# Remedies for Violations of Aboriginal Rights

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MUCH HAS BEEN WRITTEN about the nature of Aboriginal rights and how they might be defined and recognized by courts.[1] Remarkably little, however, has been written about the remedies available for violations of Aboriginal rights. In part, this reflects the nature of Aboriginal rights litigation. By denying Aboriginal claims, courts have often avoided the problems of devising remedies. Rights and remedies are, of course, interconnected. Judges do not decide questions of rights without worrying about remedies[2] and the fact that judicial remedies for violations of Aboriginal rights are unexplored may deter some judges from recognizing Aboriginal rights.

Aboriginal rights cannot be truly justiciable rights unless courts become comfortable with remedies for their violation. At the same time, it is unlikely that approaches from other areas of law can simply be transferred to the distinctive context of Aboriginal rights. I will suggest that courts can devise remedies for violations of Aboriginal rights that are both purposive and manageable. In the first instance, courts should design their remedies to facilitate negotiations between First Nations, governments and other affected interests. This will hopefully avoid the extremes of judges either attempting to resolve some of our most complex social, economic and legal problems by devising detailed and final remedies or leaving the adequacy of remedies to an unsupervised political process which deprives Aboriginal rights of legal significance. Negotiation is a flexible and participatory process well-suited for recognizing the evolving and dynamic nature of Aboriginal rights and reconciling them with other interests.

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[1] See for example B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 726; K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382.

[2] For an account of how the remedial implications of holding that racially segregated schools were unconstitutional influenced the United State Supreme Court's deliberations in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) see M. Tushnet, "What Really Happened in *Brown* v. *Board of Education*" (1991) 91 Colum. L. Rev. 1867 at 1921ff.

It has historical origins in the treaty process and has been used to obtain modern land claims agreements. Should judicial facilitation of negotiation fail, however, courts have broad and flexible remedial powers to enforce Aