s home when a stick is leaning against the entrance. This signal gives a clear indication that the owners are not in their residence and also mandates that any passers by must keep as much distance from the dwelling as their business will permit. Although this Article of The Great Law would appear to be directed only to the entering of a residence, its scope also included

\textsuperscript{153} Morgan, supra note 12 at 322-324.
\textsuperscript{154} Ibid.
\textsuperscript{155} Newell, supra note 130 at 57-58.
\textsuperscript{156} J.V.H. Clark, Lights and Lines of Indian Character and Scenes of Pioneer Life (Syracuse: E.H. Babcock & Co. 1854) at 92-93.
the principle of respect for personal property. Contrary to the prevailing belief that First Nations did not employ the concept of personal property ownership, the Haudenosaunee had an unmistakable understanding of ownership and defined sanctions for any violations. Article 44, which mandates land and Longhouse ownership to the women, illustrates this custom. Again, although the Article speaks only to the specifics of land and Longhouse ownership, the principle advanced applied to other affairs of life, as in this instance the issue of personal ownership of goods, which all were required to respect.157

A further factor that kept theft a very rare occurrence158 was the Haudenosaunee viewpoint towards the accumulation of personal property. Although property rights did exist, there was no desire by members of society to possess more than others. No social status or esteem was gained through material accumulation. In fact, one of the greatest insults was to suggest that one hoarded material goods and did not share with others.159 Generosity was highly admired. It was common for the Statesmen to own the least materially, having presented most of their goods to the populace, and in return receiving the respect and esteem of the same.160

Since generosity was the prevailing tradition, theft was considered a dereliction from the path of integrity and therefore was considered a very despicable act. Those who engaged in this behavior suffered the penalty of public disregard,161 which, as mentioned earlier, was considered a severe form of punishment. As Morgan describes,

But in justice to them it must be acknowledged, that no people ever possessed a higher sense of honor and self-respect in this particular, or looked down with greater disdain upon this shameful practice, than did the Iroquois. To this day, among their descendants, this offence is almost unknown. No locks, or bolts, or private repositories were ever necessary for the protection of property among themselves.162

157 Newell, supra note 130 at 39.
160 Colden, supra note 139 at 17.
161 Morgan, supra note 12 at 324.
162 Ibid.
The custom of generosity undoubtedly helped to maintain the guiding principles of peace and unity within the League. The Haudenosaunee believed that greed was a key factor in criminal incidences, and consequently practiced traditions to prevent its development. This in turn kept the principles of The Great Law foremost in the thoughts and actions of the population.

**Adultery**

In traditional Haudenosaunee society, adultery was considered a moderately serious anti-social or criminal act. The Iroquois did not permit polygamy, and marriage, although deemed a sacred union and permanent partnership, could be dissolved by either party by simply declaring it ended. However, such dissolution was not undertaken lightly as the longstanding tradition was one of permanence.\(^{163}\)

The act of adultery was considered serious because of the ease of spousal separation coupled with the deceit and dishonesty of the deed itself. Infidelity was not considered a sensible alternative when the option of divorce was easily obtainable. Such acts displayed a deficiency of character and a glaring disrespect for societal norms. This betrayal could also lead to significant societal turmoil, conflict, and possible blood feuds through the extracting of vengeance by an aggrieved spouse. As with other crimes that violated the principles of The Great Law, adultery was not acceptable behavior.

The primary sanction for infidelity was public ostracization of both parties involved. Societal denunciation on a daily basis was a very effective deterrent that kept adultery a rare occurrence.\(^{164}\) Again, criminal sanctions were designed in such a manner as to ensure the principles of internal peace and unity remained the central factors adhered to within the Five Nations.

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\(^{163}\) Chadwick, supra note 58 at 58-59.

\(^{164}\) J.E. Seaver, *A Narrative of the Life of Mary Jemison the White Woman of the Genesee*, 22nd ed. (New York: American Scenic and Historic Preservation Society, 1925) at 64.
Sanctions

In this section I will clarify how the above stated sanctions were integrated within and between the Haudenosaunee philosophy of reality and The Great Law. The process is somewhat complex, but I will attempt to keep it as brief and simplistic as I am able.

Ostracization

The most widely utilized punitive sanction imparted to offenders by the Five Nations was ostracization. This was considered worse than a death sentence because of the daily humiliation one had to endure.\(^{165}\) The condemnation was primarily imposed for such “offences”\(^{166}\) as theft, greed, dishonesty, confessed witchcraft and infidelity. The use of ostracization was to denounce the “bad character” of the individual. This in turn left the offender somewhat disconnected from the spiritual link with the rest of the community. Once the offender made the necessary community and personal amends to prove a change back to “good character”, he/she would be accepted back into society.\(^{167}\)

Execution

Although execution was a defined sanction within Haudenosaunee society, it was rarely utilized. The death sentence was imposed for Chiefs who consistently disregarded the will of the people, pre-meditated murder, and for denying and subsequently being found guilty of witchcraft. In the case of an obstinate Chief\(^{168}\) and an accusation of

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\(^{165}\) *Morgan, supra note 12 at 324.*

\(^{166}\) The Haudenosaunee were governed by the mandates of The Great Law, which prescribed sanctions for specific behaviours such as murder. Other behaviours such as witchcraft, theft, or adultery were also incompatible with peace, health, and righteousness so methods were developed to deter such behaviours. Thus, the concept of acting rightly or acting wrongly is ingrained into Haudenosaunee culture, yet they remain intertwined. The European notion of crime is somewhat analogous to the Haudenosaunee notion of acting wrongly, although the conceptions do come from different worldviews.

\(^{167}\) *Traditional oral teachings, supra note 54.*

\(^{168}\) See Appendix 1, Article 59.
witchcraft, execution could be prevented if the accused admitted their wrongdoing and repented for their actions.\(^\text{169}\)

While capital punishment in our contemporary society seems barbaric to many, the Haudenosaunee understood death in an entirely different manner. In their reality the deceased returned to the place of their beginning where their ancestors were waiting to greet them. The spirit world was a much kinder, gentler place in which to exist. Therefore, to the Iroquois death was not considered something to fear, nor was there any "hell" to which one might be condemned. Thus, execution was not perceived in the same manner as Euro-Canadian society.

However, the Haudenosaunee were well aware that each individual was bestowed life by the Creator and consequently had a purpose to serve. Also, execution was not considered an appropriate way to "put things right" as the offender would not have the opportunity to correct the harm they had done. In keeping with this perception the death sentence was reserved for only the most severe cases, such as pre-meditated murder or those who would not take responsibility for their misdeeds. The continued presence of these few individuals would only serve to further harm the community and nation.\(^\text{170}\)

Reparation

The most common method of addressing illicit behavior was negotiated settlement. If an individual committed an offence, the Council of that individual's family, or Clan, would meet with the Council of the victim's Clan to discuss the matter. If the offence involved members of the same Clan, the Clan Council would discuss it among themselves. The discussion would result in some settlement in which the offender would have to make reparation to the victim, or in the case of murder, to the victim's family. Reparation usually consisted of giving the aggrieved party something of great value such as wampum. This type of resolution was employed for numerous types of offences that were not injurious or malicious enough to warrant the harsher penalties. After the

\(^{169}\) \textit{Morgan, supra} note 12 at 321-322.

\(^{170}\) \textit{Traditional oral teachings, supra} note 54.
offender carried out the settlement, the offence was to be forever obliterated from the memory of the community.\textsuperscript{171}

**Banishment**

For those offenders who continued to engage in anti-social acts or hurtful behaviour, banishment or elimination of their name\textsuperscript{172} would be used as a last resort.\textsuperscript{173} The point of banishment or elimination of a name\textsuperscript{174} was firstly to protect the community, but secondly to attempt to return the offender to a spiritual state of social interconnection. When one attempted to survive alone, or was forced to live with other communities in shame, intense personal reflection that often led to a spiritual reawakening was thought to take place. Consequently, the offender would make the character changes necessary to interact positively within their community. Banishment rarely occurred for life, and the individual often returned home after a prescribed period of exile and would be allowed to remain if they had fully embraced the principles of peace and unity. The Great Law decrees that individuals acting in disruptive manners be given three opportunities to change.\textsuperscript{175} This dictate also applied to most defined sentences including banishment.\textsuperscript{176}

The above sanctions were developed, and always applied, through the Haudenosaunee spiritual/cultural perspective and The Great Law of Peace. All members of society were taught this perspective and the dictates of The Great Law of Peace from a very young age. To act in a manner contrary to either was considered somewhat peculiar, but the frailties and limitations of being human were well understood, and always taken into consideration when determining an appropriate sanction. Most problems were solved without dissension or further harm. Contrary to the prevailing belief that Aboriginal societies came to peaceful resolutions because of a dependence

\textsuperscript{171} Chadwick, supra note 58 at 55.

\textsuperscript{172} Williams & Nelson, supra note 30.

\textsuperscript{173} Clark, supra note 156 at 92.

\textsuperscript{174} The elimination of one's name symbolized that the individual no longer existed. This generally resulted in the individual leaving the community for an extended period of time.

\textsuperscript{175} See Appendix 1, Article 59.

\textsuperscript{176} Traditional oral teachings, supra note 54.
on each other for survival, the Haudenosaunee at least, came to peaceful resolutions because of the spiritual and material unity decreed by The Great Law and their world perspective.

Having established the political and cultural information necessary to assess the Haudenosaunee inherent right to criminal justice jurisdiction in Chapters 1 and 2, Chapter 3 will review the Supreme Court of Canada decisions that have set out the legal framework and legal principles applicable to the assertion of an Aboriginal right.
CHAPTER 3: REVIEW OF APPLICABLE CASELAW

In 1990 the Supreme Court of Canada undertook its first detailed examination of section 35(1)\textsuperscript{177} of the Constitution Act, 1982 in \textit{R. v. Sparrow}.\textsuperscript{178} The decision is considered a milestone in the development and recognition of Aboriginal inherent rights, and certainly put the legitimacy of these rights into the forefront of the political and public agenda. This case also set out a legal framework and provides the general guidelines and legal principles applicable to the assessment of any Aboriginal rights claim. The result is that any judicial assessment of an Aboriginal rights claim must address the four sets of issues outlined in Table 1. However, the \textit{Sparrow} case was decided fourteen years ago. Since that time there has been a significant number of Aboriginal rights cases before the Supreme Court and new facts and circumstances often require the courts to alter or expand the existing principles of law. Nonetheless, considering that \textit{Sparrow} set authoritative legal precedent that Canadian courts must observe when adjudicating any Aboriginal rights claim, it is the appropriate case with which to begin.

\textsuperscript{177} Section 35 (1) of the Constitution Act, 1982 states, "The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed".

Table 1: Overview Of An Aboriginal Rights Analysis

<table>
<thead>
<tr>
<th>Stage 1: What is an Aboriginal right and what is required to establish the existence of an Aboriginal right?</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Any practice, custom, or tradition claimed as an Aboriginal right must be characterized in a manner that precisely states the nature and purpose of the modern activity claimed to be an Aboriginal right.</td>
</tr>
<tr>
<td>(b) Aboriginal rights are those practices, customs or traditions that were integral or of central significance to a distinctive Aboriginal culture before contact with Europeans.</td>
</tr>
<tr>
<td>(c) There must be continuity between the traditional practice and the modern activity claimed as an Aboriginal right. If the practice arose solely in response to contact with Europeans it cannot be claimed as an Aboriginal right.</td>
</tr>
<tr>
<td>If the claimant proves all of the above elements the analysis moves to Stage 2.</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th>Stage 2: Can an Aboriginal right be extinguished and what is required to prove extinguishment of an Aboriginal right?</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Prior to the enactment of section 35 (1) of the Constitution Act, 1982, the Crown could unilaterally extinguish an Aboriginal right with &quot;clear and plain&quot; legislation or Constitutional enactment. Aboriginal rights can also be extinguished through &quot;surrender&quot; provisions in a treaty or other valid agreement.</td>
</tr>
<tr>
<td>(b) What is essential to satisfy the &quot;clear and plain&quot; test is clear evidence that the government actually considered the conflict between its intended action on the one hand and Aboriginal rights on the other, and chose to resolve that conflict by abrogating the right.</td>
</tr>
<tr>
<td>(c) An intention to extinguish a right can be implicit if the continued existence and application of the Aboriginal right nullifies, or is irreconcilable with, the effect of the legislation.</td>
</tr>
<tr>
<td>If the Crown cannot prove extinguishment of the right claimed the analysis moves to Stage 3.</td>
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<tr>
<th>Stage 3: Can federal or provincial governments infringe an Aboriginal right and what is required to demonstrate a prima facie infringement of an Aboriginal right?</th>
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<tbody>
<tr>
<td>(a) Aboriginal rights are now protected from infringement unless the government is able to justify the infringement.</td>
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<tr>
<td>(b) To demonstrate a prima facie infringement of section 35 (1) rights, those challenging the infringement must show that it (i) it is an unreasonable limitation; (ii) has the effect of imposing undue hardship; or (iii) denies the right holders their preferred means of exercising the right.</td>
</tr>
<tr>
<td>If the claimant demonstrates a prima facie infringement the analysis moves to Stage 4.</td>
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<tr>
<th>Stage 4: What is required to defend or justify any prima facie infringement of an Aboriginal right?</th>
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<tr>
<td>To justify any infringement the government must demonstrate the following two factors:</td>
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<tr>
<td>(a) That it was acting pursuant to a valid legislative objective. Under this principle a court would inquire into whether the objective of the legislation or regulations found to infringe an Aboriginal right are &quot;compelling and substantial&quot;.</td>
</tr>
<tr>
<td>(b) That its actions are consistent with the fiduciary duty of the government towards Aboriginal peoples. For example, in a situation involving a fishery the government must demonstrate that it has given the Aboriginal fishery priority. The Crown's fiduciary duty to Aboriginal peoples also requires the Court to consider such additional questions as: (a) whether there has been as little infringement as possible in order to effect the desired result; (b) whether, in a situation of expropriation, fair compensation is available; and (c) whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented. However, this list is not exhaustive.</td>
</tr>
</tbody>
</table>
R. V. Sparrow: The Foundation Of Post-Constitutional Aboriginal Law

Ronald Edward Sparrow, a member of the Musqueam First Nation, was charged under s. 61(1) of the Fisheries Act with the offence of fishing with a drift net longer than that permitted by the terms of the Band's Indian food fishing licence. Mr. Sparrow admitted the facts of the alleged offence, but defended the charge on the basis that he was exercising an existing Aboriginal right to fish and that the net length restriction contained in the Band's licence was inconsistent with s. 35(1) of the Constitution Act, 1982. The issue before the court was whether Parliament's power to regulate fishing was limited by s. 35(1) of the Constitution Act, and, more specifically, whether the net length restriction in the licence was inconsistent with that provision.

In its analysis the Supreme Court first addressed the meaning of "existing" Aboriginal rights and the content and scope of the Musqueam right to fish. They conclude that the word "existing" makes it clear that the rights to which s. 35(1) applies are those that were in existence when the Constitution Act, 1982 came into effect. This means that any previously extinguished Aboriginal rights could not be revived by the implementation of s. 35(1). Further, an existing Aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a "crazy patchwork of regulations". In addition, the phrase "existing Aboriginal rights" must be interpreted flexibly so as to permit their evolution over time, as "the word 'existing' suggests that those rights are affirmed in a contemporary form rather than in their primeval simplicity and vigour". Therefore, the interpretation of Aboriginal rights cannot include a frozen rights approach. The constitutional guarantee embodied in s. 35(1) demands more.

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179 Fisheries Act, R.S.C. 1970, c. F-14, ss. 34, 61(1).
181 Sparrow, supra note 178 at para 23.
182 Ibid. at para 24.
183 Ibid. at para 27.
184 Ibid.
The evidence before the court revealed that the Musqueam Nation lived in the Ladner Reach and Canoe Passage area as an organized society long before the coming of Europeans and that the taking of salmon was and is an integral part of their lives. However, the Crown argued that the Musqueam's right to fish had been extinguished by the progressive restriction and detailed regulations of the *Fisheries Act*. Therefore, from the Crown's perspective, extinguishment of the right need not be explicit but may take place where legislation is developed or exercised in a manner "necessarily inconsistent" with the continued enjoyment of the Aboriginal right.

In response to the Crown's argument, the Court stated, "The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an Aboriginal right." There was nothing in the *Fisheries Act* or its detailed regulations that demonstrated a clear and plain intention to extinguish the Musqueam right to fish. The fact that the express provisions permitting the Musqueam to fish for food may have applied to all Indians, and, that for an extended period permits were discretionary and issued on an individual rather than a communal basis, in no way demonstrated a clear intention to extinguish the right. The permits were simply a manner of controlling the fisheries, not defining underlying rights. Therefore, the Crown failed to discharge its burden of proving extinguishment.

The Court then began its examination of the scope of the existing Musqueam right to fish. The anthropological evidence revealed that the salmon fishery had always constituted an integral part of the Musqueam's distinctive culture. The salmon fishery played a highly significant role not only for subsistence purposes, but also on ceremonial and social occasions. Thus, the Musqueam have always fished for reasons connected to their cultural and physical survival and the continued right to do so may be exercised in a contemporary manner. The historical policy on the part of the Crown is not only incapable of extinguishing the existing Aboriginal right without clear intention, but is also incapable of delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing Aboriginal right. Government policy

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185 Ibid. at para 32.
186 Ibid. at para 37.
187 Ibid. at para 38.
188 Ibid. at para 39.
can continue to regulate the exercise of that right, but any such regulation must be in keeping with s. 35(1).169

The approach to be taken when interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, existing principles relating to Aboriginal rights, and the purposes behind the constitutional provision itself. The nature of s. 35(1) suggests that it be construed in a purposive way. When the purposes of the affirmation of Aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. 190

In addition, the Court found that the Crown owed a fiduciary obligation to the Musqueam. The sui generis nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. Referring to Guerin191 and Taylor192, the court stated:

....the Government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples. The relationship between the Government and Aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship.193

The Court then elaborated on the interrelationship between s. 35 and the Crown’s fiduciary obligation stating:

....we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies Aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in Nowegijick, supra, and the concept of holding the Crown to a high standard of honourable dealing with respect

169 Ibid. at para 44.
190 Ibid. at para 56.
193 Sparrow, supra note 178 at para 59.
to the Aboriginal peoples of Canada as suggested by Guerin v. The Queen, supra. 194

Therefore, s. 35(1) suggests that regulations affecting Aboriginal rights are possible but any such regulation must be enacted according to a valid legislative objective. The manner in which such an objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship between the Crown and Aboriginal peoples. Further, the extent of legislative or regulatory impact on an existing Aboriginal right may be scrutinized by the courts and the government will bear the burden of justifying any legislation that has a negative effect on any rights protected under s. 35(1). 195

Using the above framework as guidance, the Court then set out the test for a prima facie interference with an existing Aboriginal right as well as the justification requirement of such an interference stating:

The first question to be asked is whether the legislation in question has the effect of interfering with an existing Aboriginal right. If it does have such an effect, it represents a prima facie infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of Aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake. Our earlier observations regarding the scope of the Aboriginal right to fish are relevant here. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in Guerin, supra, referred to as the "sui generis" nature of Aboriginal rights. 196

To determine whether the fishing rights have been interfered with such as to constitute a prima facie infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the

194 Ibid. at para 62.
195 Ibid. at para 64.
196 Ibid. at para 68.
regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met.\textsuperscript{197}

If a *prima facie* interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional Aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to Aboriginal peoples themselves, or other objectives found to be compelling and substantial.\textsuperscript{198}

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin*, supra. That is, the honour of the Crown is at stake in dealings with Aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis Aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.\textsuperscript{199}

The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of Aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource. There is a clear need for guidelines that will resolve the allocational problems that arise regarding the fisheries. The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. If the objective pertained to conservation,

\begin{itemize}
\item \textsuperscript{197} Ibid. at para 70.
\item \textsuperscript{198} Ibid. at para 71.
\item \textsuperscript{199} Ibid. at para 75.
\end{itemize}
the conservation plan would be scrutinized to assess priorities. While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established. The significance of giving the Aboriginal right to fish for food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.200

The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat Aboriginal peoples in a way ensuring that their rights are taken seriously.201

In addition to the above principles, the court also stated that there are further questions that must be asked within the stage of justification, eg., whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented. At the same time, since any additional justification analysis depends upon the circumstances of each case, so the above list of factors is not exhaustive.202

In concluding the case, the Court dismissed both the appeal and cross-appeal and affirmed the Court of Appeal's previous setting aside of the conviction. They also ordered a new trial on the questions of infringement and whether any infringement was consistent with s. 35(1).203

200 Ibid. at para 78.
201 Ibid. at para 81.
202 Ibid. at para 83.
203 Ibid. at para 88.
Although the Sparrow decision is directly concerned with the issue of the Musqueam right to fish, it also developed an authoritative framework and set of legal principles that must be applied to all Aboriginal rights litigation, whatever the specific right claimed. In basic terminology, any Aboriginal rights analysis must address systemically the following questions: (a) does the right claimed exist?; (b) has the right been extinguished prior to 1982?; (c) has the right been infringed by legislation?; and (d) can any such infringement be justified? In its examination into these specific inquiries, a court must properly apply the guiding principles set out in Sparrow in order to come to a well-founded decision.

However, the inherent rights claimed by Aboriginal Peoples are not confined to the right to fish. As divergent claims come before the courts, some adjustment or expansion to the Sparrow framework may be required in order to properly assess the claim. Thus, an inquiry into the inherent right to criminal justice jurisdiction, that is the focus of this thesis, must follow the same fundamental four-step process set out in Sparrow, but the analysis and queries required to come to a conclusion on each of those steps will require adaptation to the unique issues involved in its assertion. Fortunately, the Supreme Court has now confronted several divergent Aboriginal rights claims and consequently amended the Sparrow doctrine where required. Accordingly, these cases will now be examined and categorized according to their significance to each of the four stages necessary to the analysis of an Aboriginal rights claim.

Is There An Existing Aboriginal Right?

In 1996 the Supreme Court gave further clarification to the nature of inherent rights in R. v. Van der Peet. In this case the appellant Dorothy Van der Peet was charged under s. 61(1) of the Fisheries Act with the offence of selling fish caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the British Columbia Fishery (General) Regulations, SOR/84-248. The charges arose from the sale by Ms Van der Peet of 10 salmon on September 11, 1987. She based her defence on the position that the restrictions imposed by s. 27(5) of the Regulations infringed her

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205 Fisheries Act, supra note 179.
existing Aboriginal right to sell fish and are therefore invalid on the basis that they violate s. 35(1) of the Constitution Act, 1982.

Before engaging in an analysis of the case Chief Justice Lamer commented on the Court's evaluation of an Aboriginal rights claim:

The task of this Court is to define Aboriginal rights in a manner which recognizes that Aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by Aboriginal people because they are Aboriginal. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures both the Aboriginal and the rights in Aboriginal rights.

The way to accomplish this task is, as was noted at the outset, through a purposive approach to s. 35(1). It is through identifying the interests that s. 35(1) was intended to protect that the dual nature of Aboriginal rights will be comprehended. In Hunter v. Southam Inc., [1984] 2 S.C.R. 145, Dickson J. explained the rationale for a purposive approach to constitutional documents. Courts should take a purposive approach to the Constitution because constitutions are, by their very nature, documents aimed at a country's future as well as its present; the Constitution must be interpreted in a manner which renders it "capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers": Hunter, supra, at p. 155. A purposive approach to s. 35(1), because ensuring that the provision is not viewed as static and only relevant to current circumstances, will ensure that the recognition and affirmation it offers are consistent with the fact that what it is recognizing and affirming are "rights". Further, because it requires the court to analyze a given constitutional provision "in the light of the interests it was meant to protect" (Big M Drug Mart Ltd., supra, at p. 344), a purposive approach to s. 35(1) will ensure that that which is found to fall within the provision is related to the provision's intended focus: Aboriginal people and their rights in relation to Canadian society as a whole.206

Lamer C.J. then went on to state:

Before turning to a purposive analysis of s. 35(1), however, it should be noted that such analysis must take place in light of the general principles which apply to the legal relationship between the Crown and Aboriginal peoples. In Sparrow, supra, this Court held at p. 1106 that s. 35(1) should be given a generous and liberal interpretation in favour of Aboriginal peoples.

206 Van der Peet, supra note 204 at para 20-21.
This interpretive principle, articulated first in the context of treaty rights... arises from the nature of the relationship between the Crown and Aboriginal peoples. The Crown has a fiduciary obligation to Aboriginal peoples with the result that in dealings between the government and Aboriginal peoples the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of Aboriginal peoples, must be given a generous and liberal interpretation. This general principle must inform the Court's analysis of the purposes underlying s. 35(1), and of that provision's definition and scope.

The fiduciary relationship of the Crown and Aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1), such doubt or ambiguity must be resolved in favour of Aboriginal peoples. In R. v. Sutherland, [1980] 2 S.C.R. 451, at p. 464, Dickson J. held that paragraph 13 of the Memorandum of Agreement between Manitoba and Canada, a constitutional document, "should be interpreted so as to resolve any doubts in favour of the Indians, the beneficiaries of the rights assured by the paragraph". This interpretive principle applies equally to s. 35(1) of the Constitution Act, 1982 and should, again, inform the Court's purposive analysis of that provision.

The Chief Justice then asserted that any purposive analysis of s. 35(1) must be carried out with the following premise in mind:

When the court identifies a constitutional provision's purposes, or the interests the provision is intended to protect, what it is doing in essence is explaining the rationale of the provision; it is articulating the reasons underlying the protection that the provision gives. With regards to s. 35(1), then, what the court must do is explain the rationale and foundation of the recognition and affirmation of the special rights of Aboriginal peoples; it must identify the basis for the special status that Aboriginal peoples have within Canadian society as a whole.

In identifying the basis for the recognition and affirmation of Aboriginal rights it must be remembered that s. 35(1) did not create the legal doctrine of Aboriginal rights; Aboriginal rights existed and were recognized under the common law. At common law Aboriginal rights did not, of course, have constitutional status, with the result that Parliament could, at any time, extinguish or regulate those rights. It is this which distinguishes the Aboriginal rights recognized and affirmed in s. 35(1) from the Aboriginal rights protected by the common law. Subsequent to s. 35(1) Aboriginal rights cannot be extinguished and can only be

207 Ibid. at para. 23-25.
regulated or infringed consistent with the justificatory test laid out by this Court in Sparrow, supra.\textsuperscript{208}

Utilizing the above principles, Lamer C.J. went on to develop what is called the "distinctive practices" test, which is designed to identify the "crucial elements" of pre-contact distinctive Aboriginal societies. The test will determine if the claim is a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right. This standard, which was first emphasized in Sparrow,\textsuperscript{209} must be met in order for any legal recognition of an Aboriginal right. The "distinctive practices" test is meant to further refine the factors that must be considered, however, "courts adjudicating Aboriginal rights claims must, [therefore], be sensitive to the Aboriginal perspective, but they must also be aware that Aboriginal rights exist within the general legal system of Canada."\textsuperscript{210} Keeping this perspective in mind, Chief Justice Lamer then went on to formulate the requisite characteristics of the "distinctive practices" test.

**Characterization of the Claim**

The first step when assessing a claim to an Aboriginal right requires the court to specifically identify the nature of the right being claimed. It is necessary to be precise in order to determine whether the claim meets the test of being integral to the distinctive culture of the Aboriginal group claiming the right. The correct characterization of the claim or right is of the utmost importance because the evidence being called to support the claim will have to substantiate and correspond to the precise nature of the claim itself.

For instance, the British Columbia Court of Appeal characterized Ms. Van der Peet's claim as the right to sell fish "on a commercial basis":\textsuperscript{211} However, the Supreme Court emphasized that Ms. Van der Peet's claim was not a claim to "sell fish on a commercial basis," but a claim to "sell fish":\textsuperscript{212} In addition the court stated:

\textsuperscript{208} Ibid. at para. 27-28.
\textsuperscript{209} Sparrow, supra note 178.
\textsuperscript{210} Van der Peet, supra note 204 at para. 49.
\textsuperscript{211} Ibid. at para. 52.
\textsuperscript{212} Ibid.
To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an Aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right. In this case, therefore, the Court will consider the actions which led to the appellant's being charged, the fishery regulation under which she was charged and the practices, customs and traditions she invokes in support of her claim.\textsuperscript{213}

and,

It should be acknowledged that a characterization of the nature of the appellant's claim from the actions which led to her being charged must be undertaken with some caution. In order to inform the court's analysis the activities must be considered at a general rather than at a specific level. Moreover, the court must bear in mind that the activities may be the exercise in a modern form of a practice, custom or tradition that existed prior to contact, and should vary its characterization of the claim accordingly.\textsuperscript{214}

After the court has determined the precise nature of the right being claimed, they must then evaluate the traditional practice being claimed as an Aboriginal right to establish if that practice, custom or tradition was integral to the claimant's Aboriginal culture or society. The Court has termed this the 'integral to distinctive culture test'.

\textbf{Evaluation Of The Traditional Practice}

To satisfy the 'integral to a distinctive culture test' the claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the Aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture, i.e., one of the things that made the culture of the society distinctive or truly made the society what it was. Because the Aboriginal rights protected by s. 35(1) are said to have the purpose of reconciling pre-existing Aboriginal societies with the assertion of Crown sovereignty over Canada, it is necessary to identify the distinctive features of those societies, as it is precisely those distinctive practices or characteristics which need to be acknowledged and reconciled with the sovereignty of the Crown. The

\textsuperscript{213} Ibid. at para. 53.
\textsuperscript{214} Ibid. at para. 54.
most practical way to decipher whether in fact a practice is integral to an Aboriginal society is to ask whether, without this practice, custom or tradition, the culture in question would be fundamentally altered to something other than what it is. The practice, custom or tradition must be a defining feature of the culture in question.215

Further, any such practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition, but must be of integral significance to the Aboriginal society. Where two customs exist, but one is merely incidental to the other, the custom which is integral to the Aboriginal community in question will qualify as an Aboriginal right, but the custom that is merely incidental will not. Incidental practices, customs and traditions cannot qualify as Aboriginal rights through a process of piggybacking on integral practices, customs and traditions. To clarify, if an Aboriginal society fished for food on a consistent and regular basis, but traded that fish for goods with other First Nations only on an occasional basis, trading fish for goods would only be considered “incidental” to fishing for food, and would therefore not likely be considered an inherent right by the court.216

If the court establishes that the claimed right is indeed of central significance to the Aboriginal society concerned, they must then evaluate the continuity between the traditional practice and the modern Aboriginal right claimed.

Assessment Of Continuity Between Traditional Practice And Modern Activity

The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the Aboriginal community claiming the right is the period prior to contact with European societies. This is primarily because Aboriginal societies lived on the land prior to the arrival of Europeans and it is this fact that underlies the Aboriginal rights protected by s. 35(1). Therefore, it is to that pre-contact period that the courts must look when identifying Aboriginal rights.217

215 Ibid. at para 59.
216 Ibid. at para 70.
217 Ibid. at para 60.
However, looking to the pre-contact time period should not suggest that the Aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. It would be entirely contrary to the spirit and intent of s. 35(1) to define Aboriginal rights in such a fashion. Doing so would preclude in practice any successful claim for the existence of such a right. Therefore, when determining whether a claimant has produced evidence sufficient to demonstrate that the activity in question is an aspect of a practice, custom or tradition integral to a distinctive Aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of Aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by Aboriginal claimants simply because that evidence does not conform precisely to the evidentiary standards that are normally applied under the common law.\textsuperscript{218}

Further, the evidence relied upon by the claimant and the courts may relate to Aboriginal practices, customs and traditions post-contact, if they are directed at demonstrating those aspects of the Aboriginal community that have their origins pre-contact. Those integral practices, customs and traditions that are rooted in the pre-contact societies of the Aboriginal community in question will constitute Aboriginal rights.

Once the applicant establishes that the claimed right is embedded in the pre-contact practices of the Aboriginal community in question, that practice will be subject to the requirement of continuity or connection with the practices, customs and traditions that existed pre-contact. The evolution of practices, customs and traditions into modern forms will not, provided that continuity is demonstrated, prevent their protection as Aboriginal rights. Nevertheless, the concept of continuity does not require Aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions and those that existed prior to contact. It could be that for a period of time an Aboriginal group ceased to engage in a practice, custom or tradition that existed prior to contact, but then resumed the practice, custom or tradition

\textsuperscript{218} Ibid. at para 68.
at a later date. Such an interruption will not preclude the establishment of an Aboriginal right. In such an instance courts should adopt the same flexibility regarding the establishment of continuity that is used to establish pre-contact practices, customs and traditions.219

Finally, the fact that Europeans in North America may have engaged in the same practices, customs or traditions as those claimed as an Aboriginal right will only be relevant to an Aboriginal claim if the practice, custom or tradition in question only arose because of the influence of European culture. If the claimed right was an integral part of the Aboriginal community's culture prior to contact with Europeans, and was then modified in response to European arrival, such an adaptation is not relevant to determination of the claim. European arrival and influence cannot be used to deprive an Aboriginal group of an otherwise valid claim to an Aboriginal right. However, if the practice, custom or tradition stems solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an Aboriginal right. For instance, in the case at hand, Ms. Van der Peet's claim to sell fish as an Aboriginal right did not demonstrate sufficient continuity with a pre-contact practice because the exchange of fish for money or goods developed after contact with Europeans and any trading that took place before contact was only incidental to the traditional practice of fishing for food or ceremonial purposes.220

Thus, any Haudenosaunee claim to criminal justice jurisdiction will require them to demonstrate all three elements of the 'distinctive practices test'. To summarize, they must (a) state precisely the nature of the claim; (b) establish that their criminal justice practices were integral to their culture; and, (c) substantiate that the expression of the right in contemporary society has continuity with pre-contact integral practices. However, the manner in which they may perform their inherent right to criminal justice jurisdiction can evolve into contemporary form. If their evidence of the claim passes the scrutiny of the above "distinctive practices" test, the court will then move to stage two of the analysis which examines whether the claimed right was extinguished prior to the implementation of s. 35 of the Constitution Act, 1982.

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219 Ibid. at para 65.
220 Ibid. at para 90.
Although Lamer C.J.'s judgment was accepted by the majority in this decision there were dissenting opinions by other justices that are clearly important to future Aboriginal rights claims. For instance, L'Heureux-Dube J. stated:

The Chief Justice concludes that the Sto:lo do not possess an Aboriginal right to exchange fish for money or other goods and that, as a result, the appellant's conviction under the Fisheries Act, R.S.C. 1970, c. F-14, should be upheld. Not only do I disagree with the result he reaches, but I also diverge from his analysis of the issue at bar, specifically as to his approach to defining Aboriginal rights and as to his delineation of the Aboriginal right claimed by the appellant.221

In her analysis of the case, Justice L'Heureux-Dube asserted that Aboriginal rights protected under s. 35(1) have to be interpreted in the context of the history and culture of the specific Aboriginal society and in a manner that gives the rights meaning to the Aboriginal peoples themselves. Therefore, a proper interpretation of Aboriginal rights requires that the Aboriginal perspective of those rights holds more weight than that of the common law.222

With this in mind, L'Heureux-Dube favoured a generic approach to defining the nature and extent of Aboriginal rights. This approach starts from the proposition that the notion of "integral part of [Aboriginals'] distinctive culture" constitutes a general statement regarding the purpose of s. 35(1). Instead of focusing on a particular practice, tradition or custom, this conception refers to a more abstract and profound concept whereby the Aboriginal rights protected under s. 35(1) should be contemplated on a multi-layered or multi-faceted basis.

Accordingly, s. 35(1) should be viewed as protecting the "distinctive culture" of which Aboriginal activities are manifestations and not the individualized practices, traditions or customs, as with the Lamer C.J. approach. Simply put, the emphasis would be on the significance of these activities to Aboriginal peoples rather than on the activities themselves.223 The Aboriginal practices, traditions and customs that form the core of the lives of native people and which provide them with a way and means of living as an organized society will fall within the scope of the constitutional protection under s.

221 Ibid. at para. 97.
222 Ibid. at para. 145.
223 Ibid. at para. 156-157.
35(1). Such protected activities are readily distinguishable from the practices or habits that were merely incidental to the lives of a particular group of Aboriginal people and, as such, would not warrant protection under s. 35(1).

Taking an approach that is based on a dichotomy between Aboriginal and non-Aboriginal practices, traditions and customs literally amounts to defining Aboriginal culture and Aboriginal rights as that which is left over after features of non-Aboriginal cultures have been taken away. Such a strict construction of constitutionally protected Aboriginal rights flies in the face of the generous, large and liberal interpretation of s. 35(1) that was advocated in Sparrow. Therefore, a better approach is to examine the question of the nature and extent of Aboriginal rights from a certain level of abstraction and generality. This rationale should inform the characterization of Aboriginal activities that warrant constitutional protection as Aboriginal rights. From this perspective, Aboriginal practices, traditions and customs that form the core of the lives of Aboriginal Peoples and provide them with a way and means of living as an organized society, will fall within the scope of the constitutional protection under s. 35(1).

Justice L'Heureux-Dube also emphasized that using a pre-contact approach when investigating for evidence of an Aboriginal right was fundamentally flawed for the following reasons:

First, relying on the proclamation of sovereignty by the British imperial power as the "cut-off" for the development of Aboriginal practices, traditions and customs overstates the impact of European influence on Aboriginal communities: see Bowker, "Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal", supra, at p. 22. From the native people's perspective, the coming of the settlers constitutes one of many factors, though a very significant one, involved in their continuing societal change and evolution. Taking British sovereignty as the turning point in Aboriginal culture assumes that everything that the natives did after that date was not sufficiently significant and fundamental to their culture and social organization. This is no doubt contrary to the perspective of Aboriginal people as to the significance of European arrival on their rights.

Second, crystallizing Aboriginal practices, traditions and customs at the time of British sovereignty creates an arbitrary date for assessing existing Aboriginal rights: see Sébastien Grammond, "La protection constitutionnelle des droits ancestraux des peuples autochtones et l'arrêt

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224 Sparrow, supra note 178.
225 Van der Peet, supra note 204 at para. 160-161.
Sparrow" (1991), 36 McGill L.J. 1382, at pp. 1403-4. In effect, how would one determine the crucial date of sovereignty for the purpose of s. 35(1)? Is it the very first European contacts with native societies, at the time of the Cabot, Verrazzano and Cartier voyages? Is it at a later date, when permanent European settlements were founded in the early seventeenth century? In British Columbia, did sovereignty occur in 1846 - the year in which the Oregon Boundary Treaty, 1846 was concluded - as held by the Court of Appeal for the purposes of this litigation? No matter how the deciding date is agreed upon, it will not be consistent with the Aboriginal view regarding the effect of the coming of Europeans.

As a third point, in terms of proof, the "frozen right" approach imposes a heavy and unfair burden on the natives: the claimant of an Aboriginal right must prove that the Aboriginal practice, tradition or custom is not only sufficiently significant and fundamental to the culture and social organization of the Aboriginal group, but has also been continuously in existence, but as the Chief Justice stresses, even if interrupted for a certain length of time, for an indeterminate long period of time prior to British sovereignty. This test embodies inappropriate and unprovable assumptions about Aboriginal culture and society. It forces the claimant to embark upon a search for a pristine Aboriginal society and to prove the continuous existence of the activity for "time immemorial" before the arrival of Europeans. This, to say the least, constitutes a harsh burden of proof, which the relaxation of evidentiary standards suggested by the Chief Justice is insufficient to attenuate. In fact, it is contrary to the interpretative approach propounded by this Court in Sparrow, supra, which commands a purposive, liberal and favourable construction of Aboriginal rights.

Moreover, when examining the wording of the constitutional provisions regarding Aboriginal rights, it appears that the protection should not be limited to pre-contact or pre-sovereignty practices, traditions and customs. Section 35(2) of the Constitution Act, 1982 provides that the "Aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada" (emphasis added). Obviously, there were no Métis people prior to contact with Europeans as the Métis are the result of intermarriage between natives and Europeans: see Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II - Section 35: The Substantive Guarantee", supra, at pp. 272-74. Section 35(2) makes it clear that Aboriginal rights are indeed guaranteed to Métis people. As a result, according to the text of the Constitution of Canada, it must be possible for Aboriginal rights to arise after British sovereignty, so that Métis people can benefit from the constitutional protection of s. 35(1). The case-by-case application of s. 35(2) of the Constitution Act, 1982 proposed by the Chief Justice does not address the issue of the interpretation of s. 35(2).

Finally, the "frozen right" approach is inconsistent with the position taken by this Court in Sparrow, supra, which refused to define existing Aboriginal rights so as to incorporate the manner in which they were regulated in 1982.
This broad proposition should be taken to relate, not only to the meaning of the word "existing" found in s. 35(1), but also to the more fundamental question of the time at which the content of the rights themselves is determined. Accordingly, the interpretation of the nature and extent of Aboriginal rights must "permit their evolution over time." 226

L’Heureux-Dube then went on to promote the "dynamic rights" approach for interpreting the nature and extent of Aboriginal rights. This methodology starts from the proposition that the phrase "existing Aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. According to this view, Aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of Aboriginal peoples as their practices, traditions and customs change and evolve with the overall society in which they live.

Instead of considering the assertion of British sovereignty as the turning point in Aboriginal culture, it would be regarded as having recognized and affirmed the practices, traditions and customs that are sufficiently significant to the culture and social organization of Aboriginal peoples. This concept specifically relates to the "doctrine of continuity", founded in British imperial constitutional law, to the effect that when new territory is acquired the lex loci of organized societies continues at common law. 227

Consequently, in order for an Aboriginal right to be recognized and affirmed under s. 35(1), it is not essential that the practices, traditions and customs exist prior to the assertion of British sovereignty or prior to European contact. Rather, the determining factor would only require that the activity claimed as an Aboriginal right formed a significant and fundamental part of a distinctive Aboriginal culture for a substantial continuous period of time. The substantial continuous period of time for which the activity must have been engaged in will depend on the circumstances and on the nature of the Aboriginal right claimed, although in most cases a period of twenty to fifty years would seem adequate. An evaluation of the substantial continuous period of time necessary for the recognition of Aboriginal rights should be assessed upon the following three factors: (1) the type of Aboriginal practices, traditions and customs; (2) the particular Aboriginal culture and society; and (3) the reference period of 20 to 50 years. However, this time

226 Ibid. at para. 166-170.

227 Ibid. at para. 173.
frame does not nullify the fact that in order to benefit from s. 35(1) protection, Aboriginal activities must still form the core of the lives of the Aboriginal Peoples making the claim.\textsuperscript{228}

In L’Heureux-Dube’s opinion the significant advantage of the "dynamic rights" approach is the proper consideration given to the perspective of Aboriginal people on the meaning of their existing rights. It recognizes that a distinctive Aboriginal culture is not a reality of the past, preserved and exhibited in a museum, but a characteristic that has evolved with Aboriginal peoples as they have evolved and modernized with the rest of Canadian society. The "dynamic rights" approach would seemingly provide a process which Aboriginal Peoples could rely upon to take full account of their perspective with regard to the meaning of the constitutional protection provided to Aboriginal rights through s. 35(1).\textsuperscript{229}

Justice McLachlin\textsuperscript{230} (as she was then) also delivered a dissenting opinion in this case that ruled in favour of Ms. Van der Peet. On the issue of what constitutes an Aboriginal right, McLachlin asserted that the court must look at what the law has historically accepted as fundamental Aboriginal rights, which would "encompass the right to be sustained from the land or waters upon which an Aboriginal people have traditionally relied for sustenance."\textsuperscript{231} Further, the right is limited to the extent of the Aboriginal people’s historic reliance on the resource, as well as the power of the Crown to limit or prohibit exploitation of the resource incompatible with its responsible use. She also stated that it is necessary to distinguish between an Aboriginal right and the exercise of an Aboriginal right. Rights are generally cast in broad general terms and remain constant over centuries. The exercise of rights, on the other hand, may take many forms and vary from place to place and from time to time.\textsuperscript{232} McLachlin also disagreed with Chief Justice Lamer’s assertion that it is essential that a practice be traceable to pre-contact times for it to qualify as a constitutional right. In her opinion:

\begin{itemize}
\item \textsuperscript{228} Ibid. at para. 177-178.
\item \textsuperscript{229} Ibid. at para. 179.
\item \textsuperscript{230} Justice McLachlin is currently the Chief Justice of the Supreme Court of Canada.
\item \textsuperscript{231} \textit{Van der peet, supra} note 204 at para. 227.
\item \textsuperscript{232} Ibid. at para. 238.
\end{itemize}
Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the Aboriginal people in question. One finds no mention in the text of s. 35(1) or in the jurisprudence of the moment of European contact as the definitive all-or-nothing time for establishing an Aboriginal right. The governing concept is simply the traditional customs and laws of people prior to imposition of European law and customs. What must be established is continuity between the modern practice at issue and a traditional law or custom of the native people.\textsuperscript{233}

and,

While Aboriginal rights will generally be grounded in the history of the people asserting them, courts must, as I have already said, take cognizance of the fact that the way those rights are practiced will evolve and change with time. The modern exercise of a right may be quite different from its traditional exercise. To deny it the status of a right because of such differences would be to deny the reality that Aboriginal cultures, like all cultures, change and adapt with time.\textsuperscript{234}

McLachlin also concluded that Aboriginal rights and practices are those that had obtained legal recognition prior to the adoption of s. 35(1) of the Constitution Act, 1982. Therefore, rights granted by treaties or recognized by the courts prior to 1982 remain rights protected by s. 35(1)\textsuperscript{235} although they are not confined to those rights formally recognized by treaty or the courts before 1982. Considering that s. 35 calls for a just settlement for Aboriginal peoples\textsuperscript{236} the better approach to defining Aboriginal rights is an empirical approach. Such an approach would look to history to see what sort of practices have been identified as Aboriginal rights in the past and from this the court may draw inferences as to the sort of things that may qualify as Aboriginal rights. Therefore, when confronted by a rights claim the court should ask, "Is this like the sort of thing that the law has recognized in the past?" Because this is the time-honoured methodology of the common law, courts should look to the past to see how the law has dealt with similar situations.\textsuperscript{237}

\textsuperscript{233} Ibid. at para. 247.
\textsuperscript{234} Ibid. at para. 250.
\textsuperscript{235} Ibid. at para. 252.
\textsuperscript{236} Ibid. at para. 253.
\textsuperscript{237} Ibid. at para. 261.
Justice McLachlin is apparently suggesting that Aboriginal rights are those practices that Aboriginal people traditionally utilized to sustain themselves from the land and that courts must look to the past for guidance in identifying what is a “time-honoured” Aboriginal right. However, her judgment may not be as restrictive as it appears. It is important to note that she also maintained that Aboriginal rights are not confined to those rights formally recognized by treaty or the courts before 1982; that courts may draw inferences as to the sort of things that may qualify as Aboriginal rights; that the exercise of such rights can take many forms; and, that the governing concept is simply the traditional customs and laws of people prior to imposition of European law and customs. Clearly she is not confining Aboriginal rights to the principle of harvesting fish, game, or plants.

It is important to note that until this case, there had not been any Aboriginal rights litigation heard by the Supreme Court that extended beyond the practices of hunting, fishing, or gathering. Therefore, it is reasonable to infer that Justice McLachlin was simply developing an interpretive principle that courts should utilize when evaluating future Aboriginal rights claims. In addition, Justice McLachlin also ties the concept of Aboriginal rights with "the right to be sustained". Webster's Dictionary defines sustenance as:

1. means of support, maintenance, or subsistence
2. the act of sustaining; the state of being sustained
3. something that gives support, endurance, or strength

Consequently, the idea of social cohesion, or peace and order, within a community can readily fall with the definition of sustenance itself. Communities that are peaceful, orderly, and cohesive generally tend to nurture the mental, emotional, physical, and spiritual growth and evolution of the individuals residing within. Therefore, such communities provide a means of support, maintenance and strength. Accordingly, criminal justice jurisdiction could also fit Justice McLachlin's characterization through its subsequent creation of peaceful, orderly and cohesive communities.

\[238\] Ibid. at para. 227.
If the court concludes its analysis in favour of the existence of an Aboriginal right, it then moves to the second stage which queries whether the identified right has been extinguished prior to 1982.

**Has The Aboriginal Right Claimed Been Extinguished Prior To The Enactment Of Section 35 (1) Of The Constitution Act, 1982?**

The test for determining when an Aboriginal right has been extinguished was first laid out by the Supreme Court in *Sparrow,* with a more contemporary analysis of that test articulated in *Gladstone.* Donald and William Gladstone are members of the Heiltsuk First Nation. They were charged under s. 61(1) of the *Fisheries Act* with the offences of offering to sell herring-spawn-on-kelp caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations,* SOR/84-248, and of attempting to sell herring-spawn-on-kelp not caught under the authority of a Category J herring-spawn-on-kelp licence, contrary to s. 20(3) of the *Pacific Herring Fishery Regulations,* SOR/84-324.

The Court applied the “distinctive practices” test according to the ruling in *Van der Peet* and concluded that the Heiltsuk had demonstrated an Aboriginal right to sell herring-spawn-on-kelp to an extent best described as commercial. Having established this right, the court then considered the issue of extinguishment, which begins with the premise that “the Sovereign's intention must be clear and plain if it is to extinguish an Aboriginal right.” To clarify, the clear-and-plain test of extinguishment was borrowed from an American test, enunciated in *United States v. Dion,* which asserts that:

> … [w]hat is essential [to satisfy the "clear and plain" test] is clear evidence that [the government] actually considered the conflict between its

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239 *Sparrow,* supra note 178.
242 *Van der Peet,* supra note 204.
243 *Sparrow,* supra note 178 at 1099.
244 *Van der Peet,* supra note 204 at para. 286.
intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty" or right.\textsuperscript{245}

With this in mind, the court in \textit{Gladstone} engaged in an in-depth analysis of the legislation the Crown asserted had extinguished the Heiltsuk right. In regard to the regulations, the Court stated:

None of these regulations, when viewed individually or as a whole, can be said to express a clear and plain intention to extinguish the Aboriginal rights of the Heiltsuk Band. While to extinguish an Aboriginal right the Crown does not, perhaps, have to use language which refers expressly to its extinguishment of Aboriginal rights, it must demonstrate more than that, in the past, the exercise of an Aboriginal right has been subject to a regulatory scheme. In this instance, the regulations and legislation regulating the herring-spawn-on-kelp fishery prior to 1982 do not demonstrate any consistent intention on the part of the Crown. At various times prior to 1982 Aboriginal peoples have been entirely prohibited from harvesting herring-spawn-on-kelp, allowed to harvest herring-spawn-on-kelp for food only, allowed to harvest herring-spawn-on-kelp for sale with the written permission of the regional director and allowed to take herring roe pursuant to a licence granted under the Pacific Fishery Registration and Licensing Regulations. Such a varying regulatory scheme cannot be said to express a clear and plain intention to eliminate the Aboriginal rights of the appellants and of the Heiltsuk Band. As in \textit{Sparrow}, the Crown has only demonstrated that it controlled the fisheries, not that it has acted so as to delineate the extent of Aboriginal rights.\textsuperscript{246}

The Crown also argued, however, that even if the regulations did not extinguish the Heiltsuk's rights, they were extinguished by the enactment of Order in Council, P.C. 2539, of September 11, 1917. After reviewing the Order-in-Council the Court concluded that the language of the Regulation suggested that the government had two purposes in enacting the amendment. First, the government wished to ensure that conservation goals were met so that salmon reached their "spawning grounds"; and secondly, the government wished to pursue those goals in a manner that would ensure the special protection granted to the Indian food fishery would continue. Further, there was an obvious attempt to meet these goals by prescribing the Indian commercial fishery to the general regulatory system governing commercial fishing in the province.

\textsuperscript{245} \textit{United States v. Dion} (1986) 476 U.S. 734 at 739-40.
\textsuperscript{246} \textit{Gladstone}, supra note 240 at para. 34.
Under the *Sparrow* test for extinguishment, this Regulation did not meet the standard necessary to extinguish the Heiltsuk’s right to fish commercially. The government’s purpose through the Regulation was to ensure that conservation goals were met, and that the Indian food fishery’s special protection would continue. There was no clear and plain intention to eliminate Aboriginal rights to fish commercially. Even though the same type of special protection granted to Aboriginal food fishing was not extended to commercial fishing, the failure to recognize an Aboriginal right, and the failure to grant special protection to it, do not constitute the clear and plain intention necessary to extinguish the right. The evidence, which negated the intention to extinguish was two-fold. First, Aboriginal people were not prohibited, and have never been prohibited, since the scheme was introduced in 1908, from obtaining licences to fish commercially under the regulatory scheme applicable to commercial fishing. Secondly, and more importantly, the government has periodically given preferences to Aboriginal commercial fishing. Greatly reduced licensing fees for Aboriginal fishers and extensive attempts to encourage Aboriginal participation in the commercial fishery are significant examples. Such encouragement of the Aboriginal commercial fishery is not consistent with the assertion that the Regulation, which was aimed at ensuring conservation of the fishery and continued the special protection given to the Aboriginal food fishery, demonstrated a clear and plain intention to extinguish the Aboriginal right to fish commercially.

In addition the Regulation was not a constitutional provision, which can also act as a valid method of extinguishing an Aboriginal right. For instance in both *Horseman*247 and *Badger*248 the *Natural Resources Transfer Agreement*,249 was utilized to extinguish certain harvesting rights of the Aboriginal peoples in Alberta, Saskatchewan and Manitoba. Because the *NRTA* is a constitutional document, the enactment of it provided for a permanent settlement of the legal rights of the Aboriginal groups to whom it


248 *Badger, supra* note 101.

249 *Natural Resources Transfer Agreement*, 1930. The relevant provision reads: In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.
applies. Its aim was to achieve a permanent clarification of the province's legislative jurisdiction and of the legal rights of Aboriginal peoples within the respective provinces. The Regulation, by contrast, was merely a statutory document dealing with an immediate conservation concern and was subject to amendment through nothing more elaborate than the normal legislative process. Its aim was only directed at dealing with the immediate problems caused by an insufficient number of salmon reaching their spawning grounds. Therefore the intention of the government when enacting the Regulation must, as a consequence, be viewed quite differently from the government's intention when enacting the NRTA. The NRTA demonstrates the clear and plain intention necessary to extinguish certain Aboriginal rights while the Regulation lacks such an obvious or clear and plain intention.250

Although not discussed in the Gladstone251 decision, surrender is the final method by which Aboriginal rights can be legally extinguished. A prime example of the Supreme Court's analysis of surrender can be found in the 1996 case R. v. Adams.252 Mr. Adams, a Mohawk, was charged with the regulatory offence of fishing without a licence in Lake St. Francis in the St. Régis region of Quebec. He challenged his conviction on the basis that he was exercising an Aboriginal right to fish as recognized and affirmed by s. 35(1) of the Constitution Act, 1982. One of the arguments presented by the Crown proposed that Mr Adam's Aboriginal right to fish in the area had been extinguished by an 1888 surrender agreement entered into by the Mohawks and the Crown. In this agreement the Mohawks allegedly surrendered any rights to the lands around the fishing area in exchange for $50,000 in compensation.

In response to the Crown's assertion the court responded with the following analysis:

The surrender of lands, because of the fact that title to land is distinct from the right to fish in the waters adjacent to those lands, equally does not demonstrate a clear and plain intention to extinguish a right. The surrender agreement dealt only with the Mohawks proprietary interest to the lands in question; it did not deal with the free-standing Aboriginal right to fish for food which existed in the waters adjacent to those lands. There

250 Gladstone, supra note 240 at para 38.
251 Ibid.
is no evidence to suggest what the parties to the surrender agreement, including the Crown, intended with regards to the right of the Mohawks to fish in the area; absent such evidence the Sparrow test for extinguishment cannot be said to have been met.\textsuperscript{253}

Considering the above reasoning and conclusion of the Court, along with the decisions in \textit{Gladstone}\textsuperscript{254} and \textit{Badger},\textsuperscript{255} it would appear that the standard necessary for the surrender of an Aboriginal right requires that any such surrender be precise and specific as to its nature and intent and that there be clear evidence that the government considered the conflict between its intended action on the one hand and the inherent right on the other.

Applied to the Haudenosaunee criminal justice issue, this stage requires the Crown to prove extinguishment of the right by, (a) clear and plain legislation; (b) surrender by treaty or other valid agreement; or, (c) constitutional enactment. If the Crown cannot prove extinguishment of the right, the Court would then move on to step three of the analysis, which would require the Haudenosaunee to demonstrate a \textit{prima facie} infringement by either federal or provincial legislation.

\textbf{Does The Legislation In Question Have The Effect Of Interfering With An Existing Aboriginal Right To The Extent That It Represents A Prima Facie Infringement S. 35(1)?}

In order to resolve this question the court must engage in a three-stage process that analyzes whether, (a) the limitation imposed by the regulation/legislation is "unreasonable"; (b) the regulation imposes "undue hardship"; and (c) whether the regulation denies to the holders of the right their preferred means of exercising that right. In coming to a conclusion on these issues, a court will look to the evidence presented in each specific case and attempt to determine whether the purpose or effect of the regulation unnecessarily infringes the interests protected by the right. For example, if a fishing regulation on net length caused undue time and money per fish caught, or resulted in hardship to the First Nation forced to use nets under the

\textsuperscript{253} Ibid. at para. 49.
\textsuperscript{254} \textit{Gladstone, supra} note 240.
\textsuperscript{255} \textit{Badger, supra} note 101.
regulation, it would be found a \textit{prima facie} infringement. On the other hand, if a licence to hunt or fish was required under legislation, but there was no fee for a First Nations person to obtain that licence, and the purpose of the licence was only to identify the First Nations individual as a holder of an inherent right to hunt or fish, that would not be considered a \textit{prima facie} infringement.

For instance, in \textit{Gladstone}\textsuperscript{256} the Supreme Court stated that the appellants' challenge was focused on a single regulation, while recognizing also that the scope of the challenge was much broader than the specific terms of the regulation. Therefore, Mr Gladstone's arguments on the points of infringement effectively impugned the entire approach taken by the Crown in managing the herring-spawn-on-kelp fishery. The specific regulation was a constituent part of a larger regulatory scheme that set the amount of herring that, (a) could be caught; (b) could be allotted to the herring-spawn-on-kelp fishery; and, (c) could be allocated to different users of the resource. Therefore, the specific regulation could not be scrutinized for the purposes of infringement without considering the entirety of the regulation of which it is a part, because all aspects of the regulatory scheme potentially infringed the rights of the appellants. To consider the specific regulation apart from the broader herring fishery legislation would distort the Court's inquiry.\textsuperscript{257}

Since each of the regulatory constituent parts has a different objective, and each involves a different pattern of government action, the infringement analysis of the government scheme should be considered as a whole because it is the legislation's cumulative effect on the appellants' rights that the court must consider. This cumulative effect acts to limit the total amount of herring-spawn-on-kelp that can be harvested by the Heiltsuk Band for commercial purposes. Thus, in order to demonstrate that there had been a \textit{prima facie} infringement of their rights, the appellants had to demonstrate that limiting the amount of herring-spawn-on-kelp that they could harvest for commercial purposes constituted a \textit{prima facie} interference.

After considering the relevant legislation and its objectives, the court concluded:

\textsuperscript{256} \textit{Gladstone}, supra note 240.
\textsuperscript{257} Ibid. at para. 40-41.
.... it seems clear that the appellants have discharged their burden of demonstrating a prima facie interference with their Aboriginal rights. Prior to the arrival of Europeans in North America, the Heiltsuk could harvest herring-spawn-on-kelp to the extent they themselves desired, subject only to such limitations as were imposed by any difficulties in transportation, preservation and resource availability, as well as those limitations that they thought advisable to impose for the purposes of conservation; subsequent to the enactment of the regulatory scheme described above the Heiltsuk can harvest herring-spawn-on-kelp for commercial purposes only to the limited extent allowed by the government. To use the language of Cory J. in R. v. Nikal, supra, at para. 104, the government's regulatory scheme "clearly impinge[s]" upon the rights of the appellant and, as such, must be held to constitute a prima facie infringement of those rights.258

Applying this to the criminal justice issue, the onus will lie with the Haudenosaunee to demonstrate there has been a prima facie infringement of their right to criminal justice jurisdiction. This essentially requires them to demonstrate that the limitation imposed by the regulation/legislation is either unreasonable, imposes undue hardship, or denies them their preferred means of exercising the right. If a prima facie infringement is established, the next and final stage requires the government to justify that infringement.

Can The Infringement Be Justified?

The infringement justification stage requires the court to employ a two-part test that was first articulated in Sparrow.259 In stage one the government must demonstrate that it was acting pursuant to a valid legislative objective:

Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to Aboriginal peoples themselves, or other objectives found to be compelling and substantial.260

258 Ibid. at para. 53.
259 Sparrow, supra note 178.
260 Ibid. at 1113.
In stage two, the government must demonstrate that its actions are consistent with the fiduciary duty of the government towards Aboriginal peoples. For example, in a situation involving a fishery the government must demonstrate that it has given the Aboriginal fishery priority in a manner consistent with the Supreme Court's decision in Jack v. The Queen. In this case it was held that the correct order of priority in the fisheries is "(i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing". Further, in Sparrow the same court also articulated that the Crown's fiduciary duty to Aboriginal peoples would require the Court to ask such additional questions as:

... whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented. . .

and,

We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of Aboriginal peoples on behalf of the government, courts and indeed all Canadians.

It was with these principles in mind that the Court in Gladstone asserted that the Aboriginal right to sell herring-spawn-on-kelp commercially had no internal limitation on the amount that could be harvested. The only limits on the Heiltsuk's need for herring-spawn-on-kelp for commercial sale were the external limitations of market demand and the availability of the resource. Taking into account this lack of internal limitation, the Court once again referred to Jack where the court had specifically distinguished between food and commercial fishing:

[The appellants'] position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing.

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262 Sparrow, supra note 178 at para 82 - 83.
fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.²⁶³

and,

I agree with the general tenor of this argument. Article 13 calls for distinct protection of the Indian fishery, in that pre-Confederation policy gave the Indians a priority in the fishery. That priority is at its strongest when we speak of Indian fishing for food purposes, but somewhat weaker when we come to local commercial purposes.²⁶⁴

Relying on the above account, the Court then began a thorough justification analysis stating that "... the evidence in this case does not justify limiting the right to harvest herring-spawn-on-kelp on a commercial basis to, for example, the sale of herring-spawn-on-kelp for the purposes of obtaining a "moderate livelihood"."²⁶⁵ However, because there is no internal limitation on the resource, to give priority to that right would result in the right-holder gaining exclusivity over any person not having an Aboriginal right to participate in the herring-spawn-on-kelp fishery. When the resource is scarce, non-Aboriginal fishermen would not have access to a livelihood simply because they are not Aboriginal. In this instance a situation exists where the resource has no internal limitation and therefore, Sparrow²⁶⁶ should not be seen as the final word on the question of priority in such a situation. The articulation in Sparrow²⁶⁷ of the meaning of resource priority, and its suggestion that it can mean exclusivity under certain limited circumstances, must be refined to take into account the varying circumstances that arise when the Aboriginal right in question has no internal limitations.

When such circumstances arise the doctrine of priority does not require that, after conservation goals have been met, the government allocate the fishery so that those holding an Aboriginal right to exploit a fishery on a commercial basis are given an exclusive right to do so. What the doctrine of priority does require is that when allocating the resource, the government take into account the existence of Aboriginal rights and

²⁶³ Jack, supra note 261.
²⁶⁴ Ibid.
²⁶⁵ Gladstone, supra note 240 at para. 57.
²⁶⁶ Sparrow, supra note 178.
²⁶⁷ Ibid.
allocate the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users.

Therefore, priority under Sparrow's justification test cannot be assessed against a precise standard but must be assessed on a case-by-case basis to determine whether the government has acted in a fashion that reflects how it has taken into account the existence of Aboriginal rights. For example, under the minimal impairment branch of the Oakes269 test a court does not scrutinize legislation to determine whether the government took the least rights-impairing action possible, but instead considers the reasonableness of the government's actions, taking into account the need to assess "conflicting scientific evidence and differing justified demands on scarce resources."269 Similarly, when the Sparrow priority doctrine is applied to Aboriginal rights with no internal limitation, courts should assess the government's actions to determine whether the government has taken into account the existence and importance of Aboriginal rights as opposed to focusing on any exclusivity to that right.

Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive Aboriginal societies prior to the arrival of Europeans and the assertion of Crown sovereignty. However, these distinctive Aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign. Therefore, in order to pursue objectives of compelling and substantial importance to that community as a whole, some limitation of Aboriginal rights will be justifiable. Aboriginal societies are a part of a broader political community; therefore, limits placed on Aboriginal rights are a necessary part of reconciliation when the objectives of those limitations are of sufficient importance to the broader community as a whole.

When these considerations are applied to the issue of Haudenosaunee criminal justice jurisdiction, the onus is on government to prove that it was acting pursuant to a substantial and compelling legislative objective, and also, that it has acted in accordance with its fiduciary obligation to the Haudenosaunee. If it can establish the criterion necessary on both branches of the justification test, the Six Nations' claim will be

dismissed. However, if it is unable to meet the legal threshold required by either branch of the test, the legislation, to the extent of its infringement on the Haudenosaunee right, will be declared of no force and effect.

Although this is the final stage in an Aboriginal rights legal analysis, there are three additional issues that are directly relevant to this examination. First, a review of existing legal precedent is necessary to determine if self-government is considered an inherent Aboriginal right; second, considering that the Haudenosaunee are not currently situated on their original territory, and that the assertion of criminal justice jurisdiction is founded on a residual right of self-government, an examination of case law on these specific issues is essential to the final outcome of this assessment; and third, much of the evidence that will be utilized throughout the pending analysis/application in Chapter 3 will come directly from Haudenosaunee oral history. Accordingly, case precedent on the use of oral history as evidence also will be discussed.

Is Self-Government An Inherent Aboriginal Right?

The first case to come before the Supreme Court on the issue of self-government was Pamajewon. In this case the Shawanaga and Eagle Lake First Nations’ both passed by-laws dealing with lotteries, although neither of these by-laws was passed pursuant to s. 81 of the Indian Act. Nor did either First Nation have a provincial licence authorizing gambling operations. Howard Pamajewon and Roger Jones, both members of the Shawanaga First Nation, were charged with keeping a common gaming house contrary to s. 201(1) of the Criminal Code. Arnold Gardner, Jack Pitchenese and Allan Gardner, all members of the Eagle Lake First Nation, were charged with conducting a scheme for the purpose of determining the winners of property, contrary to s. 206(1)(d) of the Criminal Code. In their defence the Shawanaga First Nation asserted an inherent right to self-government and the Eagle Lake First Nation asserted the right to be self-regulating in its economic activities. The primary issue before the Court was whether the regulation of high stakes gambling by the

\[\text{271 Indian Act, R.S. 1985, c. I-5.}\]
\[\text{272 Criminal Code, supra note 454.}\]
Shawanaga and Eagle Lake First Nations fell within the scope of the Aboriginal rights recognized and affirmed by s. 35(1) of the Constitution Act, 1982.

The court began its legal analysis with an application of the evidence to the "distinctive practices" test developed in Van der Peet. In the first stage of the test the court concluded that:

....the applicants rely in support of their claim on the fact that the "Ojibwa people ... had a long tradition of public games and sporting events, which pre-dated the arrival of Europeans". Thus, the activity in which the appellants were engaged and which their bands regulated, the statute they are impugning, and the historical evidence on which they rely, all relate to the conduct and regulation of gambling. As such, the most accurate characterization of the appellants' claim is that they are asserting that s. 35(1) recognizes and affirms the rights of the Shawanaga and Eagle Lake First Nations to participate in, and to regulate, gambling activities on their respective reserve lands.

The court stated that this characterization of claim was of a broad and general nature, which was not consistent with the established precedent of looking at the specific circumstances of each case and the specific history and culture of the Aboriginal group claiming the right. Any asserted right to self-government must be evaluated in a precise and unambiguous manner.

The court then proceeded with stage two of the analysis to determine if gambling was integral to the distinctive cultures of the Shawanaga or Eagle Lake First Nations and concluded:

The evidence presented at both the Pamajewon and Gardner trials does not demonstrate that gambling, or that the regulation of gambling, was an integral part of the distinctive cultures of the Shawanaga or Eagle Lake First Nations. In fact, the only evidence presented at either trial dealing with the question of the importance of gambling was that of James Morrison, who testified at the Pamajewon trial with regards to the importance and prevalence of gaming in Ojibwa culture. While Mr. Morrison's evidence does demonstrate that the Ojibwa gambled, it does not demonstrate that gambling was of central significance to the Ojibwa people. Moreover, his evidence in no way addresses the extent to which this gambling was the subject of regulation by the Ojibwa community. His

273 Van der Peet, supra note 204.
275 Ibid. at para. 27.
account is of informal gambling activities taking place on a small-scale; he does not describe large-scale activities, subject to community regulation, of the sort at issue in this appeal.276

In its final judgment the court held that the appellants had not demonstrated an Aboriginal right to “high stakes gambling” because “commercial lotteries such as bingo are a twentieth century phenomena (sic) and nothing of the kind existed amongst Aboriginal peoples and was never part of the means by which those societies were traditionally sustained or socialized.”277

Although the dismissal of this appeal was unanimous, Justice L’Heureux-Dube dissented on the characterization of the claim. In her opinion “the proper inquiry focuses broadly upon the activity itself and not on the specific manner in which it has been manifested.”278 In order to assess the scope of the right properly the court must characterize the claim broadly and determine whether the Shawanaga First Nation and the Eagle Lake First Nation possess an existing Aboriginal right to gamble. If such a right can be shown to exist it would oblige the government to justify the infringement upon that right by the Criminal Code.279 In coming to this determination, the Justice referred to her rationale in Van der Peet.280

The characterization of Aboriginal rights should refer to the rationale of the doctrine of Aboriginal rights, i.e., the historic occupation and use of ancestral lands by the natives. Accordingly, Aboriginal practices, traditions and customs would be recognized and affirmed under s. 35(1) of the Constitution Act, 1982 if they are sufficiently significant and fundamental to the culture and social organization of a particular group of Aboriginal people. Furthermore, the period of time relevant to the assessment of Aboriginal activities should not involve a specific date, such as British sovereignty, which would crystallize Aboriginal’s distinctive culture in time. Rather, as Aboriginal practices, traditions and customs change and evolve, they will be protected in s. 35(1) provided that they have formed an integral part of the distinctive Aboriginal culture for a substantial continuous period of time. [Emphasis added.]281

276 Ibid. at para. 28.
277 Ibid. at para. 29.
278 Ibid. at para. 38.
280 Van der Peet, supra note 204.
281 Ibid.
Notwithstanding her dissenting opinion on the characterization of the claim, Justice L’Heureux-Dube still concurred with the court’s dismissal of the appeal, stating, “Based on the evidence adduced, it cannot be said that gambling as a practice is connected enough to the self-identity and self-preservation of the appellants’ Aboriginal societies to deserve the protection of s. 35(1).”

Although the Pamajewon decision is a hefty blow to the Shawanaga and Eagle Lake First Nations, the Court did not specifically rule against the assertion of self-government as an existing Aboriginal right. In fact, the Court set out some clear guidelines for any future claims, such as that being examined in this thesis, which indicates that they are willing to consider self-government within the realm of existing Aboriginal rights.

### Does An Aboriginal Right Exist Independently Of Aboriginal Title?

In Adams the Supreme Court was asked to determine whether Aboriginal rights are inherently based in Aboriginal title to the land, or whether claims to title to the land are simply one manifestation of a broader-based conception of Aboriginal rights.

On May 7, 1982 George Weldon Adams, a Mohawk who lives on the St. Regis (Akwesasne) Reserve, was fishing without a licence in the marshes of the southwest portion of Lake St. Francis. At the time Mr Adams was fishing during the spawning season and caught 300 pounds of perch with a seine net made of very fine mesh several hundred feet in length. He was charged with fishing for perch without a licence contrary to s. 4(1) of the Quebec Fishery Regulations, C.R.C., c. 852. Adams appealed his lower court convictions to the Supreme Court of Canada.

The court began its analysis with the Van der Peet “distinctive practices” test, which asserted that:

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282 Pamajewon, supra note 270 at para. 40.
283 Ibid.
284 Adams, supra note 252.
285 Van der Peet, supra note 204.
Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of Aboriginal peoples on that land. In considering whether a claim to an Aboriginal right has been made out, courts must look at both the relationship of an Aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of Aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of Aboriginal rights. [Emphasis in original]286

Therefore, while claims to Aboriginal title fall within the conceptual framework of Aboriginal rights, Aboriginal rights are not dependent on the existence of Aboriginal title. Where an Aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group, then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they nonetheless will have demonstrated an Aboriginal right to engage in that practice, custom or tradition. The Van der Peet287 test is meant to protect those activities that are integral to the distinctive culture of the Aboriginal group claiming the right. Consequently, the test does not require that an Aboriginal group satisfy the further hurdle of demonstrating that their connection with the land on which the activity was taking place, was of a central significance to their distinctive culture sufficient to make out a claim to Aboriginal title to that land. Section 35 of the Constitution Act288 recognizes and affirms the rights of the Aboriginal peoples who occupied North America prior to the arrival of the Europeans. That recognition and affirmation is not limited to those circumstances where an Aboriginal group's relationship with the land is of a kind sufficient to establish title to the land.289

The reason why Aboriginal rights cannot be inexorably linked to Aboriginal title is essentially because some Aboriginal peoples were nomadic, varying the location of their settlements with the season and changing circumstances. This does not alter the fact that nomadic peoples survived through reliance on the land prior to contact with Europeans and, further, that many of the practices, customs and traditions of nomadic

286 Ibid. at para. 74.
287 Ibid.
288 Constitution Act, supra note 180.
peoples that took place on the land were integral to their distinctive cultures. Moreover, some Aboriginal Peoples, such as the Mohawks, varied the location of their settlements both before and after contact. The facts in Adams clearly demonstrate this. Even though nomadic necessity “may” preclude the establishment of Aboriginal title to the lands on which the Mohawk people temporarily settled, temporary settlement in no way dismisses the fact that, wherever they were settled before or after contact, prior to contact the Mohawks engaged in practices, customs or traditions on the land which were integral to their distinctive culture.290

That being said, it is important to note that even where an Aboriginal right exists on a tract of land to which there is no claim to Aboriginal title, the exercise of those rights may well be site specific, and therefore, only applicable to that specific tract of land. For example, if a claimant demonstrates the right to hunt upon a specific tract of land, independent of title, that right is defined as, and limited to, the right to hunt on that specific tract of land. The right does not allow the claimant to hunt on any tract of land he/she sees fit. The right continues to be a right to hunt on the tract of land in question.291

Title-independent Aboriginal rights were also explored in Cote.292 In July 1984, the appellants, accompanied by a number of young Algonquin students, entered the Controlled Harvest Zone of Bras-Coupe-Desert for the purpose of teaching the students traditional hunting and fishing practices. They refused to pay the required fee for motor vehicle access and Mr. Cote then fished the waters of Desert Lake to demonstrate traditional Algonquin fishing practices. He did so without a valid fishing licence. All were collectively charged with the provincial offence of failing to pay the access fee required293 and Mr. Cote was charged with the additional federal offence of fishing without a licence contrary to s. 4(1) of the Quebec Fishery Regulations,294 promulgated under the

290 Ibid at para. 27-28.
291 Ibid. at para. 30.
294 Quebec Fishery Regulations, C.R.C., c. 852.
In their defence, the appellants claimed that the federal and provincial regulations were inoperative in relation to their activities as they were exercising an Aboriginal right and a concurrent treaty right to fish on their ancestral lands.

In his analysis of the decision Chief Justice Lamer turned to the verdict in Adams stating:

For the reasons I have given in the related appeal in Adams, supra, I find that Aboriginal rights may indeed exist independently of Aboriginal title. As I explained in Adams, at para. 26, Aboriginal title is simply one manifestation of the doctrine of Aboriginal rights:

We wish to reiterate the fact that there is no a priori reason why the defining practices, customs and traditions of such societies and communities should be limited to those practices, customs and traditions which represent incidents of a continuous and historical occupation of a specific tract of land. However, as I stressed in Adams, at para. 30, a protected Aboriginal right falling short of Aboriginal title may nonetheless have an important link to the land. An Aboriginal practice, custom or tradition entitled to protection as an Aboriginal right will frequently be limited to a specific territory or location, depending on the actual pattern of exercise of such an activity prior to contact. As such, an Aboriginal right will often be defined in site-specific terms, with the result that it can only be exercised upon a specific tract of land.

The Court then went on to examine further aspects of the case which are not directly relevant to the content of this thesis, however, the Court found that the Quebec Fishery Regulations did infringe Mr. Cote's s.35 rights and could not be justified. Accordingly, an acquittal was entered on that charge.

Will The Court Accept Oral History Evidence?

The Delgamuukw decision is currently the leading precedent relating to the use of Aboriginal oral history as evidence. Although the case itself focuses on the issue of Aboriginal title, it also gave direction regarding the use of Aboriginal oral history as evidence in Aboriginal rights claims. For instance, the court began their discussion of

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296 Adams, supra note 252.
oral history by stating that receiving and interpreting oral evidence from Aboriginal claimants requires a "special approach"\textsuperscript{299} when "such evidence does not conform precisely with the evidentiary standards" that would be applied in private law cases.\textsuperscript{300} Further, "those histories play a crucial role in the litigation of Aboriginal rights\textsuperscript{301} and "the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents".\textsuperscript{302} The court's reasoning for this directive is based on the reality that Aboriginal Peoples did not keep written records. Therefore, requiring them to conform to strict evidentiary rule would "impose an impossible burden of proof"\textsuperscript{303} and "render nugatory"\textsuperscript{304} any rights they might have. The \textit{sui generis} categorization of Aboriginal rights, which recognizes their distinctive source and nature, "demand[s] a unique approach to the treatment of evidence which accords due weight to the perspective of Aboriginal peoples".\textsuperscript{305} The court also reaffirmed the evidentiary principles enunciated in \textit{Van der Peet}\textsuperscript{306}, which stated:

\textbf{... the reconciliation of the prior occupation of North America by Aboriginal peoples with the assertion of Crown sovereignty required that account be taken of the "Aboriginal perspective while at the same time taking into account the perspective of the common law" and that "[t]rue reconciliation will, equally, place weight on each". I also held that the Aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of Aboriginal peoples: at para. 41. As a result, if, at the time of sovereignty, an Aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for Aboriginal title.}\textsuperscript{307}

\begin{footnotesize}
\textsuperscript{299} Ibid. at para. 80.
\textsuperscript{300} Ibid.
\textsuperscript{301} Ibid. at para. 84.
\textsuperscript{302} Ibid. at para. 87.
\textsuperscript{303} Ibid.
\textsuperscript{304} Ibid.
\textsuperscript{305} Ibid. at para. 82.
\textsuperscript{306} \textit{Van der Peet}, supra note 204.
\textsuperscript{307} \textit{Delgamuukw}, supra note 298 at para. 148.
\end{footnotesize}
Thus, the Supreme Court has directed that Aboriginal oral history, perspective, and laws must be given the same equal attention and validity as all other types of evidence that happen to conform with normal evidentiary standards. Considering that there is formal academic and legal recognition of the connection between oral tradition and the actual occurrence of historic events, and that the oral traditions of Canada's First Nations have begun to play an increasingly crucial role in the litigation of Aboriginal rights, evidentiary accommodation is the only way true reconciliation can be achieved.

Having ended the discussion on applicable case law, the analysis will now move to the stage of applying the foregoing legal principles to the evidence relevant to this inquiry. The evidence itself will include combinations of oral history, historical and contemporary documentation, as well as anthropological and archeological findings.

The oral history evidence to be considered in this thesis will be entirely based upon my own traditional oral teachings. However, if the case were ever to go to litigation, oral history experts such as Hereditary Chiefs, Clanmothers, Elders and Faithkeepers would be required to testify. My own teachings have originated with these Haudenosaunee individuals, although I am not considered an expert and my renditions can only be considered an example of the type of oral history that would likely be presented.

CHAPTER 4: APPLICATION OF THE EVIDENCE

Characterization Of The Claim

For the purposes of this argument, the claim will be characterized as "The right of the Haudenosaunee of the Grand River to develop, administer and implement an autonomous system of criminal justice within their existing territorial boundaries". However, characterizing the claim in such a broad manner may appear to conflict with the standards set out in Van der Peet,\textsuperscript{309} which requires the claim to be specific and precise. The generality of 'criminal justice' includes the definition and related penalties of hundreds of specific criminal acts such as theft, manslaughter, etc. The difficulty with characterizing the claim to the specifics of each individual criminal act are varied. The most obvious obstacle is the immeasurable amount of time and resources required to challenge the inherent right to jurisdiction for each specific criminal act. In addition, focusing on each specific act would distort the Court's enquiry. The situation is analogous to that in Gladstone\textsuperscript{310} where the court stated:

....In this case, while the appellants' constitutional challenge is focused on a single regulation -- s. 20(3) of the Pacific Herring Fishery Regulations -- the scope of the challenge is much broader than the terms of s. 20(3). The appellants' arguments on the points of infringement and justification effectively impugn the entire approach taken by the Crown to the management of the herring-spawn-on-kelp fishery.

The fact that the appellants' challenge to the legislation is broader than that of the appellant in Sparrow arises from the difference in the nature of the regulation being challenged. Restrictions on net length have an impact on an individual's ability to exercise his or her Aboriginal rights, and raise conservation issues, which can be subject to constitutional scrutiny independent of the broader regulatory scheme of which they are a part. The Category J licence requirement, on the other hand, cannot be scrutinized for the purposes of either infringement or justification without

\textsuperscript{309} Van der Peet, supra note 204.
\textsuperscript{310} Gladstone, supra note 240.
considering the entire regulatory scheme of which it is a part. The requirement that those engaged in the commercial fishery have licences is, as will be discussed in more detail below, simply a constituent part of a larger regulatory scheme setting the amount of herring that can be caught, the amount of herring allotted to the herring-spawn-on-kelp fishery and the allocation of herring-spawn-on-kelp amongst different users of the resource. All the aspects of this regulatory scheme potentially infringe the rights of the appellants in this case; to consider s. 20(3) apart from this broader regulatory scheme for the herring fishery would distort the Court's inquiry.311

Attempting to connect this claim to individual criminal acts would distort the Court's enquiry because each specific act is a constituent part of the Criminal Code,312 a larger legislative scheme that, in its entirety, potentially infringes the inherent rights of the Haudenosaunee. Further, the Criminal Code313 and all of its constituent parts are the principal basis of the challenge. Therefore, from this perspective the claim must be characterized in the manner declared.

The matter of the Haudenosaunee perspective in relation to claim characterization is also at issue. From the Haudenosaunee standpoint, one cannot separate anti-social acts into individual manifestations or behaviours. Haudenosaunee practices and laws are interwoven and integrally linked. One cannot separate this foundation of worldview into individual behaviours without fracturing the whole.314 Therefore, if the court is to give equal weight to the Haudenosaunee perspective as required in Delgamuukw,315 there must be due consideration given in relation to characterization of the claim. Not to do so completely disregards the Iroquois outlook on this point and does not conform with established precedent.

**Evaluation Of The Traditional Practice**

To satisfy the "integral-to-a-distinctive-culture" test the claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in,
the Aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate that the practice, custom or tradition was one of the things that made the culture of the society distinctive or truly made the society what it was.316

Information necessary to evaluate the "integral-to-distinctive-culture test is found in Chapter 2, which illustrated that the Haudenosaunee have a distinctive understanding of spiritual and material reality, inter-societal relations, individual responsibilities, and acceptable standards of behaviour. These understandings, which are integrally connected to the mandates of The Great Law, are the foundations of their society and are directly related to how their society develops and regulates norms of behaviour. Any alterations to these understandings or their social regulation practices would effectively change Haudenosaunee society in a very fundamental manner. Thus, the integration between philosophy, The Great Law and practical methods of social control were central, significant and one of the primary cultural components that made the Haudenosaunee 'who they were'. Without this, their societies would have been fundamentally altered to something other than 'what they were'. Therefore, the evidence presented in Chapter 2 clearly indicates that social control methods or 'criminal justice' was indeed integral to the distinctive culture of the Haudenosaunee.

Assessment Of Continuity Between The Traditional Practice And The Modern Activity

As previously discussed, Chapter 1 of this thesis serves two distinct roles. In addition to summarizing Haudenosaunee political history, it also illustrates continuity of Haudenosaunee social regulation practices with an historical overview of Haudenosaunee and British relations. Consistent resistance by the Haudenosaunee to British intrusions into their sovereign affairs and jurisdictional authority reveals their intention to retain their sovereign autonomy, and consequently, their traditional methods of criminal justice. The legal standard required to demonstrate continuity would certainly require additional anthropological, archeological, historical and oral tradition evidence.

316 Van der Peet, supra note 204.
However, the evidence exhibited in Chapter 1 certainly allows one to draw rational, sound conclusions on the matter.

**Conclusion On Continuity**

In view of the examination on continuity found in Chapter 1, there are two significant issues that need to be addressed in order to pass court scrutiny of this topic of inquiry. The first of these is the migration of the Six Nations from their traditional territories, in what is now the state of New York, to their current territory on the Grand River. This undoubtedly negates the ability to establish the legal requirements for Aboriginal title, which could result in the Crown taking the position that the Haudenosaunee cannot establish an inherent right in an area that was not their homeland prior to the assertion of British sovereignty.

However, as the Supreme Court concluded in *Adams* and *Cote*, Aboriginal rights are not dependent on the existence of Aboriginal title. In this instance, the Haudenosaunee migrated to their new territory in order to escape further aggression from the United States. As noted, they secured land guarantees from the British before agreeing to act as their military allies, heedful of the possibility of an American victory. Considering that they acted as British allies, they had a justifiable belief that remaining in their original territory might subject them to violent retaliation from the Americans. In essence, the survival and continued well-being of their society was dependent on this migration.

Further, the right at question is not a right that is integrally tied to a specific tract of land, such as the right to hunt and fish, but is a right associated with the relationships between individuals and the community, including the regulation of specific behaviours. The legal requirement to demonstrate that an inherent right exists is dependent upon an Aboriginal group substantiating that a particular practice, custom or tradition was integral to the distinctive culture of that group, and even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they

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317 *Adams*, supra note 252.
318 *Cote*, supra note 292.
319 *Graymont*, supra note 23 at 284.
will nonetheless have demonstrated an Aboriginal right.\textsuperscript{320} Thus, the issue of migration should not pose a significant problem.

The apparent lack of traditional criminal justice methods utilized by the Haudenosaunee during the last 100 years is a further issue that must be addressed. As discussed, the RCMP began a coercive occupation of Haudenosaunee territory in 1922 with the aim of enforcing Canadian criminal justice legislation within that territory. However, the fact that the RCMP engaged in a longstanding process of foreign criminal enforcement does not lead to the conclusion that the Haudenosaunee either ceased to utilize their cultural practices or abandoned them outright. In fact, the oral history asserts that traditional procedures continued to be employed but were done so in a concealed manner for fear of arrest.\textsuperscript{321} Further, the vast majority of the community also refused to cooperate with RCMP investigations and engaged in a concerted effort of trickery and petty harassment in an attempt to drive the RCMP from the area.\textsuperscript{322} Essentially, the Haudenosaunee were required to adapt to a coercive foreign occupation but still maintained whatever parts of their cultural practices they could, while at the same time resisting the occupation with nonviolent means. These efforts and activities are well known within the community itself, and although such oral history may not meet the evidentiary requirements to establish continuity, it certainly can verify that Haudenosaunee criminal justice practices were not abandoned.

The key to overcoming this particular issue is the Supreme Court's conclusion that the concept of continuity does not require Aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices and those that existed prior to contact. It could be that for a period of time an Aboriginal group ceased to engage in a practice that existed prior to contact, but then resumed the practice at a later date, and if so, it will not preclude the establishment of an Aboriginal right. Such an instance requires the courts to adopt the same flexibility that is used to establish pre-contact practices, customs and traditions.\textsuperscript{323}

\textsuperscript{320} Adams, supra note 252 at para. 26.
\textsuperscript{321} Traditional oral teachings, supra note 54.
\textsuperscript{322} Ibid.
\textsuperscript{323} Vanderpeet, supra note 204 at para. 65.
This tenet is certainly applicable to the situation at hand. Although the Haudenosaunee practice at issue was not defunct or abandoned, it was significantly diminished because of the imposition of foreign jurisdiction. This diminishment may make it difficult to establish continuity in the absence of evidence that verifies a consistent utilization of traditional criminal justice practices throughout the majority of the 1900s. Thus, this situation must be within the realm of possibilities that the court was contemplating when establishing this specific directive. There are undoubtedly many instances of Aboriginal peoples unable to engage in traditional practices, customs or traditions solely because of the colonial policies of the Crown. This makes it impossible to establish continuity because a discriminatory law or policy has acted to prohibit an Aboriginal right for a period of time, which the Courts have recognized and consequently acted to remedy with the development of this specific legal directive.

The above summary of Haudenosaunee/Crown relations has confirmed several factors relevant to the confirmation of continuity. First, it is clear that the Confederacy and the British maintained a relationship as sovereign allies with little interference into one another’s internal practices until the late 1800s. Secondly, the Haudenosaunee have always maintained a position of national sovereignty and have consistently resisted any attempts by the Crown to intrude into their internal sphere of jurisdiction. Lastly, the Six Nations are currently investigating the prospect of creating an alternative justice system that incorporates traditional Haudenosaunee values.

Obviously this brief summary of Haudenosaunee history does not, in and of itself, meet the legal requirements to prove continuity, however, if further oral, historical, and anthropological/archeological evidence is obtained and subsequently evaluated according to applicable case law, it is virtually certain that continuity can be established.

Having demonstrated the existence of the Haudenosaunee inherent right to criminal justice jurisdiction, the next step places the onus on the Crown to prove that the right was extinguished before the enactment of s. 35 (1) of the Constitution Act, 1982.

**Extinguishment**

The three methods by which an inherent right could have been extinguished before the enactment of s. 35 (1) of the Constitution Act, 1982 are (1) clear and plain
legislative intention; (2) surrender by treaty or other valid agreement; and (3) constitutional enactment. Each of these will now be examined to determine if any of these areas has met the legal requirements necessary for the extinguishment of Haudenosaunee criminal justice jurisdiction.

Clear And Plain Intention

Several statutes deal directly or indirectly with the issue of Imperial and Dominion government criminal justice jurisdiction within Canada both before and after confederation. Each piece of legislation will be individually examined in chronological order to determine if they have met the requirements of a clear and plain intention to extinguish.

The Hudson's Bay Charter, 1670

On May 2, 1670 King Charles II issued a Royal Charter\textsuperscript{324} granting jurisdiction over the northwest part of America to the Governor and Company of Adventurers of England trading into Hudson's Bay, including the following legislative authority:

... to make ordeyne and constitute such and soe many reasonable Lawes Constitucions Orders and Ordinances as to them or the greater part of them being then and there present shall seeme necessary and convenient for the good Government..

The Charter also conferred to The Hudson's Bay Company limited criminal jurisdiction which authorized it to establish and impose "... such paines penaltyes and punishments upon all offenders contrary to laws ...," provided that those laws were "... reasonable and not contrary or repugnant but as neare as may be agreeable to the Lawes Statutes or Customes of this Our Realm." In addition, the Governor and his Council were also appointed the power:

...to judge all persons belonging to the said Governor and Company or that shall live under them in all Causes whether Civill or Criminall according to Lawes of this Kingdome and to execute Justice accordingly.

\textsuperscript{324} The Royal Charter for incorporating The Hudson's Bay Company, 1670.
Although this Charter extended the law of England to the somewhat vague
territory declared within, it applied exclusively to the white settlements under the
jurisdiction of the Hudson's Bay Company. A plain reading of the document reveals that
the Charter only conferred criminal jurisdiction over company employees and did not
attempt to "grant" the Company the right to interfere with existing First Nations' methods
of social control and sovereignty. Therefore, as long as First Nations' members were not
company employees, they remained self-governing and clearly outside of the jurisdiction
of English laws.\footnote{Leonardy, supra note 100 at 166.}

The Royal Proclamation Of 1763

On October 7, 1763 English King George III issued a \textit{Royal Proclamation}\footnote{Royal Proclamation, supra note 39.} in
response to the defeat of France and concerns regarding the 1762 uprising of Odawa
Chief Pontiac and the efforts of the Shawnee to form an alliance with the Iroquois in
order to mount a military offensive against the English.\footnote{O.P. Dickason, \textit{Canada's First Nations: A History of Canada's Founding Peoples from Earliest
Times} (Toronto: McClelland & Stewart, 1992) at 182-184.} Many First Nations were long
angered by the sharp dealings of English fur traders and land speculators (as well as
settler trespass) and had become determined to protect their Nations' interests. The
Crown, having recognized the danger of the situation, set about to remedy it with legal
protections for Aboriginal interests through the \textit{Royal Proclamation}. The document set
aside huge tracts of land, reserving them as Aboriginal hunting grounds, and prohibited
grants or purchases of this land, or settlement on it, without a licence. These lands could
be purchased only by the Crown, at the inclination of the "said Indians", and only after a
public meeting with the "said Indians."

The \textit{Proclamation} is clearly directed at protecting Aboriginal possession or use of
land reserved to them, but the document also describes the Crown's understanding of
Aboriginal status in relation to the two parties. The \textit{Proclamation} refers to Native people
as \textbf{Nations} or Tribes with whom they are \textbf{connected}. The use of these terms clarifies
that Aboriginal people were considered Nations to which the Crown did not hold
Sovereign authority over. The use of the word "Tribes" can only been seen as an
incidental clarifying feature (for the understanding of the English settlers at the time) to the document, as the term "Nations" directly precedes it. What is important is the recognition of Aboriginal nationhood not bound by English rule.

In addition to land protections, the Proclamation also speaks to the issue of criminal justice jurisdiction. It reserved for the Crown a right to pursue on Indian territories white offenders who had committed a crime in one of the British colonies, and who were then seeking refuge on Indian territory. In the last paragraph the Proclamation reads:

And we do further expressly enjoin and require all Officers whatever, as well Military as those Employed in the Management of Indian Affairs, within the Territories reserved for the use of the same Indians, to seize and apprehend all Persons whatever, who standing charged with Treason, Misprisins of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper guard to the Colony where the Crime was committed of which they stand accused, in order to make their Trial for the same.

What can be concluded from a plain reading is that the document only reserves British authority to crimes committed within their colonies. The wording of the Proclamation clearly indicates that Crown policy and law during this period recognized First Nations' jurisdiction over criminal justice within their societies and territories. If the Crown had presumed that its criminal jurisdiction extended to territory reserved for the Indians, then the explicit retention of criminal jurisdiction on Indian territory would not have been necessary. In fact, the above provision indicates that the British Crown implicitly recognized that crimes committed among First Nations on 'reserved lands' remained an internal matter subject only to Indian criminal jurisdiction. Therefore, the Proclamation cannot be considered a clear and plain decree of extinguishment. Quite the opposite, it must be regarded as a confirmation of existing Aboriginal rights and jurisdiction.

328 Leonardy, supra note 100 at 156.
The Canada Jurisdiction Act, 1803

In 1803 the Imperial Government implemented The Canada Jurisdiction Act\textsuperscript{330} in order to extend the jurisdiction of the existing courts. In the preamble and section one, the Act stipulates:

Whereas crimes and offences have been committed in the Indian Territories, and other parts of America, not within the limits of the Provinces of Upper and Lower Canada, or either of them, or of the jurisdiction of any of the Courts established in those Provinces, or within the limits of any civil Government of the United States and are therefore not cognizable by any jurisdiction whatever, and by reason thereof great crimes and offences have gone and may hereafter go unpunished, and greatly increase: For remedy whereof ... be it enacted ... that, from and after the passing of this Act, all offences committed within any of the Indian Territories, or parts of the said Provinces of Lower or Upper Canada, or of any civil Government of the United States of America, shall be deemed to be offences of the same nature, and shall be tried in the same manner and subject to the same punishment, as if the same had been committed within the Provinces of Lower or Upper Canada.

With a careful reading of this clause it is apparent that First Nation territories were not within “the limits of the Provinces of Upper and Lower Canada” or “the jurisdiction of any of the Courts established in those Provinces” nor were they “within the limits of any civil Government of the United States” which concludes them to be “not cognizable by any jurisdiction whatever”. This conclusion indicates a clear recognition that First Nations’ territories were not within British jurisdiction, and therefore, any activities that took place on Indian territories that were considered criminal under British law could not be prosecuted.\textsuperscript{331} In an attempt to remedy this situation, the Imperial Government tried to ensure that all offences committed within any of the Indian Territories would be tried in the same manner “as if the same had been committed within the Provinces of Lower or Upper Canada”. In addition the Act also states:

That it shall be lawful for the Governor or Lieutenant-Governor, or Person administering the Government for the Time being of the Province of Lower Canada, by Commission under his Hand and Seal, to authorize

\textsuperscript{330} An Act for Extending the Jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada, to the Trial and Punishment of Persons Guilty of Crimes and Offences within Certain Parts of North America Adjoining to the Said Provinces, 1803, 43 Geo. Ill. c. 138 (Imp.) [hereinafter An Act for Extending the Jurisdiction of the Courts of Justice].

\textsuperscript{331} Leonardy, supra note 100 at 167.
and empower any Person or Persons, wheresoever resident or being at the Time, to act as Civil Magistrates and Justices of the Peace for any of the Indian Territories or Parts of America not within the Limits of either of the said Provinces, or of any Civil Government of the United States of America, as well as within the Limits of either of the said Provinces, either upon Informations taken or given within the said Provinces of Lower or Upper Canada, or out of the said Provinces in any Part of the Indian Territories or Parts of America aforesaid, for the Purpose only of hearing Crimes and Offences, and committing any Person or Persons guilty of any Crime or Offence to safe Custody, in order to his or their being conveyed to the said Province of Lower Canada, to be dealt with according to Law; and it shall be lawful for any Person or Persons whatever to apprehend and take before any Persons so commissioned as aforesaid, or to apprehend and convey, or cause to be safely conveyed with all convenient Speed, to the Province of Lower Canada, any Person or Persons guilty of any Crime or Offence, there to be delivered into safe Custody for the Purpose of being dealt with according to Law.  

At first glance this legislation may appear to have the intent and effect of extinguishing First Nations traditional jurisdiction over criminal justice related matters. It purportedly extends the authority of British courts, magistrates and Justices of the Peace into Indian territories and extends that authority to empower appointed individuals to commit "any Person or Persons guilty of any Crime or Offence to safe Custody". However, the standard required to extinguish an Aboriginal right is 'clear and plain' intention. On close examination of the document, it is evident that the Act does not refer expressly or specifically to Indians as being subject to Imperial jurisdiction. The terminology "any Person or Persons" cannot be readily construed to include First Nations Peoples. It is well documented that Europeans of the time did not consider or legally define Indians as people or persons. In fact, subsequent Indian Act legislation between 1876 and 1951 explicitly defined "persons" to exclude Indians.

In addition, it is highly unlikely that the Imperial Government intended Indians to act as Civil Magistrates or Justices of the Peace, which under the Act, is a position available to "any Person or Persons". When reading the document as a whole and in the context of the time period in which it was created in order to determine its intent, it is cogent to conclude that Indians were not intended to be subject to Imperial Government

\[332\text{An Act for Extending the Jurisdiction of the Courts of Justice, supra note 330 s. ii.}\]

\[333\text{Indian Act, R.S.C. 1927, c. 98, s. 2 (i). This section was repealed by the Indian Act, S.C. 1951, c. 29, s. 123.}\]
jurisdiction in regard to their internal affairs. The Act itself would appear to be a reaffirmation/extension of the criminal jurisdiction principles already expressed in the Royal Proclamation of 1763.

Further, such a significant change in the existing jurisdic-tional relationships between First Nations and the Imperial Government would undoubtedly require some reference to, or indication of, this change within the terms of the Act itself. The fact that no such reference occurred indicates that the historical relationships developed through treaties and custom remained unaffected.

The Act For Regulating The Fur Trade, 1821

In response to an armed conflict between the Métis and the white settlers at Seven Oaks on the Red River in 1816, a Royal Commission was appointed to look into the governance of Rupert's Land. The Commission's report was submitted to the Imperial Parliament in 1819, which then approved An Act for Regulating the Fur Trade, and Establishing a Criminal and Civil Jurisdiction within Certain Parts of North America in 1821. This Act was implemented to end the ongoing rivalry in the fur trade between the Hudson's Bay Company and the Northwest Company, which had resulted in "...great Inconvenience and Loss, not only to the said Company and Associations, but to the said Trade in general, and also of great Injury to the native Indians, and of other Persons Subjects of His Majesty..." and "...many breaches of the peace, and violence extending to the loss of lives, and continual destruction of property, have occurred therein."

The stated intent of the Act was "...for Remedy of such Evils, it is expedient and necessary that some more effectual Regulations should be established for the apprehending, securing and bringing to Justice all Persons committing such Offences, and that His Majesty should be empowered to regulate the Trade...". Further, it appears that there was some uncertainty regarding the territorial range stated in the

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334 Leonardy, supra note 100 at 171.
335 Ibid. at 168.
1803 Act for Extending the Jurisdiction of the Courts of Justice\textsuperscript{337}. The Royal Charter of 1670 had granted the Hudson's Bay Company and the Governor criminal jurisdiction over company employees. In 1809, Thomas Douglas, Lord Selkirk, sought advice on the Hudson's Bay Company's jurisdiction in Rupert's Land and was informed by the legal opinion of five eminent Chancery lawyers that the 1803 Act did not apply within Rupert's Land.\textsuperscript{338} Therefore, the present Act purported to end this uncertainty with stipulations in its preamble and fifth section:

And Whereas Doubts have been entertained, whether the Provisions of an Act passed in the Forty third Year of the Reign of His late Majesty King George the third, intituled (sic) An Act for extending the Jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada, to the Trial and Punishment of Persons guilty of Crimes and Offences within certain Parts of North America adjoining to the said Provinces, extended to the Territories granted by Charter to the said Governor and Company; and it is expedient that such Doubts should be removed, and that the said Act should be further extended...

and,

And be it declared and enacted, That the said Act passed in the Forty third Year of the Reign of His late Majesty, intituled An Act for extending the Jurisdiction of the Courts of Justices in the Provinces of Lower and Upper Canada, to the Trial and Punishment of Persons guilty of Crimes and Offences within certain Parts of North America adjoining to the said Provinces, and all the Clauses and Provisoes (sic) therein contained, shall be deemed and construed, and it is and are hereby respectively declared, to extend to and over, and to be in full force in and through all the Territories heretofore granted to the Company of Adventurers of England trading to Hudson's Bay, any thing in any Act or Acts of Parliament, or this Act, or in any Grant or Charter to the Company, to the contrary notwithstanding.

Consequently, the 1821 Act erased any previous ambiguities and brought Rupert's Land under the civil and criminal jurisdiction of the courts in Upper Canada.\textsuperscript{339} However, under section XIV the Governor and Company still retained the authority

\textsuperscript{336} An Act for Regulating the Fur Trade, and Establishing a Criminal and Civil Jurisdiction within Certain Parts of North America, 1821, 1-2 GEO. IV., CAP. 66, (Imp.) [hereinafter An Act for Regulating the Fur Trade].

\textsuperscript{337} An Act for Extending the Jurisdiction of the Courts of Justice, supra note 330.

\textsuperscript{338} Manitoba, Report of the Aboriginal Justice Inquiry of Manitoba (Winnipeg: Queens Printer, 1991) at 58.

\textsuperscript{339} J.E. Cote, "The Introduction of English Law into Alberta" (1964), 3 Alta. L. Rev. 262-92.
granted by the 1670 Charter, which amounted to concurrent jurisdiction of the parties. This somewhat confusing situation of concurrent jurisdictions within the same territorial boundaries left the question of criminal authority uncertain, however, a close examination of the document reveals its intent in regard to any type of extinguishment of First Nations' jurisdiction over their internal forms of social control and sanction.

Throughout the Act the wording consistently makes reference to Indians, Persons and Offenders. When reading the Act as a whole it is apparent that there is a clear attempt to distinguish Indians from Persons and Offenders. If the drafters of the Act had intended to extinguish Indian forms of justice within their societies and at the same time supercede that jurisdiction with British authority, they would have taken the same careful measures to include Indians within the meaning of Persons and Offenders as they did to distinguish them from that meaning. As previously stated, Europeans of the time did not consider or legally define Indians as persons and in subsequent legislation specifically excluded them from the definition of persons.340

Further, as far as First Nations are concerned, the preamble of the Act indicates that it was intended to assure them that the British Crown was committed to protecting them from the continuing injuries arising from the fur trade. The preamble states:

WHEREAS the Competition in the Fur Trade between the Governor and company of Adventurers of England trading into Hudson's Bay, and certain Associations of Persons trading under the Name of 'The North West Company of Montreal,' has been found for some Years past to be productive of great Inconvenience and Loss, not only to the said Company and Associations, but to the said Trade in general, and also of great Injury to the native Indians...

The stated inconveniences were the "evils" that the Act was passed to remedy. It did not declare to interfere with internal First Nations' Indian justice systems but only reaffirmed the Crown's jurisdiction over inter-societal crime as had been previously agreed to in existing treaties.341 The fact that internal social disorder among First Nations remained a matter of exclusive Indian jurisdiction and of no interest to the Imperial Crown is well illustrated by Sir George Simpson, Governor of Rupert's Land from 1821 to

340 Indian Act, R.S.C. 1927, c. 98, s. 2 (i) reads: In this Act, unless the context otherwise requires, (...) (i) "person" means an individual other than an Indian.
341 Leonardy, supra note 100 at 171.
1860. In his report to the Select Committee of the Imperial House of Commons on the Hudson's Bay Company, he stated that the Indians of Rupert's Land "... are under our jurisdiction, ... when crimes are committed upon whites, but not when committed upon each other; we do not meddle with their wars."^342

Taking into consideration the totality of the above analysis, it is prudent and reasonable to conclude that this Act did not have the clear and plain intention required to extinguish First Nations internal criminal jurisdiction.

The Enfranchisement Act, 1869

In 1869, the Parliament of Canada enacted the Act for the gradual enfranchisement of Indians^343 with the primary intention of continuing the formal policy of assimilation previously introduced through the Act to Encourage the Gradual Civilization of the Indian tribes, 1857. The purpose of the Act was to abolish traditional First Nations' self-government structures and confine those powers to marginal matters, subject to approval by the Governor in Council. It further introduced a system of Colonial governmental control that was continued under subsequent Indian Acts. The Act also implicitly mentioned criminal jurisdiction over First Nations in section 5:

Any Indian or person of Indian blood who shall be convicted of any crime punishable by imprisonment in any Penitentiary or other place of confinement, shall, during such imprisonment, be excluded from participating in the annuities, interest money, or rents payable to the Indian tribe, band or body, of which he or she is a member; and whenever any Indian shall be convicted of any crime punishable by imprisonment in a Penitentiary, or other place of confinement, the legal costs incurred in procuring such conviction, and in carrying out the various sentences recorded, may be defrayed by the Superintendent General of Indian


^343 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, S.C. 1869, c. 6 32-33 Vict.) [hereinafter Enfranchisement Act].

^344 An Act to Encourage the Gradual Civilization of the Indian tribes in this Province, and to Amend the Laws respecting Indians, 1857, 20 Vict. C. 26 (Province of Canada) [hereinafter Civilization Act].

^345 Enfranchisement Act, supra note 343 s. 12.
Affairs, and paid out at any annuity or interests coming to such Indian, or to the band or tribe, as the case may be.

Through this section, as with the Civilization Act, it was presumed that Indians were subject to Colonial criminal law jurisdiction. However, although the Enfranchisement Act proclaimed a general but tacit assertion of criminal jurisdiction over Indians, there is no clear and plain intention to extinguish First Nations’ jurisdiction. The wording “Any Indian or person of Indian blood who shall be convicted of any crime” indicates that the Dominion Government merely assumed that some previous legislation had in fact legally extended their criminal justice jurisdiction into First Nations internal structures and practices. However, considering that no previous extinguishments had taken place, this legislation can only be considered a continuation of existing Governmental ‘policy’ that directed the encroachment of criminal justice authority into First Nations’ jurisdiction.346 What is required for extinguishment is clear and plain intention, which this Act does not assert either expressly or implicitly. Therefore, this legislation is only ‘necessarily inconsistent’ with the expression of First Nations’ criminal justice jurisdiction.

The Indian Act, 1876

In 1876 the Parliament of Canada exercised its jurisdiction over “Indians, and Land reserved for the Indians”347 with the passage of the first Indian Act.348 The purpose of this Act was to amend and consolidate all laws respecting Indians, thereby streamlining the federal administration of Indian affairs.349 In addition to abolishing many traditional residual forms of First Nations’ self-government, the Act also imposed significant changes to the distribution of criminal jurisdiction as affecting Indians. Early versions of the Act consolidated prior legislation that prohibited the sale of alcohol to First Nation individuals and prohibited trespass on their lands, fraudulent acquirement
and removal of cultural articles by non-Indians, and the settlement of squatters. Later amendments to the Act implemented a process of cultural destruction with the criminalization of First Nations spiritual practices. For instance, an 1884 amendment reads:

Every Indian or other person who engages in or assists in celebrating the Indian festival known as the "Potlatch" or in the Indian dance known as the "Tamanawas" is guilty of a misdemeanour, and shall be liable to imprisonment for a term of not more than six nor less than two months in any gaol or other place of confinement and any Indian or other person who encourages, either directly or indirectly, an Indian or Indians to get up at such festival or dance, or to celebrate the same, or who shall assist in the celebration of the same is guilty of a like offence, and shall be liable to the same punishment.

The administration and enforcement of Indian Act laws was delegated to 'Indian agents', who by 1882, were acting as Stipendiary and Police Magistrates in order to adjudicate any infractions of the Act. In 1884, a further amendment extended Indian agents' authority to:

... any other matter affecting Indians with jurisdiction wheresoever any contravention of [the Indian Act, 1880] occurs, or wheresoever it is considered by him most conducive to the ends of justice that the trial be held.

This amendment essentially conferred on Indian agents the authority to hold trials for violations of the Indian Act that had occurred outside of reserve territory, as well as granting a general judicial authority over all other existing criminal acts. Consequently, Indian agents acted as Justices of the Peace over all statutory and common law offences with the single jurisdictional limitation that non-Indians could only be tried for violations of the Indian Act. However, an 1886 amendment diminished this

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351 An Act further to amend "The Indian Act, 1880" S.C. 1884, c. 27, s. 3.
352 An Act further to amend "The Indian Act, 1880" S.C. 1882, c. 30, s. 3.
353 An Act further to amend "The Indian Act, 1880" S.C. 1884, c. 27, s. 23.
broad jurisdiction and re-established Indian Agents' jurisdiction only to violations of the Indian Act, regardless of the offender's race and where the offence had occurred.355

In 1890, the Indian Act was amended356 once again to expand Indian Agent jurisdiction to include the sexual offences stipulated under section 157 of the Act respecting Offences against Public Morals and Public Convenience.357 This legislation created the offences of enticing a woman to a brothel, or to knowingly conceal her within such brothel and also forbade men to seduce and have illicit connections with any woman of previously chaste character. In addition, bawdyhouse provisions were re-enacted with additional prohibitions against residency in, or attendance at, such bawdyhouses.358 However, Indians would soon receive specific attention in regard to these types of sexual offences in subsequent Criminal Code359 legislation.

Upon examining the Indian Act, it is obvious that it is legislation directed towards regulating the legal status of First Nation individuals, their internal government structures and numerous other matters integral to their societies. However, the creation and imposition of Indian Agent courts does not meet the requirements necessary to demonstrate a clear and plain extinguishment of First Nations' jurisdiction over their internal systems of criminal justice. The extension of Dominion government jurisdiction into Indian territories was "nothing more than the establishment of an outpost of the general, non-Aboriginal justice system on Indian reserves provided with the mandate to enforce non-Aboriginal laws - including the Indian Act - against Indians".360 The Indian Acts themselves make no explicit references to the extinguishment of internal systems of First Nations' justice, nor do they even mention existing forms of justice as a matter to be considered.

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355 Indian Act, R.S.C. 1886, c. 43, s. 117.
356 Indian Act, R.S.C. 1890, c. 29, s. 9.
358 Chronology of Canadian Prostitution Law [http:llwww.rapereliefshelter .bc.ca/herstory /rr_files 86.html].
359 Criminal Code, S.C. 1892, c. 29.
360 Leonardy, supra note 100 at 182.
Hence, the most rational conclusion one can surmise is that the Dominion government erroneously assumed that any First Nations jurisdiction had been extinguished previously, or that there was no necessity to enact valid legislation that clearly and plainly stated any such intent to extinguish. Therefore, Indian Act legislation cannot be considered the legislative instrument by which First Nations' jurisdiction was extinguished, but only as legislation which is 'necessarily inconsistent' with the exercise of First Nations' jurisdiction.

The Criminal Code, 1892

The first Canadian Criminal Code was enacted in 1892,\(^{361}\) thereby codifying criminal common law and repealing prior collections of criminal legislation. The drafters of the Code gave no direct consideration to traditional First Nations' systems. However, two provisions were included to deal specifically with Indian offences. The first of these is found in section 98, which reads:

\begin{quote}
Every one is guilty of an indictable offence and liable to two years' imprisonment who induces, incites or stirs up any three or more Indians, non-treaty Indians or half-breeds, apparently acting in concert:

(a.) to make any request or demand of any agent or servant of the Government in a riotous, routous, (sic) disorderly or threatening manner, or in a manner calculated to cause a breach of the peace; or

(b.) to do any act calculated to cause a breach of the peace.
\end{quote}

In addition, section 190 reads:

\begin{quote}
Every one is guilty of an indictable offence and liable to a penalty not exceeding one hundred dollars and not less than ten dollars, or six months imprisonment:

(a) who, being the keeper of any house, tent or wigwam, allows or suffers any unenfranchised Indian woman to be or remain in such house, tent or wigwam, knowing or having probable cause for believing that such Indian woman is in or remains in such house, tent or wigwam with the intention of prostituting herself therein; or

(b) who, being an Indian woman, prostitutes herself therein; or
\end{quote}

\(^{361}\) Criminal Code, supra note 359.
(c) who, being an unenfranchised Indian woman, keeps, frequents or is found in a disorderly house, tent or wigwam used for any such purpose.

2. Every person who appears, acts or behaves as master or mistress, or as the person who has the care or management, of any house, tent or wigwam in which any such Indian woman is or remains for the purpose of prostituting herself therein, is deemed to be the keeper thereof, notwithstanding he or she is not in fact the real keeper thereof.

In regard to the enforcement of these provisions, Indian Agents were delegated jurisdiction over Indians for the stated offences by way of part XIII of the Code and an amendment to the 1894 Indian Act. Under the existing principles of statutory law, Indian Agent authority to enforce these Criminal Code offences under Indian Act legislation was considered concurrent with that of other Criminal Courts. Therefore, Indian Agents acting as Justices of the Peace, were considered the exclusive overseers of justice pertaining to First Nations.

The validity of this legislation and its jurisdiction was commonly accepted without question by the judiciary of the time. For example, in the 1908 case of R. v. Beboning the First Nations defendant was charged with the offence of theft under s. 347 of the Criminal Code for allegedly taking a quantity of hay without 'colour of right'. As part of his defence the accused argued that ss. 21, 22 and 127 of the Indian Act essentially prohibited the application of the Criminal Code to reserve territory. In essence, this argument asserted that the Indian Act was lex specialis or a special law, and therefore, its subject matter was an exception to the general application of the Criminal Code. In response to this contention, Osler J.A. stated:

According to the circumstances, the act may be a theft or in the nature of a mere trespass upon the reserve, and there is nothing in the Code or in the Indian Act which suggests that it can only be dealt with under the latter, where the elements of the graver offence exist ...

In a more colonial tone, Meredith J.A. declared:

362 Indian Act, S.C. 1894, c. 32, s. 8.
363 Leonardy, supra note 100 at 181.
366 Criminal Code, R.S.C. 1906, c. 146.
The suggestion that the Criminal Code does not apply to Indians is also so manifestly absurd as to require no refutation; nor can I imagine any good reason why the provisions of the Indian Act for the imposition of a fine upon an Indian for trespassing upon land in the reserve held by another Indian, and cutting and carrying away, among other things, hay, can repeal or modify the provisions of the Criminal Code respecting theft, in so far as they affect Indians, or in any manner exempt Indians from its provisions.\footnote{Beboning, supra note 365 at para. 13.}

Although the Justices in this case clearly declare that the Criminal Code did apply to Indians and First Nations’ territory, they make this declaration without any indication or enunciation of the legislation that extinguished Indian jurisdiction and consequently necessitated Dominion criminal authority over First Nations. This lack of clarification would appear to indicate that the judiciary, as well as the Dominion government, merely presumed that the Code had extinguished First Nations’ jurisdiction. However, this presumption is clearly unfounded. The Criminal Code on one hand attempts to distinguish Indians with the application of ss. 98 and 190, while on the other hand, the judiciary attempts to overlook this distinction by including Indians within the meaning of ‘everyone’, ‘person’ or other terminology used to define offenders. Further, the Code does not make any explicit reference to First Nations’ internal justice systems or their extinguishments, which does not amount to a ‘clear and plain’ intention. Actually, in regard to statutory intention, what could be less ‘clear and plain’?

Therefore, any such intention to extinguish could only have been implied. In order for an implied intention to be considered ‘clear and plain’, the exercise of the rights that the statute had intended to extinguish must be irreconcilable with the general intent of the statute itself. In other words, the legislation must necessarily imply that the legislative scheme was specifically to prevail to the extent that it is inconsistent with the relevant Aboriginal right.\footnote{Ibid. at para. 23.} Framed in the context of this subject matter, the continued existence and application of First Nations’ internal criminal jurisdiction and practices must nullify, or be irreconcilable with, the effect of the Criminal Code.\footnote{Delgamuukw, supra note 298 at para. 52-55. Leonardy, supra note 100 at 182.}
However, the idea that First Nations traditional justice systems would act to 'nullify' the 'effect' of the *Criminal Code* is without merit. Current and historical reality demonstrates that parallel systems of criminal law have always existed in Canada without any noteworthy disruption to ingrained political culture or criminal justice.\(^{371}\) For instance, Canadian soldiers are regulated and sanctioned under the *National Defence Act*\(^ {372}\) and young offenders under differing statutes since 1908.\(^ {373}\) Thus, criminal law in Canada has never been dealt with in a uniform manner, the reality of which, indicates that the continuation and application of First Nations' justice systems, were not and are not, irreconcilable with the intended and actual effect of *Criminal Code* legislation.\(^ {374}\)

Although Imperial and Dominion government legislation have acted to intrude upon the traditional social control or criminal justice systems of First Nations situated in Canada, the above analysis has illustrated that none of this legislation has acted to 'clearly and plainly' extinguish First Nations' internal criminal justice jurisdiction. Simply carrying out a policy of control and regulation regarding First Nations does not act to extinguish First Nations' jurisdiction or inherent rights, and is therefore, only 'necessarily inconsistent' with the exercise of those rights.\(^ {375}\) Further, the legislation discussed has not demonstrated a consistent intention on the part of the Crown to effect extinguishment. It has touched First Nations expression of jurisdiction to varying degrees in different periods of time, from outright acceptance to prohibition. More recent government actions would suggest a cautious but evident recognition of First Nations criminal jurisdiction.

There are numerous examples of government programs and processes that have acted to return a significant measure of control over criminal justice to First Nations and First Nations territories. For instance, in June 1991 the federal government introduced the First Nations Policing Policy (FNPP) in order to provide First Nations across Canada with access to police services that are "professional, effective, culturally appropriate, and

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\(^{374}\) Leonardy, *supra* note 100 at 182.

\(^{375}\) Gladstone, *supra* note 240 at para. 34.
accountable to the communities they serve". The FNPP operates on the principle of "partnership" to negotiate "tripartite agreements" for police services that are responsive to the particular needs of each community. Under the program, First Nations communities can choose to develop and administer their own police service, or select a force delivered by a body of First Nations officers working within an existing police force. In addition, the program applies to all First Nation reserves, Inuit communities, and other Indian communities on Crown land and "is designed to give First Nations communities greater control over the delivery and management of policing services in their communities." In addition, the Aboriginal Justice Strategy has also been implemented with a primary mandate to "enter into self-government negotiations in the field of administration of justice". A principal objective of the Strategy is to "support Aboriginal communities as they take greater responsibility for the administration of justice". The program also supports four different types of alternative justice programs including Tribal Courts, which to date, have been primarily managed by First Nations and Tribal Councils.

These programs clearly signify that First Nations have a valid jurisdictional claim to criminal justice. It is nonsensical to assert that legislation has extinguished an inherent right while at the same time support programs that effectually allow and even encourage the expression of that right. The situation is analogous to that in Gladstone where a varying legislative scheme acted to prohibit, allow, and then protect the exercise of Heiltsuk inherent rights. In this decision, the Supreme Court clearly asserted that simple control over an Aboriginal right is not sufficient to extinguish that right and there must be a consistent intention on the part of the Crown to cause extinguishment. The same is so with the varying pieces of criminal justice legislation that gradually exerted control over First Nations. In the words of the Supreme Court, "such a varying regulatory scheme

377 Ibid.
379 Ibid.
380 Gladstone, supra note 240 at para. 34.
cannot be said to express a clear and plain intention to eliminate (the) Aboriginal rights…” 381

Surrender

The principle of surrender essentially requires a First Nation to have agreed to the extinguishment of a specified right or rights within the context of a treaty or other valid agreement. The common law has always presumed that inherent rights can be surrendered in this manner, however, there are certain established principles set out by the Supreme Court that must be utilized when interpreting any surrender provision. For instance, in Simon the court concluded that a treaty between the Crown and First Nations is an agreement sui generis, or a special agreement like no other and should be given a “fair, large and liberal construction in favour of the Indians.” 382 These principles were subsequently affirmed in Sioui 383 where the Supreme Court also concluded that treaties and statutes relating to First Nations should be liberally construed and that any uncertainties ought to be resolved in favour of First Nations. In 1996 the Badger 384 decision set out the following authoritative guidelines and principles of treaty interpretation which are now the foundation of all treaty rights litigation:

1. A treaty represents an exchange of solemn promises between the Crown and the various First Nations. It is an agreement whose nature is sacred.

2. The honour of the Crown is always at stake in its dealings with First Nations. It is always assumed that that the Crown intends to fulfill its promises. No appearance of 'sharp dealing' will be sanctioned.

3. Any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of First Nations. A counterpart to this principle is that any limitations which restrict the rights of First Nations must be narrowly construed.

4. The scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles set out by the Supreme Court. The historical context and oral history are relevant and

381 Ibid.
384 Badger, supra note 101.
important to this determination. Further, First Nations’ treaties should be interpreted as their Indian signatories would have understood them.

5. The onus of proof that a treaty right has been extinguished lies upon the Crown. There must be strict proof of the fact of extinguishment and evidence of a clear and plain intention on the part of the government to extinguish treaty rights prior to the enactment of s. 35 (1).

6. Treaties should be interpreted in a manner that maintains the integrity of the Crown, particularly the Crown’s fiduciary obligation toward Aboriginal peoples.

7. The justification of any infringement of a treaty right will be subject to the infringement/justification test found in Sparrow.

With these guiding principles in mind, it is also important to understand what treaties and treaty making meant to the Haudenosaunee in order to ascertain a reasonable idea of what they understood their treaties with the British to truly mean.

For the Iroquois, treaty making was essentially an extension of The Great Law of Peace to a broader context. The rituals, established orations, and exchanges of gifts mandated by The Great Law provided the basic paradigm for all diplomatic relations with foreign peoples, be they First Nation or European. What was most important to the Haudenosaunee throughout the process of external diplomacy was the status of peaceful relationships and the intention to create and maintain this status. For the Haudenosaunee the intent of treaty making was to invite the foreign nation to accept the peace, power and righteousness as mandated by The Great Law. Doing so was integrally connected to the procedures utilized throughout the process itself. In effect, what this means is that when a foreign nation accepted and adopted the diplomatic procedures prescribed by the Confederacy, that nation was in fact placing itself under The Great Law. This applied equally to European nations, who until approximately the 1830s, knowingly adopted and adapted each element of Haudenosaunee Council and treaty procedure. Therefore, by following the processes prescribed by The Great Law, they were, in effect, placing themselves under the Tree of Peace. For the Iroquois, "these relationships were consistent with The Great Law as they respected the internal


386 Williams & Nelson, supra note 30.
lawmaking powers and sovereignty of the nations while linking those nations together in a union of peace and power.”

In addition, the Iroquois always engaged in the treaty process with the understanding that all parties to the accord were obligated to renew the bonds that had been created. In fact, treaty renewal “was regarded as a continuing constitutional obligation of treaty partners.” Thus, the bonds and understandings created by treaty agreements needed to be continually renewed and strengthened, whereas neglecting to do so would generally dissolve those bonds and understandings.

Thus, it would seem apparent that the Haudenosaunee understood treaty making to represent a foreign nations’ acceptance of The Great Law of Peace, which in turn created a status of sovereign alliance between the parties. The idea that one nation could interfere with the internal sovereignty of the other was not a possible outcome of such compacts. To do so was in violation of The Great Law itself. Therefore, this understanding must be given due consideration in any treaty provisions that allegedly surrender a Haudenosaunee inherent right.

In regard to the treaties themselves, the Haudenosaunee and British have entered into numerous formal treaties and other compacts, the documentation of which exceeds 10,000 pages. However, only two of those treaties speak directly to the issue of criminal justice jurisdiction, both of which will now be examined.

The Two Row Wampum Or Fort Albany Treaty, 1664

The earliest treaty record between the Haudenosaunee and the British was made at Fort Albany, New York, on September 24, 1664 between Colonel George Cartwright, the commanding officer at Albany, and sachems of the “Maquaes” and “Synicks”. The English had recently defeated the Dutch, who surrendered their claims to New

387 Ibid.
388 Williams, supra note 55 at 112.
389 Ibid. at 113.
390 Williams & Nelson, supra note 30.
391 Ibid.
Netherlands and the King of England then placed the territory under the authority of his brother, the Duke of York, who named the colony New York. The treaty was intended to replace the previously existing Dutch relationship with the Haudenosaunee with a similar British relationship and provided that the English "for the future" would supply "the Indian Princes above named and their subjects" with the same wares and commodities as had historically been given by the Dutch.

The treaty clearly stipulated separate criminal jurisdiction between the parties. Each was responsible for the conduct of its own subjects and any conflicts and "satisfaction" were to be resolved at a government-to-government level, with any grievances to be made to the Haudenosaunee sachems on one side and to the governor of New York or the officer in charge at Albany on the other:

That if any English, Dutch, or Indian under the protection of the English do any wrong, injury or violence to any of ye said Princes, or their Subjects, in any sort whatsoever, if they complained to the Governor at New York or to the Officer in Chief at Albany, if the person so offending can be discovered, then that person shall suffer punishment and all due satisfaction shall be given, and the like shall be done for all other English Plantations.

That if any Indians belonging to any of the Sachims aforesaid, do any wrong, injury or damage to the English, Dutch, or Indians under the protection of the English, if complaint be made to ye Sachims, and the person be discovered who did the injury, then the person so offending shall be punished and all just satisfaction shall be given to any of His Majesties subjects in any Colony or other English plantation in America.

In addition to the written treaty itself, the meaning and intent of the relationship was also symbolized in the form of a wampum belt, formally known as the Two Row Wampum. Since the founding of The Great Law the Haudenosaunee had always used wampum belts to record important events and to exchange at treaty conferences, and in keeping with this tradition, the Two Row Wampum was likely completed for the Fort Albany meeting. Haudenosaunee tradition states that the belt dates back to 1664, and the treaty in September of that year would have been the most likely time for the belt to

392 Ibid.
393 Treaty of Fort Albany, 1664.
394 Snow, supra note 20 at 91.
have been exchanged, but there are no British documents confirming the belt itself. Unfortunately, few historical records describe any belts in detail.\footnote{Williams & Nelson, supra note 30.} However, Iroquois protocol required treaty commitments to be regularly renewed and maintained, so it is virtually certain that several Two Row belts were exchanged between the two parties.\footnote{Ibid.} In fact, three of the ancient belts have been preserved and two are kept at the Grand River Territory while the third remains in the Museum of the American Indian. All three belts, as well as any versions that may have been lost, stand for the same basic principles:

The symbol of the relationship is a wampum belt nine rows wide, with two parallel rows of dark wampum running its entire length. The two dark rows symbolize the sailing ship of the British and the bark canoe of the Haudenosaunee. Their paths are parallel because, while they are to remain close allies, they are not to interfere in each other's course. The three white rows separating the two dark rows signify peace, trust, and respect and friendship (that is, respect and friendship can be interchanged). These three concepts, it is said, are what keep the two craft close together, yet at a respectful distance from each other.

That treaty established our equal rights in this land and our separate and equal coexistence on this land between our two peoples, the canoe of the Indian and the boat of the white man going down the river of life in peace and friendship forever. The last three principles were memorialized in the great Silver Covenant Chain with the three binding us together forever, peace and friendship forever. As long as the grass grows green, as long as the water runs downhill, and as long as the sun rises in the east and sets in the west shall we hold this treaty.\footnote{Ibid.}

In 1692 the original Two Row Wampum treaty relationship was further solidified at a Treaty Council between the two parties, but thereafter, became known as the Silver Covenant Chain.\footnote{The Covenant Chain [http://www.iroquoisdemocracy.pdx.edu/html/covenantchain.htm] (January 18, 2004).} The Treaty was so named as a metaphor for the relationship, which was considered a chain that tied the British ship and the Iroquois canoe to the Tree of Peace. An actual silver chain was constructed by the British in order to symbolize their agreement, and the three links of that chain were said to represent peace, friendship, and forever, which were the basic principles inherent in the Two Row Wampum. The
parties also agreed to meet regularly to polish the chain to restore their original friendship and to pass the treaty down from generation to generation, so that its intent would never be forgotten.\textsuperscript{399}

That the British fully understood this intent is well illustrated with the personal seal that Sir William Johnson designed for himself as Imperial Superintendent General of Indian affairs. The seal is constructed with the interpretive symbols of both the \textit{Two Row Wampum} and the \textit{Silver Covenant Chain}. Around the outside of the seal is an endless \textit{Silver Covenant Chain}, grasped by seven arms, with one wearing a shirt and coat and said to be Sir William himself, and the others representative of the Six Nations. The interior of the circular \textit{Silver Covenant Chain} contains a pine tree or the Tree of Peace, a pipe of peace, a council house, and a sailing ship and a canoe, side by side.\textsuperscript{400}

The forgoing examination clearly indicates that the Haudenosaunee and the British entered the \textit{Two Row Wampum} and \textit{Silver Covenant Chain} with the definitive understanding that each party would bear responsibility for the criminal acts of its citizens who injured citizens of the other. The language of the written agreement implicitly confirms the sovereignty of both the Haudenosaunee and the British. Each is recognized as having national 'subjects' and the same type of jurisdictional authority and terms vested in each party. There is a clear separation of laws and government with neither party being subordinate to the other. In addition the symbolic significance of the \textit{Two Row Wampum} and \textit{Silver Covenant Chain} demonstrate that both parties recognized the sovereign authority of the other to personal jurisdiction in criminal matters. Further, the recognition of the sovereignty of the other undoubtedly suited both parties:

For the British, it meant leverage: it meant that the entire Confederacy would be responsible for atoning for the actions of any wayward individuals. British law for at least a hundred years after 1664 was not in a position to enforce criminal sanctions in the frontier territory. For the Haudenosaunee, it was an extrapolation of a principle of the Kainerekowa (The Great Law): just as the clan was responsible to other clans for actions and injuries of its members, and the nation was responsible to other nations, so was it true at the international level between the British

\textsuperscript{399} What is important about the treaties? [http://sixnations.buffnet.net/Lessons_from_History/] (January 18, 2004).

\textsuperscript{400} S. W. Johnson, \textit{Sir William Johnson Papers} vol. XIII at 98.
and the Haudenosaunee. Separate criminal jurisdiction, with each side liable to give 'satisfaction', was consistent with the spirit and intent of The Great Law of Peace and another indication that the British were governing themselves by the spirit of that law. Separate jurisdiction meant that territory was irrelevant: it was the individual, rather than his location, that mattered.\textsuperscript{401}

Therefore, considering the plain reading of the text, the spirit and intent found within the \textit{Two Row Wampum}, and the advantages to both parties entering into the compact, it is prudent to conclude that this treaty only acted to reaffirm Haudenosaunee criminal jurisdiction.

\textbf{Treaty Of Niagara, 1764}

In 1764, Sir William Johnson sought an extension of the \textit{Covenant Chain} to include the Western or Lakes Confederacy and also requested a change in the criminal justice provisions as set out in the 1664 \textit{Albany Treaty}. Johnson believed it important to secure British criminal jurisdiction over the Haudenosaunee in cases of murder and robbery where the victims were not Indians. Apparently such incidents were escalating because the victims had no clans to resolve matters according to Iroquois criminal justice practice. The presence of two sovereigns in one territory led to uncertainty, and Haudenosaunee institutions were under attack as settlers and citizens challenged the established methods of resolving conflict.\textsuperscript{402}

In March 1762, Haudenosaunee and British representatives held a conference at Johnson Hall and the discussion centered on the application of British criminal law. Sir William Johnson demanded that the Haudenosaunee hand over several young Senecas who had been accused of murdering an English subject so they could be tried and sanctioned by the British. In their response, the Confederacy stated:

\begin{quote}
...this accident affords us as much uneasiness as it can you, and after mature deliberation we are of opinion, as it is not in our power to deliver up the murderers, having no laws for that purpose, that the same should be amicably settled according to the antient (sic) Custom of our Forefathers, and Yours, who first entered into that Agreement together in such cases, which they have always abided by, as our Forefathers were
\end{quote}

\textsuperscript{401} Williams & Nelson, supra note 30.
\textsuperscript{402} Ibid.
of opinion, that it was better to accommodate Matters already bad enough, than to shed further Blood thereon.

Arguing for the British position on the matter, Johnson threatened that the English would withdraw from their longstanding alliance and trade relationship with the Haudenosaunee if they did not concede:

I well know the customs of your Forefathers, and I look upon that Agreement to have been made when times were very different, and when you did not act as you now do. We have writings, and know the transactions of them times very well. At the same time, you must be convinced that such a Covenant would in time require to be altered, as it would be productive of many Quarrels...

We don't want the Blood of any one, merely out of a thirst of revenge. No. We want only to preserve the Peace, which we can never do, if either of us may Murder at Discretion.

If people are not punished for capital offences, they will often repeat them; but if proper examples are made of the guilty, it will put a stop to the committing of crimes, which it is in your interest, more than ours to consider...

...in case you are licensed to murder, our people will claim the same privilege, and, not only that, but we must be obliged to stop up the road of peace, and withdraw all our traders and smiths from amongst you.

Johnson's threats seemingly convinced the Haudenosaunee to comply with his demands. During this period, the Iroquois had come to rely on English trade goods, and losing their historic alliances with the British would have weakened the Confederacy substantially. Consequently, the Senecas ratified the Treaty of Niagara and surrendered their jurisdiction over the crimes of murder and robbery:

That should any Indian commit Murder, or rob any of His Majesty's subjects, he shall be immediately delivered up to be tried, and punished according to the equitable laws of England, and should any White man be guilty of the like crime towards the Indians, he shall be immediately tried and punished if guilty.

And the Senecas are never for the future to procure themselves Satisfaction, otherwise than as before mentioned, but to lay all matters of complaint before Sir William Johnson, or His Majesty's Superintendent of
Indian Affairs for the time being, and strictly to maintain and abide by the Covenant Chain of Friendship.\textsuperscript{403}

The text of the treaty itself states that the surrender applies only to the murder and robbery of 'His Majesty's subjects', however, the Confederacy's own traditions state that the jurisdiction extends to cases of rape and it is not restricted to those crimes where the victim is non-Aboriginal. How the Iroquois came to the conclusion that the surrender comprised additional subject matter and applied to all six nations of the League is not documented, but there is evidence that the Confederacy conceded this to be the case. For example, correspondence from Haudenosaunee sachem William Jacobs to Britain's Joseph Howe on May 7, 1872 states:

There is three things in you Law we wish to be like yours the way to punish the bad this is all.\textsuperscript{404}

Those 'three things' are identified as murder, rape and theft.\textsuperscript{405} Confirmation of this understanding can also be documented up to the 1940s when the Confederacy at the Grand River territory chose not to exert jurisdiction in a case of theft within Six Nations boundaries. John Noon, a researcher of the Grand River Haudenosaunee during this era states:

The Chiefs claimed to have made an agreement with the British Government to relinquish jurisdiction over the crimes of theft, rape and murder. Since this charge made by the plaintiff falls within this group of crimes, they may have, for this reason, considered the case beyond their jurisdiction.\textsuperscript{406}

Unfortunately, there does appear to be significant ambiguity in regard to this treaty. A plain reading of the text suggests that it is only the Senecas who were subject to the surrender of jurisdiction over the two crimes of murder and robbery. However, the Haudenosaunee tradition stresses that they understood and accepted the spirit and intent of the treaty to include the additional crime of rape, and that the surrender applied to all six nations of the Confederacy. In addition, it appears the Confederacy also understood the term robbery to include theft, which according to Canadian criminal law,

\textsuperscript{403} Treaty of Niagara, 1764.
\textsuperscript{404} Canada, National Archives of Canada, RG10, vol. 1862, file 239.
\textsuperscript{405} Williams & Nelson, supra note 30.
\textsuperscript{406} Noon, supra note 19 at 72-73.
are two separate categories of offences. Robbery denotes the use of a weapon, or the application, or threat of the application of violence to gain something from the victim.\footnote{Criminal Code, supra note 279 s. 343.} Theft on the other hand does not include the application of violence or threats of violence.\footnote{Ibid. at s. 322.} These distinctions are quite significant in both the measure of severity and the type and length of prescribed sanction. Therefore, further examination into this specific issue would be required in order to determine what exactly the Confederacy understood the meaning of robbery and theft to include.

What is clear is that the Seneca surrendered jurisdiction over murder and robbery by the terms of this treaty. It is also clear that the Haudenosaunee understood that this agreement applied to the Confederacy as a whole and also included the crime of rape. However, one vital factor that remains to be addressed is whether this surrender was subject to the renewal and reaffirmation required under Iroquois treaty protocol. As noted earlier, the Iroquois considered treaties to be an ongoing relationship that required consistent renewal by the parties.\footnote{Williams, supra note 55 at 110-113.} Therefore, if the British and the Haudenosaunee did not subsequently reaffirm this treaty, it may have been understood by the Iroquois as either a temporary surrender, or as having been dissolved.

Thus, no clear conclusion regarding the Treaty of Niagara can be made at this time. Further research regarding Haudenosaunee understandings of the Treaty's terms, as well as confirmation of any subsequent renewals of those terms, is necessary to fully resolve this issue.

**Constitutional Enactment**

The final method by which an inherent right can be extinguished is by constitutional enactment. However, as with all other methods of extinguishment, constitutional enactments are also subject to specified principles of interpretation when analyzing their effect. These principles include:
1. Interpretations of statutory provisions which have an impact upon treaty or Aboriginal rights must be approached in a manner which maintains the integrity of the Crown.

2. Any ambiguities or doubtful expressions in the wording of the document must be resolved in favour of the Indians.

3. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty or inherent rights.  

In accordance with these interpretive principles, the three existing constitutional enactments that directly affect First Nations will now be examined.

**The British North America Act, 1867**

The *British North America Act, 1867* was enacted by the Imperial Parliament and the British Crown in order to distribute jurisdictions between the federal parliament and the three existing provinces of Canada, Nova Scotia and New Brunswick. In this new division of powers, the federal authority was accorded exclusive administrative authority over Indians and Indian Lands and the criminal law. The relevant provisions read:

VI. DISTRIBUTION OF LEGISLATIVE POWERS.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,


27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

The method by which the federal government has acted to express and discharge its jurisdiction in both of these areas has been through the creation and

410 Badger, supra note 101 at para. 41.
enactment of legislation, specifically the Indian Act\textsuperscript{411} and Criminal Code.\textsuperscript{412} However, as previously demonstrated, none of the legislation enacted under the authority of these constitutional provisions has operated to extinguish the Haudenosaunee inherent right to criminal justice jurisdiction. Therefore, it must be determined if the constitutional provisions themselves express an implicit intention to extinguish that right. At first glance, both areas of jurisdiction might appear to exhibit such an implicit intention, but the clause itself only provides the federal government with the authority to enact legislation in the stipulated areas of jurisdiction. There is clearly no "strict proof of the fact of extinguishment" and the provisions cannot be interpreted to effect extinguishment over criminal justice jurisdiction any more than federal government jurisdiction over "Sea Coast and Inland Fisheries"\textsuperscript{413} can be concluded to extinguish the inherent right of Aboriginal peoples to fish.

Further, the BNA Act's effect on the Aboriginal inherent right to self-government was directly confronted by the British Columbia Supreme Court in Campbell.\textsuperscript{414} After reviewing the applicable case law the court made the following conclusions:

Thus, what was distributed in ss. 91 and 92 of the British North America Act was all of (but no more than) the powers which until June 30, 1867 had belonged to the colonies. Anything outside of the powers enjoyed by the colonies was not encompassed by ss. 91 and 92 and remained outside of the power of Parliament and the legislative assemblies just as it had been beyond the powers of the colonies.\textsuperscript{415}

... the object of the division of powers in ss. 91 and 92 between the federal government and the provinces was not to extinguish diversity (or Aboriginal rights), but to ensure that the local and distinct needs of Upper and Lower Canada (Ontario and Quebec) and the maritime provinces were protected in a federal system.\textsuperscript{416}

A consideration of these various observations by the Supreme Court of Canada supports the submission that Aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten "underlying values" of the Constitution outside of

\textsuperscript{411} Indian Act, supra note 271.
\textsuperscript{412} Criminal Code, supra note 279.
\textsuperscript{413} Constitution Act, 1867 s. 91 (12).
\textsuperscript{415} Ibid. at para. 76.
\textsuperscript{416} Ibid. at para. 78.
the powers distributed to Parliament and the legislatures in 1867. The federal-provincial division of powers in 1867 was aimed at a different issue and was a division "internal" to the Crown.\textsuperscript{417}

Thus, existing case law clearly concludes that the \textit{BNA Act} did not have as its object or effect the extinguishment of Aboriginal self-government rights.

\textbf{The Manitoba Act And The Natural Resources Transfer Agreement}

Neither the \textit{Manitoba Act} nor \textit{The Natural Resources Transfer Agreement} deals with the issue of criminal justice jurisdiction in any manner, nor do they affect Haudenosaunee inherent rights with their contents. However, both do contain extinguishment provisions that the courts have upheld. Thus, they are included to illustrate the type of "clear and plain" intention necessary to effectively extinguish Aboriginal rights.

On May 12, 1870, the federal government passed the \textit{Manitoba Act}, which essentially created the province of Manitoba and provided for a system of elected government. The enactment also extinguished "Indian Title" to certain lands in the province with the following clause:

\begin{quote}
...towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.\textsuperscript{418}
\end{quote}

In 1929 and 1930 the provinces of Manitoba, Saskatchewan and Alberta entered into agreements with the federal government with the primary purpose of transferring control of natural resources and Crown lands from the federal authority to the three provinces.

\textsuperscript{417} Ibid. at para. 81.

\textsuperscript{418} \textit{Manitoba Act}, 1870 s. 31.
provinces. The agreements were subsequently affirmed by the United Kingdom Parliament with the passage of the Constitution Act, 1930. Entitled the Natural Resources Transfer Agreement, the statute has been interpreted by the Supreme Court to have effectively extinguished the commercial harvesting rights of First Nations within the stated provinces, and replaced those rights with the right to hunt, fish and trap for food during all seasons and on all unoccupied Crown lands, or other lands to which First Nations may have valid access. The relevant provision reads:

In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

As already discussed, the only constitutional enactment which includes the subject matter of criminal justice jurisdiction is the declared federal authority over criminal justice in s. 91 (27) of the British North America Act, 1867. However, the provision itself only designates the federal government the exclusive legislative authority over the sphere of criminal justice, which would have authorized the development of independent legislation that clearly and plainly extinguished Haudenosaunee or First Nations criminal justice jurisdiction prior to the enactment of s. 35 (1). Section 91 (27) does not provide the clear and plain intent required for extinguishment as demonstrated in the Manitoba Act and the Natural Resources Transfer Agreement.

The same conclusion can also be reached in relation to s. 91 (24) which only provided the federal government with the authority to develop further independent legislation as it relates to Indians and Indian reserve land. The required clear and plain intention to extinguish is absent. Further, applicable case law has also concluded that the Act only encompassed those matters internal to the Crown and did not have as its objective the extinguishment of Aboriginal self-government rights. Accordingly, it is reasonable and prudent to conclude that no constitutional enactment has extinguished

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420 Natural Resources Transfer Agreement, 1930 s. 13.
the Haudenosaunee right to criminal justice jurisdiction as a residual form of self-government.

Conclusion On Extinguishment

As the above analysis has demonstrated, the federal government has not enacted any legislation or constitutional statute that has effected extinguishment with a clear and plain intention. Since the late 1800s there undoubtedly have been attempts by the Dominion and Canadian governments to intrude upon Haudenosaunee internal criminal justice practices through varying pieces of legislation. However, none of this legislation has demonstrated a clear and plain intention to extinguish that jurisdiction. "Intrusion" and "legal extinguishment" are entirely different matters and the statutory and historical evidence openly suggest that Imperial, Dominion and Canadian governments have only demonstrated a continuing policy of colonial interference.421

The issue of surrender on the other hand is somewhat uncertain. What is clear is that the Seneca explicitly surrendered jurisdiction over murder and robbery in the Treaty of Niagara, 1764. However, with the Confederacy asserting the position that this agreement applied to all six nations of the League, and that it also included the additional crimes of rape and theft, there is significant ambiguity regarding the extent of the surrender. The case law on treaty interpretation affirms that any ambiguity in the wording of a treaty must be resolved in favour of the First Nation,422 but this issue appears to go beyond a simple reading of the text, which is not ambiguous. The conviction that the Haudenosaunee as a whole are subject to the surrender is understandable in that the Seneca are an integral and necessary part of the Confederacy as mandated by The Great Law. Considering that all members of the Confederacy agreed to and ratified the treaty as one political body, one can appreciate their position that in doing so they were also accepting the terms their Seneca brethren were coerced to accept. Any subsequent renewals of this treaty are also at issue. If the treaty was not renewed according to Iroquois treaty protocol, then it is very possible that

421 Leonardy, supra note 100 at 182-83.
422 Badger, supra note 101 at para. 41.
the Haudenosaunee understood the treaty as either a temporary surrender, or as having been dissolved.

The ability to come to a definitive conclusion on these matters will require further dialogue with hereditary Chiefs and elders at Six Nations, as well as research into historic treaty documentation. Such an inquiry goes far beyond the scope of the current thesis. For the moment, this issue remains inconclusive.423

After having determined the extent of extinguishment, the process proceeds to stage three, which queries whether the inherent right has been infringed by federal or provincial legislation.

**Has The Inherent Right To Criminal Justice Jurisdiction Been Infringed By Federal Or Provincial Legislation?**

In order for a court to determine if there is a prima facie infringement of an inherent right it must consider three specific issues as set out in Sparrow:

1. Is the legislative limitation on the inherent right unreasonable?
2. Does the legislation impose undue hardship?
3. Does the legislation deny to the holders of the right their preferred means of exercising that right?

The onus of proving an infringement lies on the Haudenosaunee and the following discussion is an example of existing evidence that would demonstrate a *prima facie* infringement:

**Is The Legislative Limitation Unreasonable?**

In this instance the limitation is basically the prohibition to practice autonomous Haudenosaunee forms of criminal justice within their own territorial boundaries and

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423 Please note that a clear position on the extent of surrender is necessary for any future litigation. If the Treaty is interpreted to have extinguished Haudenosaunee jurisdiction over murder and robbery, then any claim would have to exclude those two crimes.
amongst their own people. This in turn has resulted in the imposition of a criminal justice system that treats the Iroquois Peoples in an inequitable and discriminatory manner.

The limitation appears to presume that the Haudenosaunee are unable to control and regulate crime within their own society and therefore, must be subject to an imposed system that treats Aboriginal Peoples in a harsher manner than it does most other Peoples in Canada. However, this presumption is nonsensical. The historic evidence confirms that the Iroquois people had very low rates of internal criminal conduct and that this was achieved by adhering to the principles and values dictated by The Great Law and the other behavioral standards required by their societies.

To conclude the Haudenosaunee are no longer able to develop and administer a successful and effective community justice system that incorporates their cultural values is condescending and discriminatory. Historically they did so for centuries. Currently, they are one of the most highly educated First Nation communities in Canada. For the years 1998 to 2003, there was an average of 115 post secondary graduates per year in a diverse range of disciplines including law, administration, social work and other areas relevant to the operation of a contemporary justice system. In addition, the hereditary Confederacy Council still remains an integral part of the community and can ensure the values and principles required for success are fully ingrained. There is no legitimate reason to assume that they cannot re-establish a system that is both capable and effective.

Essentially, the purpose behind such an initiative is to improve relationships and quality of life for the community and the offender. To deny this in favour of a system that is prejudicial towards Aboriginal accused and predominantly serves to recycle deviance is clearly an unreasonable limitation on the expression of this inherent right.

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424 Please see the following section "Does the Legislation Impose Undue Hardship" for a thorough discussion of the longstanding discrimination and inequities experienced by Aboriginal Peoples dealt with by the Canadian criminal justice system.

425 Please see "The Regulation of Criminal Acts".


427 M.E. Turpel-Lafond J., (Presentation to the College of Law, University of Saskatchewan, 25 November 1999).
Does The Legislation Impose Undue Hardship?

The issue of undue hardship relates directly to the imposition of foreign values and the systemic discrimination and overrepresentation experienced by Aboriginal peoples within the mainstream Canadian criminal justice system.\textsuperscript{428}

The formal acknowledgement of these grim realities extends at least as far back as a Canadian Corrections Association publication entitled \textit{Indians and the Law}.\textsuperscript{429} This 1967 report was prepared for the Department of Indian and Northern Affairs as a response to growing public awareness and concern about the situation of Aboriginal people in the justice system.\textsuperscript{430}

The report presented offence and corrections population statistics and made a series of recommendations for change. Recommendations included: modification of the nature and extent of law enforcement; implementation of judicial and correctional services for Indians and "Eskimos"; resolution of jurisdictional conflicts between federal and provincial governments; greater use of preventative and educational programs in schools; expansion of the Indian constable system; increased funding for friendship centres; and the recruitment of Indians and "Eskimos" to work in the criminal justice system.\textsuperscript{431}

Governmental reaction to the committee's recommendations was less than adequate. Subsequent written works exposed continuing legal difficulties experienced by Aboriginal peoples. Publications such as \textit{Wahbung Our Tomorrows}\textsuperscript{432} in 1971, \textit{Native Peoples and Justice}\textsuperscript{433} in 1975, and \textit{Report of the Metis and Non-Status Indian Crime

\begin{footnotesize}
\item[428] Leonardy, \textit{supra note 100} at 183-48.
\item[429] Canada, Indian and Northern Affairs, \textit{Indians and the Law} (Ottawa: Canadian Corrections Association and the Department of Indian and Northern Affairs, 1967).
\item[431] \textit{Indians and the Law}, \textit{supra note 429} at 19.
\item[432] \textit{Wahbung Our Tomorrows}, (Manitoba: Manitoba Indian Brotherhood, 1971).
\end{footnotesize}
and Justice Commission in 1977 all described the enduring distress faced by Aboriginal peoples and the glaring idleness of government in implementing any recommended response to the situation.

In April 1985, a report entitled Reflecting Indian Concerns and Values in the Justice System was released. The objective of this study was to "examine the current situation in relation to the circumstances of the Indian people of Saskatchewan and to recommend improvements or modifications that can be made within the existing constitutional and legal framework, such that the justice system would better reflect Indian concerns, interests, values and culture."

The working groups undertaking the study recommended greater participation by Indian communities in all aspects of the justice system, more education for Indian communities on how the justice system works, a community-based approach to problem solving with an emphasis on Indian values and customs, and co-operation between all levels of government and Aboriginal communities. Further recommendations were made to improve the Native Justice of the Peace Program and the Indian Special Constable Program, to encourage the use of Peacemakers, to establish local community justice committees, and to augment legal advisory services to assist in the development of these recommendations. The working groups seemed to recognize the legitimacy of traditional Aboriginal concepts of justice, a recognition that paralleled broader discussions about criminal justice at the time.

Additional support for the development of an Aboriginal justice system came in the 1988 publication Locking Up Natives in Canada. The report examined differing Aboriginal justice systems and the sentencing of Aboriginal people, as well as the

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435 Soliloquy and Dialogue, supra note 430 at 204-212.
436 Joint Canada-Saskatchewan-Federation of Saskatchewan Indian Nations, Reflecting Indian Concerns and Values in the Justice System (Ottawa: 1985).
437 Ibid. at l.
438 Soliloquy and Dialogue, supra note 430 at 221.
situation of Aboriginals in Canadian prisons. It revisited the idea of delivering justice in an alternative manner, introduced the concept of legal pluralism and considered self-government in relation to criminal justice. Criminal justice reform was seen as contingent on the recognition of the right of Aboriginal peoples to self-determination.440 The committee concluded by recommending the development of, and funding for, parallel Aboriginal justice systems. It further encouraged governments to support initiatives by Aboriginal communities to implement traditional values into the criminal justice process and to assume greater control over corrections issues that affect them.441

A surge of commissions, inquiries and special initiatives followed. Fully 16 more documents were produced between 1988 and 1992,442 including Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice443, Royal Commission on the Donald Marshall Jr. Prosecution444, Report of the Osnaburgh/Windigo Tribal Council Justice Review Committee445, and the Report of the Aboriginal Justice Inquiry of Manitoba.446 All came to the common conclusion that decolonization is a necessary and urgent reform needed to create an impartial legal system for Aboriginal people.447 Notable is the Justice Inquiry's conclusion:

For Aboriginal people, the essential problem is that the Canadian system of justice is an imposed and foreign system. In order for a society to accept a justice system as part of its life in its community, it must see the system and experience it as being a positive influence working for that society. Aboriginal people do not.448

440 Ibid. at 8.
441 Soliloquy and Dialogue, supra note 430 at 229.
442 Ibid. at 226.
446 Report of the Aboriginal Justice Inquiry of Manitoba, supra note 338.
Other studies followed, the most comprehensive and climactic coming from the Royal Commission on Aboriginal Peoples in 1996. In the Commission’s publication *Bridging the Cultural Divide*, the necessity of including Aboriginal justice systems within the framework of self-government was discussed. In their interim conclusions the Commission stated:

Aboriginal people’s alienation from the justice system is partly a result of the fact that justice - far from being the blind, impartial arbiter - has been the handmaiden to their oppression. But equally important, this alienation is the product of the fundamental differences Aboriginal people bring to the concept and process of justice. Recognition of the right of Aboriginal peoples to establish and control their own justice systems is an essential and integral part of recognizing and respecting cultural difference.

and,

Based on the evidence we have considered, it is our view that the contemporary expression of Aboriginal concepts of justice are likely to be more effective than the existing non-Aboriginal justice system, both in responding to the wounds that colonialism has inflicted, which are evident in a cycle of disruption and destructive behaviour, and in meeting the challenges of maintaining peace and security in a changing world.

and as one final recommendation they declared,

The Commission recommends that federal, provincial and territorial governments recognize the right of Aboriginal nations to establish and administer their own systems of justice pursuant to their inherent right of self-government, including the power to make laws, within the Aboriginal nation’s territory.

The Supreme Court of Canada itself has criticized the discriminatory and unjust manner in which Aboriginal Peoples are dealt with by the Canadian criminal justice system. In *R. v. Gladue*, where the court was asked to interpret s. 718 (2) (e) of the *Criminal Code*, the following comments were made:

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449 *Bridging the Cultural Divide*, supra note 9.
450 Ibid. at 58-59.
451 Ibid.
452 Ibid. at 224.
454 *Criminal Code*, supra note 279.
Not surprisingly, the excessive imprisonment of Aboriginal people is only the tip of the iceberg insofar as the estrangement of the Aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. As this Court recently noted in R. v. Williams, [1998] 1 S.C.R. 1128, at para. 58, there is widespread bias against Aboriginal people within Canada, and "[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system".  

Later, they continued,

...it must be recognized that the circumstances of Aboriginal offenders differ from those of the majority because many Aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, Aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.  

and,

...it must in every case be recalled that the direction to consider these unique circumstances flows from the staggering injustice currently experienced by Aboriginal peoples with the criminal justice system. The provision reflects the reality that many Aboriginal people are alienated from this system which frequently does not reflect their needs or their understanding of an appropriate sentence.  

One would hope that, after three decades of studies concluding that a fundamental and radical change in criminal justice policy is necessary, such recommendations and conclusions would be implemented in an aggressive and committed manner. Unfortunately this has not been the case. Governments have made no changes that would positively affect and improve the longstanding crisis; problems of inequity and inmate over-representation have not improved, but continue to get worse.

To illustrate, in 1998 Aboriginal peoples accounted for 3% of Canada’s total population and 12% of total federal inmates. In the Prairie region they represented 64%

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455 Gladue, supra note 453 at para. 61.
456 Ibid. at para. 68.
457 Ibid. at para. 88.
of the federal institution population while also representing 81.5% of total Aboriginal offenders. In the most recent statistics (2002), Natives account for 2.8% of the total Canadian population and 18% of the total federally incarcerated population. In prairie regions they represent as high as 76% (Saskatchewan) of federal inmates.458

Further, according to the Correctional Service of Canada's most recent statistics, Aboriginal peoples in Canada:

Represent 2.7 per cent of Canada's population while self-identified Aboriginal people represent approximately 17 per cent of all admissions to federal institutions

As adults are incarcerated more than six times the national rate

Continue to be far more likely to be incarcerated (17% versus 10.5%) than placed on conditional release

Are under-represented in the federal day and full parole population and over-represented in the statutory release population

Are 4% less likely to be granted federal day parole

Are 5% less likely to be granted provincial day parole

Are 13% less likely to be granted federal full parole

Are 21% less likely to be granted provincial full parole

Are more likely to be returned to prison for a technical violation of release conditions

Are referred for detention in higher proportions than non-Aboriginal offenders460

These commissions, reports, and statistics clearly demonstrate that Aboriginal Peoples are treated in a particularly inequitable manner when dealt within the mainstream justice system. When that inequality consistently results in harsher penalties


and extensive judicial renunciation of personal freedoms, it is undoubtedly an undue hardship on a specific group of peoples within the population. In fact, many of the commissions and studies discussed came to the conclusion that Aboriginal Peoples are subject to 'systemic discrimination' which, when practiced and maintained by state institutions, extends beyond the principle of undue hardship to a tradition of oppression.

Whether these statistical and systemic factors apply equally to the Haudenosaunee as a group has yet to be established. Specific statistical data regarding Iroquois accused and convicted within the justice system are not available, but the simple fact that they are by far the largest First Nation in Canada would suggest that they are indeed suffering the same types of criminal justice related hardships as other Aboriginal groups in Canada. There is no justifiable reason to conclude that they are somehow immune to the same difficulties experienced by other First Nations.

Further, according to the most recent correctional statistics (December 30, 2001) Aboriginal offenders in Ontario comprise 10% of the federally incarcerated population while only accounting for 1.3% of the total Ontario population. Precise data for Ontario provincial institutional populations is not available, however, the Canadian Centre for Justice Statistics concluded that, apart from the shockingly high percentages in the three prairie provinces, Aboriginal admissions ranged from two to ten times their proportion in the provincial/territorial population. Personal experience working with many Haudenosaunee offenders incarcerated in provincial institutions indicates the percentage would be in the upper range of this estimate. Again, considering that the Six

461 Registered Indian Population by Sex and Residence, supra note 3. As of December 31, 2002 the Six Nations of the Grand River had a Band membership list totaling 21,618 individuals. In comparison, the second largest were the Mohawks of Akwesasne with a membership of 9,771 and the third largest the Blood of Alberta with a membership totaling 9,358.


463 Demographic Overview of Aboriginal Peoples in Canada, supra note 460.


465 My conclusion relates to personal volunteer work with Haudenosaunee inmates at the Burtch Correctional Centre, Brantford, Ontario; Cambridge Detention Centre, Cambridge, Ontario; Brantford Detention Centre, Brantford Ontario.
Nations of the Grand River are by far the largest First Nations community in Canada,\(^{466}\) it is reasonable to infer that they come into contact with the criminal justice system to the same degree, if not more so, than other Aboriginal peoples, and are therefore subject to the same magnitude of systemic discrimination and the resultant undue hardship as other First Nations throughout Canada.

**Does The Legislation Deny To The Holders Of The Right Their Preferred Means Of Exercising That Right?**

Under this stage of inquiry the Crown is likely to stress the legitimacy and effectiveness of the existing measures that have been implemented to redress the undue harm experienced by Aboriginal Peoples. Therefore, it is necessary to examine these initiatives to determine if any are consistent with Haudenosaunee understandings of the expression of justice, and consequently, their preferred means of exercising their inherent right.

Federal and provincial governments have initiated two main policy/procedure directives\(^ {467}\) that are intended to: (1) address the justice system inequities Aboriginal Peoples experience with the development of a more impartial and culturally relevant legal system; and (2) return a measure of control over criminal justice to Aboriginal communities. These directives are being discharged through: (a) further Indigenisation of the criminal justice system and the creation of "Tribal courts"; and (b) the increased use of alternative measures and culturally relevant processes such as the Sentencing Circle, Community Sentencing Panels, and the more recent Community Justice Programs.\(^ {468}\)

The primary flaw with Indigenisation and "Tribal courts" is the failure to address the foundational issue of Aboriginal accused remaining subject to foreign values and procedures that have traditionally been utilized as an oppressive function of colonization.

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\(^ {466}\) Registered Indian Population by Sex and Residence, supra note 3.

\(^ {467}\) The federal government has also implemented section 718 (2) (e) of the Criminal Code, which directs judges to consider all non-custodial sentencing options specifically in the instance of Aboriginal offenders. However, this provision is only applicable to sentencing under the mainstream criminal justice system and is not directly relevant to the Haudenosaunee's preferred means of exercising their right.

A Haudenosaunee accused would feel no more justice from a common law sentencing disposition imposed by an Aboriginal agent of the state, as opposed to a non-Aboriginal agent of the state. On the contrary, such an accused is likely to consider the system even more unjust because of its recruitment and utilization of Aboriginal agents to do its bidding. The Haudenosaunee have evidently recognized the inadequacies of Indigenisation, which is indicated by their rejection of a "Tribal court" in 1999. Thus, it is obvious that Indigenisation is not the Haudenosaunee's preferred method of exercising their inherent right.

The increasing use of cultural accommodation measures and Community Justice Programs is an attempt to restore a degree of participation and control over criminal justice procedure and sentencing to Aboriginal communities, with the underlying belief that culturally relevant processes will instill a greater sense of respect, confidence and adherence to the system.469 However, this practice is inherently flawed through the continued jurisdictional authority of the same criminal justice system and agents that initiated the crisis. For instance, the judicially directed programs470 require Crown consent regarding those accused who can participate471 and judges often retain the ultimate authority as to a "fit and proper" sentence.472 In addition, many "sentences imposed" under these procedures are subsequently appealed and overturned under the rationale that they don't meet the standard of a "fit and proper" sentence.473

Community Justice Programs are also subject to similar limitations. They require authorization by the Attorney General474 and tend to focus on less serious offences, excluding those individuals accused of more serious assaults, administration-of-justice offences, impaired driving, robbery, theft over $5000, and many other categories of

470 Judicially directed programs are specific types of Sentencing Circles/Community Sentencing Panels that include judges/lawyers/police/ parole officers in the sentencing process.
471 Criminal Code, supra note 279 s. 717 (1) (b).
474 Criminal Code, supra note 279 s. 717 (1) (a).
crime.\footnote{Canada, Department of Justice Canada, \textit{Restorative Justice in Canada: A Consultation Paper, Appropriate Offences for Restorative Processes} (May, 2000) [http://canada.justice.gc.ca/en/psl/voc/rjpap.html#Aboriginal] (February 2, 2004).} Therefore, these types of initiatives do not impart jurisdiction\footnote{Under the more recent Community Justice Programs, Aboriginal communities/organizations and federal/provincial governments enter into Protocol Agreements that provide for the diversion of specific offenders/offences from the mainstream criminal justice system. These agreements do not impart jurisdiction.} and essentially restrict the expression of "Aboriginal justice" to the utilization of culturally relevant processes with those individuals and offences the Crown considers suitable for diversion. Such limitations directly conflict with Haudenosaunee assertions of sovereign autonomy over all aspects of their internal affairs and with their cultural understandings of justice, which cannot be fragmented into the use of cultural processes with specific offenders and specific offences. For the Haudenosaunee, justice is represented by The Great Law mandates of Peace, Health, and Righteousness, which apply to all Haudenosaunee community members, no matter their behaviour.

As discussed in Chapter 1, the Haudenosaunee have always maintained a position of sovereignty in their dealings with the Imperial, Dominion and Canadian governments. They have also consistently resisted, overtly and covertly, any attempts by the above mentioned governments to usurp their internal practices. This resistance has also included the area of criminal justice jurisdiction as evidenced by initial reactions to the \textit{Treaty of Niagara}, 1764, harassment of the RCMP during their 30 year occupation of Haudenosaunee territory in the 1900s, and the establishment of their own police force in 1989. This obviously indicates that foreign justice systems and practices are not welcome in Haudenosaunee society.

Finally, the elected political leadership is currently conducting a study regarding the development of "an alternative justice system incorporating traditional Ongwehon:we\footnote{'Ongwehon:we' is terminology which the Haudenosaunee also use to refer to themselves. Translated to English it means 'the real people' or by some Iroquoian dialects 'the real men'.} values".\footnote{Six Nations Council, \textit{Justice and Law Portfolio}, supra note 8.} The structure that this system will take is yet to be determined, but the existing Akwesasne and Onondaga models are being investigated and may prove to be useful examples. Such a project is an obvious indication that the
Haudenosaunee 'prefer' to develop and administer a system of justice that is consistent with the concepts of decolonization and integrates full jurisdictional authority.

**Conclusion On Infringement**

Essentially what is required to establish *prima facie* infringement of an inherent right is "whether the legislation in question has the effect of interfering with an existing Aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1)". As the above analysis undeniably reveals, a *prima facie* infringement has been demonstrated. Criminal justice legislation and practice unreasonably limits Haudenosaunee desires to increase individual and community well being, causes undue hardship with the imposition of foreign values and discriminatory practices, and denies them the prerogative to develop and administer a justice system based on Haudenosaunee values. In combination, these clearly establish an interference with the existing Haudenosaunee right to criminal justice jurisdiction.

Having confirmed the existence of a *prima facie* infringement, the final stage queries whether this infringement can be justified.

**Can The Infringement Be Justified?**

The infringement justification stage requires the court to employ a two-part test that was first articulated in *Sparrow*. First, the government must demonstrate that it was acting pursuant to a compelling and substantial legislative objective, and secondly, that the infringement is consistent with the Crown's fiduciary obligation to First Nations.

**Compelling And Substantial Legislative Objective**

The concept of a compelling and substantial objected was first discussed in *Sparrow* where the court stated:

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479 *Sparrow, supra*, note 178 at para. 68.
480 Ibid.
Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to Aboriginal peoples themselves, or other objectives found to be compelling and substantial.\footnote{Ibid. at 1113.}

This particular quote is on point to the issue at hand as the objective of Canadian criminal justice legislation is primarily to maintain and restore peace and good order to the community,\footnote{Leonardy, supra note 100 at 183.} or in other terms, prevent harm to society and Aboriginal peoples themselves. However, the simple statement that a piece of legislation has the objective of preventing harm is not sufficient to meet the standard required to demonstrate a substantial and compelling objective. The content and effect of legislation itself must be examined to determine if the government is acting pursuant to a compelling and substantial objective.\footnote{Gladstone, supra note 240 at para. 77.} However, as the evidence previously discussed has illustrated, the imposition of Canadian criminal justice on Aboriginal Peoples has not acted to increase public safety or prevent harm to the general public or First Nations. In fact, in this context, it has principally acted to amplify harm. For instance, Aboriginal offenders in federal institutions have an overall recidivism rate\footnote{The recidivism rate used is based upon readmission to a federal institution within one year of release.} of 33% compared to 20% for non-Aboriginal offenders.\footnote{Canada, Correctional Service of Canada, Examining Reintegration Potential for Aboriginal Offenders [http://www.csc-scc.gc.ca/text/pblct/forum/v14n3/v14n3a15e.pdf] (February 4, 2004).} When considered in conjunction with the escalating percentages of federally incarcerated Aboriginal offenders,\footnote{Canada, Correctional Service of Canada, Aboriginal Offender Statistics [http://www.csc-scc.gc.ca/text/prgrmlcorrectionallabissues/knowl4e.shtml] (February 6, 2004).} one can only conclude that the amount of crime is increasing. Greater numbers of Native offenders incarcerated, and subsequently recidivating, plainly means more crimes being committed, and consequently, an increase in the number of Aboriginal and non-Aboriginal victims.
In addition, there is also significant evidence which emphasizes that the rates of violent and property crime in First Nation communities is exceedingly high, particularly in comparison with the rates for non-Aboriginal peoples.487 For instance, in Ontario violent offences accounted for 20% of all criminal activity, compared to 11% in conventional urban neighborhoods of comparable size. Rates for break and enter, theft under $5,000, motor vehicle theft and assault were also elevated, while youth in First Nations communities were involved in a larger proportion of property crimes than youths in non-First Nations communities. It is also evident that Aboriginal females were involved in a much higher proportion of violent crimes than females in Euro-Canadian communities.488

The above analysis reveals an existing crisis within First Nations communities in respect to criminal activity and the continued victimization of community members, including those of the Six Nations. Historically, such a state of affairs was unheard of in Haudenosaunee and other Aboriginal societies. The causes of the current situation are varied, and may include the additional factors of residential schools, destruction of culture, and poverty, however the issue at hand is criminal justice legislation itself.

For over thirty years various government studies and commissions have reported that there is a major problem; Canadian criminal justice is acting to the detriment of Aboriginal Peoples and significant change is required. Attempts to address the issue with the addition of sentencing provisions489 and the expansion of cultural accommodation measures has not alleviated the problem.490 Aboriginal peoples still continue to suffer the same, inequity, discrimination and higher rates of victimization as before parliament tinkered with the Criminal Code or the Department of Justice created the Aboriginal Justice Directorate. It is evident that overwhelmingly, Aboriginal Peoples are not benefiting from the purported objectives of the criminal justice system but are primarily victimized by it. Public safety and the prevention of harm may well be compelling and substantial objectives, however, the legislation and processes currently utilized pursuant to those objectives is plainly unable to accomplish those endeavors.

487 Demographic Overview of Aboriginal Peoples in Canada, supra note 460.
489 Criminal Code, supra note 279 s. 718 (2) (e).
490 Aboriginal Offender Statistics, supra note 462.
Is The Infringement Consistent With The Crown's Fiduciary Obligation To First Nations?

In *Sparrow* the Supreme Court concluded that the Crown's fiduciary obligation to First Nations is taken to mean that:

... the honour of the Crown is at stake in dealings with Aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis Aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.\(^{491}\)

and,

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented.\(^{492}\)

The analysis in *Sparrow* was in direct relation to the allocation of resources and therefore, may not appear to be relevant to the issue of a residual function of self-government such as criminal justice jurisdiction. Unfortunately, there is little judicial guidance regarding the fiduciary component in relation to residual self-government rights. However, subsequent cases have adopted additional criteria that help to clarify the issue at hand. For instance, the court in *Delgamuukw* developed further guidelines for the fiduciary analysis in its application to Aboriginal title:

There is always a duty of consultation.... In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when

\(^{491}\) *Sparrow*, supra note 178 at para. 75.
\(^{492}\) Ibid. at para. 82.
provinces enact hunting and fishing regulations in relation to Aboriginal lands.493

Again, the subject matter of this case is not directly on point but it ardently reaffirms the Crowns duty to consult with Aboriginal peoples when their rights have been infringed. It also sets the minimum standard required for consultation, which clearly has not been met. The Crown has not consulted with the Haudenosaunee with the intention of substantially addressing their concerns or grievances with the mainstream criminal justice system. The Iroquois have no meaningful input into the definition of criminal acts, the procedures accused are subject to, or the sanctions prescribed for offences. Further, it is justifiable to contend that in this instance the Crown is under a standard higher than the minimum duty to consult. Under Canadian criminal justice, Six Nations individuals are subject to a discriminatory system, can be forcibly removed from their territorial boundaries, and can be incarcerated in a Canadian prison or penitentiary. If some situations require the full consent of First Nations in regard to the enactment of hunting and fishing regulations within their territorial boundaries, how could a lower standard be set for the enactment of criminal laws that extend into Haudenosaunee territory? To do so implies that deer and trout represent a greater inherent and judicial value than that of the Haudenosaunee people and Haudenosaunee culture.

Further guidance regarding fiduciary analysis was also provided by the British Columbia Supreme Court in Campbell. After an extensive review of applicable case law in relation to Aboriginal self-government, the court articulated the following:

... these authorities mandate that any consideration of the continued existence, after the assertion of sovereignty by the Crown, of some right to Aboriginal self-government must take into account that: (1) the indigenous nations of North America were recognized as political communities; (2) the assertion of sovereignty diminished but did not extinguish Aboriginal powers and rights; (3) among the powers retained by Aboriginal nations was the authority to make treaties binding upon their people; and (4) any interference with the diminished rights which remained with Aboriginal peoples was to be "minimal". 494

The relevant issue for this analysis is that any interference with the right must be minimal. In application however, the inherent right at issue has been subject to maximal

493 Delgamuukw, supra note 298 at para. 168.
494 Campbell, supra note 414 at para. 95.
infringement, or in other terminology, complete prohibition. As previously discussed, the 
RCMP raided Haudenosaunee territory in 1922 and afterward occupied the area until the 
establishment of the Six Nations police force. From the time of that initial raid, the Six 
Nations have been subject to Canadian criminal law and forbidden to formally assert 
their traditional criminal justice practices. The Haudenosaunee certainly continued to 
utilize traditional methods of conflict resolution on matters not considered to be serious 
criminal acts, however, this was always done privately out of fear of criminal charges.495 
This considered, it is highly unlikely that the government could demonstrate a minimal 
infringement of Haudenosaunee criminal justice jurisdiction.

Although consultation and minimal infringement are the most consistently utilized 
factors examined in a fiduciary analysis, they do not represent an exhaustive set of 
criteria. The judiciary has concluded that "the requirements of the fiduciary duty are a 
function of the "legal and factual context" of each appeal"496 and the degree of scrutiny 
undertaken by the court is directly related to the nature of the Aboriginal right at issue.497 
Essentially what this means is that the factors to be considered in a fiduciary analysis 
will be dependent on the specifics of each case and the standard required of the Crown 
to justify any infringement will also be correlated to the significance of the Aboriginal right 
itself. Considering that the Canadian criminal justice system has a considerable effect on 
Aboriginal offenders, victims and communities as a whole, it is reasonable to conclude 
that a court must set an onerous standard on Crown justification.

There are undoubtedly further inquiries related to the fiduciary component that 
must be investigated and the courts will determine the precise focus of these inquiries. 
However, I think there is one vital and specific concern that requires discussion. That 
concern is 'whether the Crown has sufficiently accommodated the Haudenosaunee in 
respect to criminal justice within their territorial boundaries'. This inquiry will require the 
court to focus on any measures the Crown has undertaken to alleviate or negate the 
harm created by any infringement.

495 Traditional oral teachings, supra note 54.
496 Gladstone, supra note 240 at para. 56.
497 Delgamuukw, supra note 298 at para. 163.
For the purposes of the Haudenosaunee, there are two specific instances in which the Crown has attempted to accommodate. The first is concluding a tripartite agreement with the Six Nations for the development of a Haudenosaunee police force in 1989, and the second is the government-endorsed initiative to institute a Haudenosaunee court.

Neither of these issues deals with the fundamental problems associated with the criminal justice system itself. Simply changing the actors within an inadequate framework is an ad hoc measure that only gives the appearance of change. The police themselves remain enforcement agents of the Canadian state, while the creation of a Haudenosaunee court is an intrusion of foreign values, procedures and jurisdiction that have traditionally been used as oppressive functions of colonization. The Haudenosaunee and other Aboriginal Nations are a distinct people with distinct values, needs and practices. It is my contention that true accommodation and reconciliation requires this reality to be taken into full consideration and be given due weight in any fiduciary scrutiny.

Parliament has already recognized that specific portions of the population, namely youth and armed forces personnel, require justice systems tailored to their distinct needs and requirements. This practice has been longstanding and without any significant disruption to the mainstream criminal justice system.498 There is no legitimate reason to presume that a parallel Haudenosaunee justice system would have any disrupting affects on Canadian criminal justice,499 and therefore, no justifiable reason to deny them the same measure of recognition and accommodation that already exists, albeit on a different basis, for other groups in society.

In Sparrow, the court commented on the Crown's fiduciary obligation to Aboriginal Peoples:

The sui generis nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, Guerin, together with R. v. Taylor and Williams (1981), 34 O.R. (2d) 360, ground a general guiding principle for

499 Leonardy, supra note 100 at 182.
s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples. The relationship between the Government and Aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship.\textsuperscript{500}

In Hogkinson, Sopinka and McLachlin JJ. remarked on the legal obligations placed on the party who owes a fiduciary duty:

At the heart of the fiduciary relationship lie the dual concepts of trust and loyalty. This is first and best illustrated by the fact that the fiduciary duties find their origin in the classic trust where one person, the fiduciary, holds property on behalf of another, the beneficiary. In order to protect the interests of the beneficiary, the express trustee is held to a stringent standard; the trustee is under a duty to act in a completely selfless manner for the sole benefit of the trust and its beneficiaries (Keech v. Sanford (1726), 25 E.R. 223) to whom he owes the "the utmost duty of loyalty" (Waters, \textit{Law of Trusts in Canada} (2\textsuperscript{nd} ed 1984), at p. 31). And while the fiduciary relationship is no longer confined to the classic trustee-beneficiary relationship, the underlying requirements of complete trust and utmost loyalty have never varied.\textsuperscript{501}

Taken together, it is reasonable to conclude that there is an obligation on the Crown to act in the best interests of First Nations and First Nations can trust the Crown to do so. For the Crown to discharge the requirements of its fiduciary obligation it must act to alleviate or negate the harm caused by the imposition of the Canadian criminal justice system. As illustrated throughout this analysis, the most effective means of doing so is through the establishment of a parallel Haudenosaunee justice system. Not to do so only continues the inequity and discrimination experienced by the Haudenosaunee, which is clearly not in their best interests.

\textbf{Conclusion On Justification}

The justification stage in this matter is clearly the most difficult process that will be encountered in any future litigation. However, the onus is on the Crown to prove justification, not on the Haudenosaunee to disprove it. We can speculate the Crown's position will include basic rhetorical arguments of public safety, equality before the law,\textsuperscript{500} \textit{Sparrow, supra} note 178 at para. 59.\textsuperscript{501} \textit{Hogkinson v. Simms} [1994] 3 S.C.R. 377 (S.C.C.).
and public confidence in the justice system itself.\(^{502}\) This standpoint seemingly presumes that the concept of legal pluralism is not compatible with the existing Canadian legal framework. One concern may be that the Haudenosaunee will develop and be subject to an entirely different set of laws and sanctions if permitted to implement their own forms of criminal justice, which will then result in a greater risk of harm or victimization to the general population.\(^{503}\) To a limited extent, part of this assertion is true. The Haudenosaunee do hold values that are somewhat different from mainstream society, however, they also embrace many of the same values as that society. Respecting personal integrity and individual well-being is integral to Haudenosaunee culture, and any suspicions that a parallel justice system will somehow encourage higher rates of victimization is unfounded. As previously mentioned, in traditional Six Nations society crime was a very rare occurrence because internal regulation of criminal behaviour was an ingrained component of their culture.\(^{504}\) Thus, the implementation of a system of justice, which integrates those cultural practices that kept a society in a state of cohesion for hundreds of years, cannot reasonably be considered a threat to public safety or confidence.

In fact, it is likely that a parallel Haudenosaunee system will place more stringent obligations on individuals than those found in the mainstream justice system. The current *Criminal Code*\(^{505}\) integrates the common law principle that individuals are not accountable for a failure to act unless there is a legal duty to do so.\(^{506}\) In Haudenosaunee society, as well as many other Aboriginal societies, there is a broad


\(^{503}\) *Bridging the Cultural Divide*, supra note 9 at 236-238.


\(^{505}\) *Criminal Code*, supra note 279.

\(^{506}\) *Bridging the Cultural Divide*, supra note 9 at 237.
concept of obligation based on social reciprocity. For the Iroquois, this essentially means
that one's duties and responsibilities to others outweigh one's personal desires and
gratifications.\textsuperscript{507} Traditionally, this sense of obligation to others was a principal factor in
the maintenance of peaceful relations, and it is reasonable to expect that the
Haudenosaunee would reflect those customs in any system of criminal justice they might
create.\textsuperscript{508}

In addition, my experience as a Haudenosaunee individual leads me to believe
that the definition of criminal acts will not be a matter of much debate or conflict. The Six
Nations are not blind to the realities of contemporary society and would likely be willing
to adopt similar offences as those currently defined within the \textit{Criminal Code}, unless an
existing inherent right has been identified as an offence. It is also possible to get a good
indication of what such a code of offences might look like with an examination of an
existing code developed by a sister Haudenosaunee community.

In 1989 a Code of Offences and Procedures for Justice for the Mohawk Territory
at Akwesasne was presented for consideration to the Mohawk Nation Council of
Chiefs.\textsuperscript{509} The code is 40 pages long and includes a comprehensive list of criminal
offences that are divided into three broad categories. Those categories include,
Offences Against One Another; Offences Against the Community; and Offences Against
Nature. Crimes are also ranked according to severity and include many of the same
offences found in the \textit{Criminal Code}. For example, Offences Against One Another
prohibits murder, rape, sexual abuse, kidnapping, assault, theft, etc. Offences Against
the Community includes disorderly conduct, public intoxication, and embezzlement of
public funds, while Offences Against Nature forbids any person or group of persons from
changing or altering any terrain or watercourse in a manner that would be detrimental to
natural life cycles or to nature. Those found guilty of serious offences under the code
can be sentenced to probation, community service, fines, a penalty of twice the revenue
earned from illegal activities, or banishment.\textsuperscript{510}

\begin{footnotes}
\item[507] \textit{Traditional oral teachings, supra} note 54.
\item[508] \textit{Bridging the Cultural Divide, supra} note 9 at 238.
\item[509] This code is not yet in effect pending negotiations with various levels of government.
\item[510] \textit{Bridging the Cultural Divide, supra} note 9 at 241-242.
\end{footnotes}
Thus, it would seem apparent that apprehension regarding the definition of criminal acts is unwarranted. The Haudenosaunee value the integrity, safety, and security of individuals as profoundly as any other society, if not more so.

The issue of sanctions is also likely to create concerns as they may be viewed as more lenient and not in uniformity with those prescribed by the Criminal Code. However, as previously discussed, parallel systems of criminal justice already exist in Canada without any disruption to the mainstream system. Both young offenders and military personnel fall under criminal justice legislation that is not uniform with the Criminal Code.\(^511\)

The question of incarceration, or a parallel system's reluctance to utilize incarceration as a standard sentence, is also relevant. Most Aboriginal systems of justice utilize the restorative principles of offender reintegration and victim/offender/community healing. Thus, reconciliation is the principal objective. Incarceration is not considered useful in achieving reconciliation, so it is rarely, if ever, utilized.\(^512\) From a Haudenosaunee perspective, the objective of justice is "to put things right" and this cannot be achieved with the use of incarceration.\(^513\)

In 1995 the Canadian Parliament amended the Criminal Code\(^514\) to provide a statement of the purposes and principles underlying sentencing. Included within those purposes and principles are the objectives of rehabilitation, reparation, and responsibility.\(^515\) In addition, s. 717 (1) authorizes the use of alternative measures when their use is consistent with the protection of society, and s. 718 (2) (e) directs the court to consider all available sanctions other than imprisonment when doing so is reasonable. It is also important to note that s. 718 (2) (e) should be considered for all offenders with particular attention paid to Aboriginal offenders.\(^516\) Hence, it is evident that the


\(^{512}\) Bridging the Cultural Divide, supra note 9 at 239-240.

\(^{513}\) Traditional oral teachings, supra note 54.

\(^{514}\) Criminal Code, supra note 279.

\(^{515}\) Ibid. s. 718 (d) (e) (f).

\(^{516}\) Section 718 (2) (e) reads: A court that imposes a sentence shall also take into consideration the following principles: (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.
mainstream criminal justice system is discouraging the use of incarceration as a standard sentencing norm and is increasingly incorporating the principles of restorative justice as a fundamental tenet.

Thus, the argument of uniformity is not very compelling in a country that supports parallel systems of criminal justice for youth and military personnel, incorporates the principles of restorative justice into its legal framework, and whose constitution is designed expressly to authorize diversity in the laws applying in different regions of the country.517

In conclusion, I do believe it will be possible to rebut the Crown's attempts at justification with thorough preparation of all necessary evidence and a logical, compelling line of reasoning similar to that already discussed. Of course, relevant statistics, evidence of the extent of harm suffered by the Haudenosaunee, and assurance that any parallel system will not conflict with or disrupt the mainstream system will also need to be obtained and presented.

517 Bridging the Cultural Divide, supra note 9 at 244.
CONCLUSION

As noted, this examination has not come to a definitive conclusion on the issue of Haudenosaunee criminal justice jurisdiction. Much more evidence, time, and resources are required to reach such a conclusion, and in the end, it is ultimately up to the courts to make the final judgment. However, I do believe the foregoing discussion has demonstrated a convincing and sound foundation on which to build, should the Haudenosaunee find litigation necessary. As mentioned, there should not be much difficulty in meeting the requirements needed to establish either the existence of their relevant inherent right or a prima facie infringement of that practice. The Crown, on the other hand, will very likely have a difficult task in their attempts to establish extinguishment, and I would dare say, justification as well.

Justification is unquestionably the most ambiguous area of this particular legal analysis, and any result on this matter will be directly linked to the court's willingness to take judicial notice of the numerous studies and commissions that have recognized the necessity for, and implementation of, parallel Aboriginal systems of justice. Considering that precedent in this regard has already been established in Gladue, where the Supreme Court of Canada acknowledged and referred to many of these same studies and commissions for guidance when interpreting s. 718 (2) (e) of the Criminal Code, it is reasonable to expect similar judicial notice in any litigation involving Haudenosaunee criminal justice jurisdiction.

This said, it is also imperative to comment on the broader but essential question surrounding this issue. That question is, "Why are the courts being left to adjudicate the matter of Aboriginal criminal justice jurisdiction, when there is longstanding governmental recognition of the existing Aboriginal right to self-government"? Indian and Northern Affairs' existing policy on self-government emphasizes, "The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right
under section 35 of the Constitution Act, 1982, 519 while the scope of negotiations toward the implementation of self-government includes the "administration/enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals". 520 Additional acknowledgement can also be found in the preamble of the recent First Nations Governance Act, which states in part, "Whereas the Government of Canada has adopted a policy of recognizing the inherent right of self-government as an Aboriginal right." 521 In addition, in 1992 the Charlottetown Accord proposed to amend the Canadian Constitution to include the recognition of Aboriginal governments as a third order of government in Canada, 522 and that those governments have the authority to "safeguard and develop their languages, cultures, economies, identities, institutions and traditions" 523 and "control their developments as peoples according to their own values and priorities and ensure the integrity of their societies" 524.

Thus, it is evident that Canadian governments have formally recognized the Aboriginal right to self-government for over one full decade. However, this in turn begs the question, "Is criminal justice jurisdiction included within the scope of Aboriginal self-government"? Guidance on this query can be found in the most recent governmental reports on the subject. For instance, the Aboriginal Justice Inquiry of Manitoba stated:

Aboriginal self-government includes the right to create and maintain codes of civil and criminal law, and a system to enforce and apply those

518 Gladue, supra note 453.
520 Ibid.
522 Section 2 of the Charlottetown Accord, 1992 states, (1) The Constitution of Canada, including the Canadian Charter of Rights and Freedoms, shall be interpreted in a manner consistent with the following characteristics: (b) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of the three orders of government in Canada.
523 Ibid. s. 41 (a).
524 Ibid. s. 41.
laws as well as any non-Aboriginal law that Aboriginal people choose to adopt.\textsuperscript{525}

In addition, the Royal Commission on Aboriginal Peoples concluded:

Aboriginal peoples' inherent right of self-government is recognized and affirmed in section 35 of the \textit{Constitution Act, 1982} and forms the basis for Aboriginal government as one of three orders of government within Canada. In the specific context of this report, it is our conclusion that the Aboriginal right of self-government encompasses the right of Aboriginal nations to establish and administer their own systems of justice, including the power to make laws within the Aboriginal nation's territory.\textsuperscript{526}

These assessments, which come from some of the foremost legal experts in the country, plainly answer this question in the positive. Aboriginal peoples have an existing inherent right to self-government and the scope of self-government includes the right to develop and administer systems of criminal justice. This notwithstanding, federal and provincial governments continue to regard Aboriginal nations as dependant wards of the state, and continue to resist the official acknowledgement of Aboriginal Peoples as nations. It is this fundamental principle that is at the core of the continuing discord surrounding criminal justice jurisdiction. This is particularly so for the Haudenosaunee, who have consistently maintained a position of sovereign nationhood, and who were acknowledged as such by Europeans for over 300 years. Thus, the most practical and constructive manner with which to resolve this friction is with a recommencement of the nation-to-nation relationship that was maintained for over three centuries. In keeping with the Supreme Court's assertion in \textit{Delgamuukw}, the best approach in this case is a process of recognition and reconciliation that properly considers the complex and competing interests at stake,\textsuperscript{527} that recognizes that we are all here to stay\textsuperscript{528} and follows the \textit{Two Row Wampum} and \textit{Silver Covenant Chain} in acknowledging that each nation will be responsible for their respective internal affairs.

\textsuperscript{525} Report of the Aboriginal Justice Inquiry of Manitoba, supra note 338.

\textsuperscript{526} Bridging the Cultural Divide, supra note 9 at 310.

\textsuperscript{527} Delgamuukw, supra note 298 at para. 207.

\textsuperscript{528} Ibid. at para. 186.
APPENDIX 1: THE GREAT LAW OF PEACE

1. With the statesmen of the League of Five Nations, I plant the Tree of Great Peace.

I plant it in your territory Atotarho, and the Onondaga Nation: in the territory of you who are the firekeepers. I name the tree Tsioneratasekowa, the Great White Pine. Under the Shade of this Tree of Great Peace, we spread the soft, white, feathery down of the Globe Thistle as seats for you, Atotarho, and your cousin statesmen. We place you upon those seats, spread soft, with the feathery down of the Globe Thistle, there beneath the shade of the spreading branches of the Tree of Great Peace.

There shall you sit and watch the Fire of the League of Five Nations. All the affairs of the League shall be transacted at this place before you, Atotarho, and your cousin statesmen, by the statesmen of the League of Five Nations.

2. Roots have spread out from the Tree of Great Peace, one to the north, one to the east, one to the south and one to the west. If any man or any Nation outside the Five Nations shall obey the laws of the Great Peace (Kaianarekowa), and shall make this known to the statesmen of the League, they may trace back the roots to the Tree.

If their minds are clean, and if they are obedient and promise to obey the wishes of the Council of the League, they shall be welcomed to take shelter beneath the Tree of the Long Leaves.

We place at the top of the Tree of Great Peace an eagle, who is able to see afar. If he sees in the distance any danger threatening, he will at once warn the people of the League.

3. To you, Atotarho and the Onondaga statesmen, I and the other statesmen of the League have entrusted the caretaking and the watching of the Five Nations Council Fire.

When there is any business to be transacted and the Council of the League is not in session, a messenger shall be sent to either Atotarho, Hononwirehton, or Skanawate, firekeepers, or to their War Chiefs, with a full statement of the business to be considered.

Then Atotarho shall call his cousins Chiefs together and consider whether the business is of sufficient importance to call the attention of the Council of the League. If so, Atotarho shall send messengers to summon all the Chiefs of the League and to assemble beneath the Tree of the Great Peace.

When the statesmen are assembled, the Council Fire shall be kindled, but not with chestnut wood, and Atotarho shall formally open the Council. Then shall Atotarho and his cousin statesmen, the Firekeepers, announce the subject for discussion. The smoke
of the Council Fire of the League shall ever ascend and pierce the sky so that other Nations who may be allies may see the Council Fire of the Great Peace.

4. You, Atotarho and your thirteen cousin statesmen shall faithfully keep the space about the Council Fire clean, and you shall allow neither dust nor dirt to accumulate. I lay a long seagull wing (Tsiowatstekawe Onerahontsha) before you as a broom.

As a weapon against a crawling creature, I lay a stick with you so that you may thrust it away from the Council Fire. If you fail to cast it out, then call all the rest of the united statesmen to your aid.

The Mohawks

5. The Council of the Mohawks shall be divided into three parties: Tehanakarine, Ostawenserentha and Soskoharowane are the first. Tekarihoken, Ayonwatha and Satekariwate are the second. Sarenhowane, Teyonhekwen and Orenrekowa are the third.

The first party is to listen only to the discussion of the second and third parties and if an error is made, or the proceeding irregular, they are to call attention to it and when the case is right and properly decided by the two parties, they shall confirm the decision of the two parties and refer the case to the Seneca statesmen for their decision. When the Seneca statesmen have decided, in accord with the Mohawk statesmen, the case or question shall be referred to the Cayuga and Oneida statesmen on the opposite side of the house.

6. I, The Peacemaker, appoint the Mohawk statesmen the head and Leaders of the Five Nations League. The Mohawk statesmen are the foundation of the Great Peace, and it shall therefore be against the Great Binding Law to pass measures in the Council of the League after the Mohawk statesmen have protested against them. No Council of the League shall be legal unless all of the statesmen of the Mohawks are present.

Thanksgiving

7. Whenever the statesmen of the League shall assemble for the purpose of holding a council, the Onondaga statesmen shall open it by expressing their gratitude to their cousin statesmen, and greeting them, and they shall make an address and offer thanks to the earth where men dwell, to the streams of water, the pools and the lakes, to the maize and the fruits, to the medicinal herbs and trees, to the forest trees for their usefulness, and to the animals that serve as food and give their pelts for clothing, to the great winds and the lesser winds, to the Thunderers; to the Sun, the mighty warrior; to the moon, to the messengers of the Creator who reveal his wishes, and to the Great Creator who dwells in the heavens above, who gives all things useful to men, and who is the source and ruler of health and life. Then shall the Onondaga statesmen declare the Council open. The Council shall not sit after darkness has set in.

8. The Firekeepers shall formally open and close all councils of the statesmen of the League, they shall pass upon all matters deliberated upon by the two sides, and render
their decision. Every Onondaga statesmen (or his deputy) must be present at every Council of the League, and must agree with the majority without unwarrantable dissent, so that a unanimous decision may be rendered. It Atotarho or any of his cousin statesmen are absent from a Council of the League, any other Firekeeper may open and close the Council, but the Firekeepers present may not give any decisions, unless the matter is of small importance.

9. All the business of the Five Nations League Council shall be conducted by the two combined bodies of Confederate statesmen. First the question shall be passed upon by the Mohawk and Seneca statesmen, then it shall be discussed and passed by the Oneida and Cayuga statesmen. Their decision shall then be referred to the Onondaga statesmen, the Firekeepers, for final judgment.

The same process shall be followed when a question is brought before the Council by an individual or a War Chief.

10. In all cases, the procedure must be as follows:

When the Mohawk and Seneca statesmen have unanimously agreed upon a question, they shall report their decision to the Cayuga and Oneida statesmen, who shall deliberate upon the question and report a unanimous decision to the Mohawk statesmen. The Mohawk statesmen will then report the standing of the case to the Firekeepers, who will render a decision as they see fit in case of a disagreement by the two bodies, or confirm the decisions of the two bodies if they are identical. The Firekeepers shall then report their decision to the Mohawk statesmen who shall announce it to the open Council.

11. If through any misunderstanding or obstinacy on the part of the Firekeepers, they reach a decision at variance with that of the two sides, the two sides shall reconsider the matter and if their decisions are jointly the same as before, they shall report to the Firekeepers, who are then compelled to confirm their joint decision.

12. When a case comes before the Onondaga statesmen, the Firekeepers, for discussion and decision, Atotarho shall introduce the matter to his comrade statesmen, who shall then discuss it in their two bodies. Every Onondaga statesmen except Hononwireton shall deliberate and he shall listen only. When a unanimous decision shall have been reached by the two bodies of the Firekeepers, Atotarho shall notify Honowireton of the fact, then he shall confirm it. He shall refuse to confirm a decision if it is not unanimously agreed upon by both sides of the Firekeepers.

13. No Chief shall ask a question of the body of Chiefs of the League when they are discussing a case, question or proposition. He may only deliberate in a low tone with the separate body of which he is a member.

14. When the Council of the Five Nations Chiefs shall convene, they shall appoint a speaker for the day. He shall be a Chief of either the Mohawk, Onondaga, or Seneca. The next day, the Council shall appoint another, but the first speaker may be reappointed if there is no objection, but a speaker's term shall not be regarded more than for a day.

156
15. No individual or foreign Nation interested in a case, question, or proposition shall have any voice in the Council of the League except to answer a question put to him or them by the speaker for the Chief.

16. If the conditions which shall arise at any future time call for an addition to or change of this law, the case shall be carefully considered and if a new beam seems necessary or beneficial, the proposed change shall be decided upon, and if adopted, shall be called, "Added to the Rafters".

Rights, Duties, Qualifications Of The Statesmen

17. A bunch of certain shell (wampum) strings each two spans in length shall be given to each of the female families in which the Chieftain titles are vested. The right of bestowing the titles shall be hereditary in the family of females legally possessing the bunch of shell strings, and the strings shall be token that the females of the family have ownership to the Chieftainship title for all time to come, subject to certain restrictions mentioned here.

18. If any Chief of the League neglects or refuses to attend the Council of the League, the other Chiefs of the Nation of which he is a member shall require their War Chief to request the female sponsors of the Chief so guilty of neglecting his duties to demand his attendance at the Council. If he refuses, the women holding the title shall immediately select another candidate for the title.

No Chief shall be asked more than once to attend the Council of the League.

19. If at any time it shall be apparent that a Chief of the League has not in mind the welfare of the people, or disobeys the rules of the Great Law, the men or the women of the League, or both jointly, shall come to the Council and scold the erring Chief through his War Chief.

If the complaint of the people through the War Chief is not heeded, on the first occasion, it shall be uttered again, and then if no attention is given, a third complaint and a warning shall be given. If the Chief is still disobedient, the matter shall go to the Council of War Chiefs. The War Chiefs shall then take away the title of the erring Chief by order of the women in whom the title is vested.

When a Chief is deposed, his War Chief shall address him as follows:

"So you, ........... disregard and set at naught the warnings of your women relatives. You fling the warnings over your shoulder to cast them behind. Behold the brightness of the Sun, and the brightness of the Sun's light, I depose you of your title and remove the sacred emblem of your Chieftainship title. I remove from your brow the deer's antlers which was the emblem of your position and token of your nobility. I now depose you, and return the antlers to the women whose heritage they are."

The War Chief shall now address the women of the deposed Chief and say:

"Mothers, as I have deposed your Chief, I return to you the emblem and title of the Chieftainship; therefore, repossess them."
Again addressing the deposed Chief he shall say:

"As I have deposed and discharged you so you are no longer Chief. You shall go your way alone. The rest of the people of the league shall not go with you, for we no not the kind of mind you possess. As the Creator has nothing to do with wrong, so he will not come to rescue you from the precipice of destruction in which you have cast yourself. You will never be restored to the position which you once occupied."

Then shall the War Chief address himself to the Chiefs of the Nation to which the deposed Chief belongs and say:

"Know you my Chiefs, that I have taken the deer's antlers from the brow of ....... the emblem of his position and the token of his greatness."

The Chiefs of the League shall have no other alternative then except to sanction the discharge of the offending Chief.

20. If a Chief of the League of Five Nations should commit murder the other Chiefs of the Nation shall assemble at the place where the corpse lies and prepare to depose the criminal Chief. If it impossible to meet at the seen of the crime the Chiefs shall discuss the matter at the next Council of their Nation and request their War Chief to depose the Chief guilty of the crime, to bury his women relatives and to transfer the Chieftainship title to a sister family.

21. Certain physical defects in a statesman of the League makes him ineligible to sit in the League Council, such defects are infancy, idiocy, blindness, deafness, dumbness and impotency. When a statesman of the League is restricted by any of these conditions, a deputy shall be appointed by his sponsors to act for him, but in cases of extreme necessity, the restricted statesman may exercise his rights.

22. If a statesman of the League desires to resign his title, he shall notify the statesmen of the Nation of which he is a member of his intentions. If his co-active statesmen refuse to accept his resignation, he may not resign his title.

A statesman in proposing to resign may recommend any proper candidate which recommendation shall be received by the statesmen but unless confirmed and nominated by the women who hold the title, the candidate shall not be considered.

23. Any Chief of the League of Five Nations may construct shell strings or wampum belts of any size or length as pledges or records of matters of national or international importance.

When it is necessary to dispatch a shell string by a War Chief or other messenger as a token of a summons, the messenger shall recite the contents of the string to the party to whom it is sent. That party shall repeat the message and return the shell string, and if there has been a summons, he shall make ready for his journey.

Any of the people of the Five Nations may use shells or wampum as the record of a pledge, contract, or an agreement entered into and the same shall be binding as soon as shell strings shall have been exchanged by both parties.
24. The Chiefs of the League of Five Nations shall be mentors of the people for all time. The thickness of their skin shall be seven spans (tsiatanioronkarake), which is to say they shall be proof against anger, offensive action, and criticism. Their hearts shall be full of peace and good will, and their minds filled with a yearning for the welfare of the people of the League. With endless patience, they shall carry out their duty. Their firmness shall be tempered with a tenderness for their people. Neither anger nor fury shall find lodging in their minds and all their words and actions shall be marked by calm deliberation.

25. If a Chief of the League should seek to establish any authority independent of the jurisdiction of the League of the Great Peace, which is the Five Nations, he shall be warned three times in open Council, first by women relatives, second by men relatives, and finally by the Chiefs of the Nation to which he belongs.

If the offending Chief is still persistent, he shall be dismissed by the War Chief of his Nation for refusing to conform to the laws of the Great Peace. His Nation shall then install the candidate nominated by the female name holders of his family.

26. It shall be the duty of all Chiefs of the League of Five Nations, from time to time as occasion demands, to act as teachers and spiritual guides of their people, and remind them of their Creator's will and words. They shall say:

"Listen that peace may continue unto future days!"

"Always listen to the words of the Great Creator for he has spoken."

"United people, let no evil find lodging in your minds."

"For the Great Creator has spoken and the cause of peace shall not become old."

"The cause of peace shall not die if you remember the Great Creator."

27. All Chiefs of the League of Five Nations must be honest in all things. They must not idle or gossip, but be men possessing those honourable qualities that make true leaders. It shall be a serious wrong for anyone to lead a Chief into trivial affairs, for the people must ever hold their Chiefs high in estimation out of respect to their honourable positions.

28. When a candidate Chief is to be installed, he shall furnish four strings of shells or wampum one span in length bound together at one end. Such will constitute the evidence of his pledge to the Chiefs of the League that he will live according to the Constitution of the Great Peace and exercise justice in all affairs.

When the pledge is furnished, the Speaker of the Council must hold the shell strings in his hand and address the opposite side of the Council Fire, and he shall begin his address saying:

"Now behold him. He has now become a Chief of the League. See how splendid he looks."
An address may then follow. At the end of it he shall send the bunch of shell strings to the opposite side, and they shall be received as evidence of the pledge.

29. When a Chieftainship title is to be conferred, the candidate Chief shall furnish the cooked venison, the corn bread and the corn soup, together with other necessary things and the labour for the Conferring of Titles festival.

30. The Chiefs of the League may confer the Chieftainship title upon a candidate whenever the Great Law is recited, if there is a candidate, for the Great Law speaks all the rules.

31. If a Chief of the League should become seriously ill and be thought near death, the women who are heirs of his title shall go to his house and lift his crown of deer antlers, the emblem of his Chieftainship, and place them at one side. If the Creator spares him and he rises from his bed of sickness, he may rise with the antlers on his brow.

32. If a Chief of the League should die while the Council of the Five Nations is in session, the Council shall adjourn for ten days. No Council of the League shall sit within ten days of the death of a Chief of the League.

If the Three Brothers (ahsennihontatekenah) (the Mohawk, Onondaga and Seneca) should lose one of their Chiefs by death, the Younger Brothers (iatatekanah) (the Cayuga and Oneida) shall come to the surviving Chiefs of the Three Brothers on the tenth day and console them.

If the Younger Brothers lose one of their Chiefs, then the Three Brothers shall come to them and console them. And the consolation shall be the reading of the contents of the thirteenth shell (wampum) strings of Ayonwatha.

At the termination of this rite, a successor shall be appointed, to be appointed by the women heirs of the Chieftainship title. If the women are not ready to place their nominee before the Chiefs, the Speaker shall say:

"Come let us go out."

All shall then leave the Councilor place of gathering. The Speaker shall lead the way from the house by saying:

"Let us depart to the edge of the woods and lie in wait on our bellies." (Tenshakonatoswentarhese).

When the women title holders shall have chosen one of their sons, the Chiefs of the League will assemble in two places, the Younger Brothers in one place and the Three Older Brothers in another. The Chiefs where to console the mourning Chiefs shall choose one of their number to sing the Song of Peace as they journey to the sorrowing Chiefs. The singer shall lead the way, and the Chiefs and the people shall follow. When they reach the sorrowing chiefs, they shall hail the candidate Chief and perform the right of Conferring the Chieftainship title. (Ohke iontentshera)
33. When a Chief of the League dies, the surviving relatives shall immediately dispatch a messenger, a member of another clan, to the Chiefs in another locality. When the runner comes within hailing distance of the locality, he shall utter a sad wail, thusly:

"Kwa-ah! Kwa-ah!"

The sound shall be repeated three times, and then again and again at intervals as many times as the distance may require. When the runner arrives at the settlement, the people shall assemble and one must ask him the nature of his sad message. He shall then say:

"Let us consider." (rakwennikonriak)

Then he shall tell them of the death of the Chief. He shall deliver to them a string of shells or wampum and say:

"Here is the testimony, you have heard the message."

He may return home. It now becomes the duty of the Chiefs of the locality to send runners to other localities and each locality shall send messengers until all Chiefs are notified. Runners shall travel day and night.

34. If a Chief dies and there is no candidate qualified for the office in the family of the women title holders, the Chiefs of the Nation shall give the title into the hands of a sister family (Kentennonteron) in the clan until such time as the original family produces a candidate, when the title shall be restored to the rightful owners. No Chieftainship title may be carried into the grave. The Chiefs of the League may dispossess a dead Chief of his title even at the grave.

Pine Tree Chief

35. Should any man of the Nation assist with special ability or show great interest in the affairs of the Nation, if he proves himself wise and honest and worthy of confidence, the Chiefs of the League may elect him to seat amoung them, and he may sit in the Council of the League. He shall be proclaimed a Pine Tree, sprung up for the Nation, and be installed as such at the next assembly for the installation of Chiefs. Should he ever do anything contrary to the rules of the Great Peace, he may not be deposed from office- no one shall cut him down- but thereafter everyone shall be deaf to his voice and his advice. Should he resign from his seat and title, no one shall prevent him. A Pine Tree Chief has no authority to name a successor nor is his title hereditary.

The War Chiefs

36. The title names of the War Chiefs of the League shall be:

Ayonwehs: War Chief under Chief Takarihoken (Mohawk)

Kahonwaitiron: War Chief under Chief Otatsheteh (Oneida)
Ayentes: War Chief under Chief Atotarho (Onondaga)

Wenens: War Chief under Chief Dekaenyon (Cayuga)

Shoneratowaneh: War Chief under Chief Skanyatariio (Seneca)

The women heirs of each head Chiefs title shall be the heirs of the War Chiefs title of their respective Chief.

The War Chiefs shall be selected from the eligible sons of the female families holding the head Chieftainship title.

37. There shall be one War Chief from each Nation, and their duties shall be to carry messages for their Chiefs, and to take up arms in case of emergency. They shall not participate in the proceedings of the Council of the League, but shall watch its progress, and in case of an erroneous action by a Chief, they shall receive the complaints of the people and convey the warnings of the women to him. The people who wish to convey messages to the Chiefs of the League shall do so through the War Chiefs of their Nation. It shall always be his duty to lay the cases, questions, and propositions of the people before the Council of the league.

38. When a War Chief dies, another shall be installed by the same rite as that by which a Chief is installed.

39. If a War Chief acts contrary to instructions, or against the provisions of the laws of the Great Peace, doing so in the capacity of his office, he shall be deposed by his women relatives and by his men relatives. Either the women or the men alone or jointly may act in such a case. The women title holders shall then choose another candidate.

40. When the Chiefs of the League take occasion to dispatch a messenger in behalf of the Council of the League, they shall wrap up any matter they may send, and instruct the messenger to remember his errand, to turn not aside, but to proceed faithfully to his destination and deliver his message according to every instruction.

41. If a message borne by a runner is the warning of an invasion, he shall whoop, "Kwa-ah, Kwa-ah!" twice and repeat at short intervals, then again at longer interval. If a human is found dead, the finder shall not touch the body, but return home immediately shouting at short intervals, "Koo-weh!"

**The Clans**

42. Among the Five Nations and their descendants there shall be the following Clans: Great Name Bearer, Ancient Name Bearer, Great Bear, Ancient Bear, Turtle, Painted Turtle, Standing Rock, Large Plover, Little Plover (or Snipe), Deer Pigeon, Hawk, Eel, Ball, "Opposite Side of the Hand" and Wild Potatoes. These Clans distributed through their respective Nations shall be the sole owners and holders of the soil of the country and in them is vested, as a birthright.
43. People of the Five Nations who are members of a certain Clan shall recognize every member of the Clan, no matter what Nation, as relatives. Men and women therefore, who are members of the same Clan are forbidden to marry.

44. The lineal descent of the people of the Five Nations shall run in the female line. Women shall be considered the progenitors of the Nation. They shall own the land, and the soil. Men and women shall follow the status of their mothers.

45. The women heirs of the Chieftainship titles of the League shall be called Oianer or Otiianer (Noble) for all time to come.

46. The women of the 48 (now 50) noble families shall be the heirs of the Authorized Names for all time to come.

When an infant of the Five Nations is given an Authorized Name at the Midwinter Festival or at the Green Corn and Strawberry and Harvest Festival, one in the cousinhood of which the infant is a member shall be appointed a Speaker. He shall then announce to the opposite cousinhood the names of the father and mother of the child, together with the Clan of the mother. Then the Speaker shall announce the child's name twice, the uncle of the child shall then take the child in his arms and walking up and down the room shall sing "My head is firm; I am of the League." as he sings the opposite cousinhood shall respond by chanting, "Hyen, Hyen" until the song is ended.

47. If the female heirs of a title of a Chief of the League become extinct, the title shall be given by the Chiefs of the League to a sister family whom they shall elect, and that family shall hold the name and transmit to their female heirs, but they shall not appoint any of their sons as a candidate for a title until all the eligible men of the former family shall have died, or otherwise have become ineligible.

48. If all the heirs of a Chieftainship become extinct, and so all the families in the Clan, then the title shall be given by the Chiefs of the League to a family of a sister Clan whom they shall elect.

49. If any of the Otiianer women, heirs of a titleship, shall willfully withhold a Chieftainship or other title and refuse to bestow it, or if such heirs abandon, forsake, or despise their heritage, then shall such women be deemed buried, and their family extinct. The titleship shall then revert to a sister family, or Clan, upon application and complaint. The Chiefs of the League shall elect the family or Clan which shall in future hold the title.

50. The Otiianer women of the League, heirs of the Chieftainship titles shall elect two women of their family as cooks for the Chief when the people shall assemble at his house for business or other purposes. It is not good nor honourable for a Chief of the League to allow his people whom he has called to go hungry.

51. When a Chief holds a conference in his home, his wife, if she wishes, may prepare the food for the union Chiefs who assemble with him. Theirs is an honourable right which she may exercise, and an expression of her esteem.

52. The Otiianer women, heirs of the Chieftainship titles, shall, should it be necessary, correct and admonish the holders of the titles. Those only who attend the Council may
do this, and those who do not shall not object to what has been said nor strive to undo the action.

53. When the Otiianer women, holders of a Chieftainship title, select one of their sons as a candidate, they shall select one who is trustworthy, of good character, of honest disposition, one who manages his own affairs, and supports his own family, if any, and who has proven a faithful man to his Nation.

54. When a Chieftainship title becomes vacant through death or other cause, the Otiianer women of the Clan in which the title is hereditary shall hold a council, and choose one of their sons to fill the office made vacant. Such a candidate shall not be the father of any Chief of the League. If the choice is unanimous the name is referred to the men relatives of the Clan.

If they should disapprove, it shall be their duty to select a candidate from among their own number. If then the men and women are unable to decide which of the two candidates shall be named, then the matter shall be referred to the Chiefs of the League in the Clan. They shall decide which candidate shall be named. If the men and women agree to a candidate, then his name shall be referred to the sister Clans for confirmation. If the sister Clans confirm the choice and present it to their cousin Chiefs, and if the cousin Chiefs confirm the name, then the candidate shall be installed by the proper ceremony for the conferring of Chieftainship titles.

The Symbols

55. A large bunch of shell strings, in the making of which the Five Nations Chiefs have equally contributed, shall symbolize the completeness of the union, and certify the pledge of the Nations represented by the Chiefs of the league of the Mohawk, the Oneida, the Onondaga, the Cayuga, and the Seneca, that all are united and formed into one body, or union, called the Union of the Great Law which they have established.

A bunch of shell strings is to be the symbol of the Council Fire of the League of Five Nations. And the Chief whom the Council of Firekeepers shall appoint to speak for them in opening the Council shall hold the strands of shells in his hands when speaking. When he finishes speaking, he shall place the strings on an elevated place or pole so that all the assembled Chiefs and the people may see it and know that the Council is open and in progress.

56. Five strings of shell tied together as one shall represent the Five Nations, each string shall represent one territory, and the whole a completely united territory known as the Five Nations Territory.

57. Five arrows shall be bound together very strong and shall represent one nation each. As the five arrows are strongly bound, this shall symbolize the complete union of the Nations. Thus are the Five Nations completely united and enfolded together, united into one head, one body, and one mind. They shall therefore labour, legislate, and council together for the interest of future generations.

The Chiefs of the League shall eat together from one bowl the feast of cooked beaver’s tail. While they are eating, they are to use no sharp utensils, for if they should, they
might accidentally cut one another, and bloodshed would follow. All measures must be taken to prevent the spilling of blood in any way.

58. There are now the Five Nations League Chiefs standing with joined hands in a circle. This signifies and provides that should any one of the Chiefs of the League leave the Council and the League, his crown of deer antlers, the emblems of his Chieftainship title, together with his birthright, shall lodge on the arms of the Union Chiefs whose hands are so joined. He forfeits his title, and the crown falls from his brow, but it shall remain in the League.

A further meaning of this is that if at any time any one of the Chiefs of the League choose to submit to the law of a foreign people, he is no longer in but out of the League, and persons of this class shall be called "They have alienated themselves." (Tehonatonkoton). Likewise, such persons who submit to laws of foreign nations shall forfeit all birthrights and claims on the League of Five Nations and territory.

You, the League of Five Nations Chiefs, be firm so that if a tree should fall upon your joined hands, it shall not separate you or weaken your hold. So shall the strength of union be preserved.

59. A bunch of wampum strings, three spans of the hand in length, the upper half of the bunch being white and the lower half black, and formed from equal contributions of the men of Five Nations, shall be the token that the men have combined themselves into one head, one body, and one thought, and it shall symbolize their ratification of the peace pact of the league. Whereby the Chiefs of the Five Nations have established the Great Peace. The white portion of the shell strings represent the women, and the black portion the men. The black portion, furthermore, is a token of power and authority vested in the men of the Five Nations.

This string of wampum vests the people with the right to correct their erring Chiefs. In case a part of the Chiefs or all of them pursue a course not vouched for by the people and heed not the third warning of their women relatives (Wasenensawenrate), then the matter shall be taken to the General Council of the Women of the Five Nations. If the Chiefs notified and warned three times fail to heed, then the case falls into the hands of the men of the Five Nations. The war Chiefs shall then, by right of such power and authority, enter the open Council to warn the Chief or Chiefs to return from their wrong course. If the Chiefs heed the warning, they shall say, "We shall reply tomorrow." If then an answer is returned in favor of justice and in accord with this Great Law, then the Chiefs shall individually pledge themselves again, by again furnishing the necessary shells for the pledge. Then shall the War Chief or Chiefs, exhort the Chiefs, urging them to be just and true.

Should it happen that the Chiefs refuse to heed the third warning, then two courses are open: either the men in the Council may decide to depose the Chief or Chiefs, or to club them to death with war clubs. Should they in their Council decide to take the first course, the War Chief shall address the Chief or Chiefs, saying:

"Since you the Chiefs of the Five Nations have refused to return to the procedure of the Constitution, we now declare your seats vacant, and we take off your horns, the token of your Chieftainship, and others shall be chosen and installed in your seats. Therefore, vacate your seats."
Should the men in their Council adopt the second course, the War Chief shall order his men to enter the Council, to take positions beside the errant Chiefs, sitting between them where ever possible. When this is accomplished, the War Chief holding in his outstretched hand a bunch of black wampum strings shall say to the erring Chiefs:

"So now. Chiefs of the Five Nations, harken to these last words from your men. You have not heeded the warnings of the General Council of Women, and you have not heeded the warning of the men of the Nations, all urging you to the right course of action. Since you are determined to resist and hold justice from your people, there is only one course for us to adopt."

At this point, the War Chief shall drop the bunch of black wampum, and the men shall spring to their feet, and club the erring Chiefs to death. Any erring Chief may become submissive before the War Chief lets fall the black wampum. Then his execution is withheld.

The black wampum used here symbolizes that the power to execute is buried, but it may be raised up again by the men. It is buried, but when the occasion arises, they may pull it up and derive their power and authority to act as here described.

60. A broad belt of wampum of thirty eight rows, having a white heart in the centre, on either side of which are two white squares all connected with the heart by white rows of beads shall be the emblem of unity of the Five Nations.

The first of the squares on the left represents the Mohawk Nation and its territory, the second square on the left and near the heart represents the Oneida Nation and its territory, and the white heart in the middle represents the Onondaga Nation and its territory. It also means that the heart of the Five Nations is single in its loyalty to the Great Peace, and that the Great Peace is lodged in the heart (meaning with Onondaga League Chiefs) and that the Council Fire is to burn there for the Five Nations. Further it means that the authority is given to advance the cause of peace whereby hostile Nations out of the League shall cease warfare. The white square to the right of the heart represents the Cayuga Nation and its territory and the fourth and last square represents the Seneca Nation and its territory.

White here symbolizes that no evil nor jealous thought shall creep into the minds of the Chiefs while in Council under the Great Peace. White, the emblem of peace, love, charity, and equity surrounds and guards the Five Nations.

61. Should a great calamity threaten the generations rising and living of the Five United Nations, then he who is able to climb to the top of the Tree of the Great Long Leaves may do so. When he reaches the top of the Tree, he shall look about it in all directions and should he see evil things indeed approaching, then he shall call to the people of the Five United Nations assembled beneath of the Tree of the Great Peace and say, "A calamity threatens your happiness."

Then shall the Chiefs convene in Council and discuss the impending evil. When all the truths relating to the trouble shall be fully known and found to be truths, then shall the people seek a Tree of Kahonkaahkona, the great swamp elm tree, and when they shall find it they shall assemble their heads together and lodge for a time between its roots. Then, their labours being finished, they may hope for happiness many days after.
62. When the League of the Five Nations Council declares for a reading of the belts of shell calling to mind these laws, they shall provide for the reader a specially made mat woven of the fibres of wild hemp. The mat shall not be used again for such formality is called "honouring the importance of the law."

63. Should two sons of opposite sides of the Council Fire (iatawa) agree in a desire to hear a reciting of the Laws of the Great Peace and so refresh their memories in a way specified by the Founder of the League, they shall notify Atotarho. He shall consult with five of his cousin Chiefs and they in turn shall consult their eight brethren. Then should they decide to accede to the request of the two sons from the opposite sides of the Council Fire, Atotarho shall send messengers to notify the Chiefs of each of the Five Nations. Then they shall dispatch their War chief to notify their brother and cousin Chiefs of the meeting and it's time and place.

When all have come and have assembled, Atotarho, in conjunction with his cousin Chiefs, shall appoint one Chief who shall repeat the laws of the Great Peace to the two sons. Then the chosen one shall repeat the laws of the Great Peace.

64. At the ceremony of the installation of Chiefs, if there is only one expert speaker and singer of the Law and Song of Peace to stand at the Council Fire, then when this speaker and singer has finished addressing one side of the Fire, he shall go to the opposite side and reply to his own speech and song. He shall thus act for both sides of the Fire until the entire ceremony has been completed. Such a speaker and singer shall be termed "Two-faced" because he speaks and sings for both sides of the Fire.

65. The Peacemaker, and the United Chiefs, now uproot the tallest tree (skarenhesekowa) and into the hole thereby made we cast all weapons of war. Into the depths of the earth, down into the deep underneath currents of water (Tionawatetsien) flowing to unknown regions we cast all the weapons of strife. We bury them from sight and we plant again the tree. Thus shall the Great Peace be established and hostilities shall no longer be known between the Five Nations, but peace to the United people.

Adoptions

66. The father of a child of great comeliness, learning, ability or specially loved because of some circumstances may, at the will of the child's Clan, select a name from his own (the father's) Clan and bestow it by ceremony, such as is provided, this naming shall be only temporary, and shall be called, "A name hung about the neck."

67. Should any person, a member of the League of Five Nations, especially esteem a man or a woman of another Clan or of a foreign nation, he may choose a name, bestow it upon that person so esteemed. The naming shall be in accord with the ceremony of bestowing names. Such a name is only temporary and shall be called "A name hung about the neck." A short string of shells shall be delivered with the name as a record and a pledge.

68. Should any member of the Five Nations, a family, or a person belonging to a foreign nation submit a proposal for adoption into a Clan of one of the Five Nations, he or they shall furnish a string of shells, a span in length, as a pledge to the Clan into which he or
they wish to be adopted. The Chiefs of the Nation shall then consider the proposal and submit a decision.

69. Any member of the Five Nations, who through esteem or other feelings, wishes to adopt an individual, a family, or a number of families, may offer adoption to him or them, and if accepted, the matter shall be brought to the attention of the Chiefs for confirmation and the Chiefs must confirm the adoption.

70. When the adoption of anyone shall have been confirmed by the Chiefs of the Nation, the Chiefs shall address the people of the Nation and say:

"Now you of our Nation, be informed that ...... (such a person, such family or such families) have ceased forever to bear their birth Nation's name and have buried it in the depth of the earth. Henceforth let no one of our Nation ever mention the original name or Nation of their birth. To do so will hasten the end of our peace."

Emigration

71. When a person or family belonging to the Five Nations desires to abandon their Nation and the territory of the Five Nations, they shall inform the Chiefs of their Nation and the Council of the league of Five Nations shall take notice of it.

When any person or any people of the Five nations emigrate and reside in a distant region away from the territory of the League of Five Nations, the Chiefs of the Five Nations at will may send a messenger carrying a broad belt of black shells and when the messenger arrives he shall call the people together or address them personally, displaying the belt of black shell and they shall know that this is an order for them to return to their original homes and to their Council Fires.

Foreign Nations

72. The soil of the earth from one end to the other is the property of the people who inhabit it. By birthright, the Onkwehonwe, the original beings, are the owners of the soil which they own and occupy and none other may hold it. The same law has been held from the oldest times.

73. The great Creator has made us of one blood, and of the same soil he made us, and as only different tongues constitute different Nations, he established different hunting grounds and territories and made boundary lines between them.

74. When any alien Nation or individual is admitted into the League the admission shall be understood to be a temporary one. Should the person or Nation create loss, do wrong, or cause suffering of any kind to endanger the peace of the League, the League Statesmen shall order one of their War Chiefs to reprimand him or them. If a similar offence is committed, the offending party or parties shall be expelled from the territory of the League.
75. When a member of an alien Nation comes to the territory of the League and seeks refuge and permanent residence, the Statesmen of the Nation to which he comes shall extend hospitality and make him a member of the Nation. Then shall he be accorded equal rights and privileges in all matters except as mentioned here.

76. No body of alien people who have been adopted temporarily shall have a vote in the Council of the Chiefs of the League, for only they who have been invested with Chieftainship titles may vote in the Council. Aliens have nothing by blood to make claim to a vote and should they have it, not knowing all the traditions of the League, might go against the Great Peace. In this manner, the Great Peace would be endangered and perhaps destroyed.

77. When the Chiefs of the League decide to admit a foreign Nation and an adoption is made, the Chiefs shall inform the adopted Nation that it's admission is only temporary. They shall also say to the Nation that it must never try to control, to interfere with, or to injure the Five Nations, nor disregard the Great Peace or any of it's rules or customs. In no way should they cause disturbance or injury. Then shall the adopted Nation disregard these injunctions, their adoption will be annulled and they will be expelled.

78. Whenever a foreign Nation enters the League or accepts the Great Peace, the Five Nations and the foreign Nation shall enter into an agreement and compact by which the foreign Nation shall endeavor to persuade the other Nations to accept the Great Peace.

79. Skanawati shall be vested with a double office, duty, and with double authority. One half of his being shall hold the Statesman title, and the other half shall hold the title of War Chief. In the event of war he shall notify the five War Chiefs of the League and command them to prepare for war and have the men ready at the appointed time and place for engagement with the enemy of the Great Peace.

80. When the Council of the League has for it's object the establishment of the Great Peace among the people of an outside nation and that Nation refuses to accept the Great Peace, then by such refusal they bring a declaration of war upon themselves from the Five Nations. Then shall the Five Nations seek to establish the Great Peace by a conquest of the rebellious Nation.

81. When the men of the League, now called forth to become warriors, are ready for battle with an obstinate opposing Nation that has refused to accept the Great Peace, then one of the five War Chiefs shall be chosen by the warriors of the League to lead the army into battle. It shall be the duty of the War Chief so chosen to come before his warriors and address them. His aim shall be to impress upon them the necessity of good behaviour and strict obedience to the commands of the War Chiefs.

He shall deliver an oration exhorting them with great zeal to be brave and courageous and never to be guilty of cowardice. At the conclusion of his oration he shall march forward and commence a War Song.

82. When the warriors of the Five Nations are on an expedition against the enemy, the War Chief shall sing the War Song as he approaches the country of the enemy and not cease until his scouts have reported that the army is near the enemy's lines when the War Chief shall approach with great caution and prepare for the attack.
83. When peace shall have been established by the termination of the war against a foreign Nation, then the War Chief shall cause all the weapons of war to be taken from the Nation. Then shall the great Peace be established and that Nation shall observe all the rules of the Great Peace for all time to come.

84. Whenever a foreign Nation is conquered or has by their own will accepted the Great Peace, their own system of internal government may continue, but they must cease all warfare against other Nations.

85. Whenever a war against a foreign nation is pushed until that nation is about exterminated because of it's refusal to accept the Great Peace, and if that nation shall by it's obstinacy become exterminated, all their rights, property, and territory shall become the property of the Five Nations.

86. Whenever a foreign nation is conquered and the survivors are brought into the territory of the League of Five Nations and placed under the Great Peace, the two shall be known as the Conqueror and the Conquered. A symbolic relationship shall be devised, and be placed in some symbolic position. The conquered nation shall have no voice in the Councils of the League in the body of Chiefs.

87. When the War of the Five Nations on a foreign rebellious nation is ended, peace shall be restored to that nation by a withdrawal of all their weapons of war by the War Chief of the Five Nations. When all the terms of peace shall have been agreed upon, a state of friendship shall be established.

88. When the proposition to establish the Great Peace is made to a foreign nation, it shall be done in mutual council. The foreign nation is to be persuaded by reason, and urged to come into the Great Peace. If the Five Nations fail to obtain the consent of the nation at the first council, a second council shall be held and upon a second failure, a third council shall be held and this third council shall end the peaceful methods of persuasion. At the third council, the War Chief of the Five Nations shall address the Chief of the foreign nation and request him three times to accept the Great Peace, if refusal steadfastly follows, the War Chief shall let the bunch of white lake shells drop from his outstretched hand to the ground, and shall bound quickly forward and club the offending Chief to death. War shall thereby be declared, and the War Chief shall have his warriors to back any emergency. War must continue until the contest is won by the Five Nations.

89. When the Chiefs of the Five Nations propose to meet in conference with a foreign nation with proposals for an acceptance of the Great Peace, a large band of warriors shall conceal themselves in a secure place, safe from the espionage of the foreign nation, but as near at hand as possible. Two warriors shall accompany the Union Chief who carries the proposals, and these warriors shall be especially cunning. Should the Chief be attacked, these warriors shall hasten back to the army of warriors with the news of the calamity which fell through the treachery of the foreign nation.

90. When the Five Nations Council declares war, any Chief of the league may enlist with the warriors by temporarily renouncing his sacred Chieftainship title which he holds through the nomination of his women relatives, the title then reverts to them and they may bestow upon another temporarily until the war is over, when the Chief, if living, may resume his title and seat in the council.
91. A certain wampum belt of black beads shall be the emblem of authority of the five War Chiefs to take up the weapons of war and with their men to resist invasion, this shall be called a War in Defense of the Territory.

92. If a nation, part of a nation, or more than one nation within the Five Nations should in any way endeavor to destroy the Great Peace by neglect or violating its laws, and resolve to dissolve the League, such a nation or such nations shall be deemed guilty of treason and called enemies of the League and the Great Peace.

It shall then be the duty of the Chiefs of the League who remain faithful to resolve to warn the offending people, they shall be warned once, and if a second warning is necessary, they shall be driven from the territory of the League by the War Chief and his men.

Rights Of The People

93. Whenever an especially important matter or a great emergency is presented before the League Council, and the nature of the matter effects the entire body of the Five Nations, threatening their utter ruin, then the Chiefs of the League must submit the matter to the decision of their people and the decision of the people shall affect the decision of the League Council. This decision shall be a confirmation of the voice of the people.

94. The men of every Clan of the Five Nations shall have a Council Fire ever burning in readiness for a Council of the Clan. When it seems necessary for the interest of the people, for a council to be held to discuss the welfare of the Clan, then the men may gather about the fire. This Council shall have the same rights as the Council of Women.

95. The women of every Clan of the Five Nations shall have a Council Fire ever burning in readiness for a Council of the Clan. When in their opinion it seems necessary for the interest of the people, they shall hold a Council, and their decision and recommendation shall be introduced before the Council of Chiefs by the War Chief for it's consideration.

96. All the Clan Council Fires of a Nation or of the Five Nations may unite into one general Council Fire, or delegates from all the Council Fires may be appointed to unite in a general Council for discussing the interest of the people. The people shall have the right to make appointments, and to delegate their power to others of their number.

When their Council shall have come to a conclusion on any matter, their decision shall be reported to the Council of the Nation or the League Council (as the case may require) by the War Chief or the War Chiefs.

97. Before the real people united their nations, each Nation had it's own Council Fires. Before the Great Peace their Councils were held. The Five Council Fires shall continue to burn as before and they are not quenched. The Chiefs of each Nation in the future shall settle their Nation's affairs at this council Fire, governed always by the laws and rules of the Council of the League and the Great Peace.

98. If either a nephew or a niece see an irregularity in the performance of the functions of the Great Peace and it's laws, in the League Council or in the conferring of Chiefs
titles in an improper way, through their War Chief they may demand that such actions become subject to correction, and that the matter conform to the ways prescribed by the law of the Great Peace.

Ceremonies

99. The rites and festivals of each Nation shall remain undisturbed and shall continue as before, because they were given by the people of old times as useful and necessary for the good of men.

100. It shall be the duty of the Chiefs of each brotherhood to confer at the approach of the time of the Midwinter Thanksgiving and to notify the people of the approaching festival. They shall hold a Council over the matter, and arrange its details and begin the Thanksgiving five days after the moon of Tiskonah is new. the people shall assemble at the appointed place and the nephews shall notify the people of the time and place, from the beginning to the end, the Chiefs shall preside over the Thanksgiving and address the people from time to time.

101. It shall be the duty of the appointed managers of the Thanksgiving Festivals to do all that is needful for carrying out the duties for the occasions. the recognized festivals of Thanksgiving shall be the Midwinter Thanksgiving, the Maple or Sugar Making Thanksgiving, the Strawberry Thanksgiving, the Cornplanting Thanksgiving, the Corn Hoeing Thanksgiving, the Little Festival of Green Corn, the Great Festival of Ripe Corn, and the Complete Thanksgiving for the Harvest. Each Nation's festivals shall be held in their Longhouses.

102. When the Thanksgiving for the Green Corn comes, the special managers, both the men and the women, shall give it careful attention and do their duties properly.

103. When the Ripe Corn Thanksgiving is celebrated, the Chiefs of the Nation must give it the same attention as they give to the Midwinter Thanksgiving.

104. Whenever any man proves himself by his good life and his knowledge of good things, he shall be recognized by the Chiefs as a Teacher of Peace and Kariwiiio, and the people shall hear him.

Installation Song

105. The song used in installing the new Chief of the League shall be sung by Atotarho and it shall be:

"Haii, haii Akaw wiio
Haii, haii Akonhewawatha
Haii, haii Skaweiesekowa
Haii, haii Yonkwawi
Haii, haii lakonhewatha"

106. Whenever a person properly entitled desires to learn the Song of Peace, he privileged to do so, but he must prepare a feast at which his teachers may sit with him and sing. The feast is provided that no misfortune may befall them for singing the song when no Chief is installed.

Protection Of The House

107. A certain sign shall be known to all the people of the Five Nations which shall denote that the owner or occupant of a house is absent. A stick or a pole in a slanting or leaning position shall indicate this and be the sign. Every person not entitled to enter the house by right of living within upon seeing such a sign shall not enter the house by day or by night, but shall keep as far away as his business will permit.

Funerals

108. At the funeral of a Chief of the League these words are said:

"Now we become reconciled as you start away. You were once a Chief of the League of Five Nations, and the united people trusted you. Now we release you, for it is true that it is no longer possible for us to walk about together on the earth. Now, therefore, we lay it (the body) here. Here we lay it away. Now then we say to you, persevere onward to the place where the Creator dwells in peace, let not the things of the earth hinder you. Let nothing that transpired while you lived hinder you. In hunting you once delighted; in the game of lacrosse, you once delighted, and in the feast and pleasant occasions your mind was amused, but now do not allow thoughts of these things to give you trouble."

"Let not your relatives hinder you and also let not your friends and associates trouble your mind. Regard none of these things."

"Now then, in turn, you here present who are related to the man, and you who were his friends and associates, behold the path that is yours also. Soon we ourselves will be left in that place. For this reason, hold yourselves in restraint as you go from place to place. In your actions and in your conversation do no idle thing. Speak not idle talk, neither gossip. Be careful of this, and speak not and do not give away to evil behaviour. One year is the time that you must abstain from unseeming levity, but if you cannot do this for ceremony, ten days is the time to regard these things for respect."

109. At the funeral of a War Chief say:

"Now we become reconciled as you start away. Once you were a War Chief of the Five Nations League, and the united people trusted as their guard from the enemy." (The remainder is the same as the address at the funeral of a Chief)

110. At the funeral of a warrior say:
"Now we become reconciled as you start away. Once you were a devoted provider and protector of your family, and you were ready to take part in battles for the Five Nations. The united people trusted ..." (The remainder is the same as the address at the funeral of a Chief)

111. At the funeral of a young man say:

"Now we become reconciled as you start away. In the beginning of your career you were taken away, and the flower of your life is withered away." (The remainder is the same as the address at the funeral of a Chief)

112. At the funeral of a Chief woman say:

"Now we become reconciled as you start away. You were once a Chief woman of the League of Five Nations. You were once a Mother of the Nations. Now we release you, for it is true that it is no longer possible for us to walk about together on the earth. Now, therefore, we lay it (the body) here. Here we lay it away. Now then we say to you, persevere onward to the place where the Creator dwells in peace. Let not the things of the earth hinder you. Let nothing that transpired while you lived hinder you. Looking after your family was a sacred duty, and you were faithful. You were one of the many joint heirs of the Chieftainship titles. Feasting were yours and you had pleasant occasions...." (The remainder is the same as the address at the funeral of a Chief).

113. At the funeral of a woman of the people say:

"Now we become reconciled as you start away. you were once a woman in the flower of life and the bloom is now withered away. You once held a sacred position as a mother of the Nation. Looking after your family was a sacred duty and you were faithful. Feastings ...." (The remainder is the same as the address at the funeral of a Chief).

114. At the funeral of an infant or young woman say:

"Now we become reconciled as you start away. You were a tender bud and gladdened our hearts for only a few days. Now the bloom has withered away. Let none of these things that have transpired on earth hinder. Let nothing that happened while you lived hinder you" (The remainder is the same as the address at the funeral of a Chief).

115. When an infant dies within three days, mourning shall continue only five days. Then shall you gather the little boys and girls at the house of the mourning, and at the funeral feast, a speaker shall address the children and bid them to be happy once more, though by death, gloom has been cast over them. Then shall the children be again in the sunshine.

116. When a dead person is brought to the burial place, the Speaker on the opposite side of the Council Fire shall bid the bereaved family cheer in their minds once more and rekindle their hearth fires in peace, to put their house in order and once again be in brightness, for darkness has covered them. He shall say that the black clouds shall roll away and that the bright blue sky is visible once more. Therefore they shall be at peace in the sunshine again.
117. Three strings of shell, one span in length, shall be employed in addressing the assemblage at the burial of the dead. The Speaker shall say:

"Hearken, you who are here, this body is to be covered. Assemble in this place again in ten days hence, for it is the decree of the Creator that mourning shall cease when ten days have expired. Then a feast shall be made."

Then at the expiration of ten days, the Speaker shall say:

"Continue to listen you who are here. The ten days of mourning have expired and your mind must now be freed of sorrow as before the loss of your relative. The relatives have decided to make a little compensation to those who have assisted at the funeral, it is a mere expression of thanks. This is to the one who did the cooking while the body was lying in the house. Let her come forward and receive this gift and be dismissed from the task." (In substance, this will be repeated for everyone who assisted in any way until all have been remembered.)"
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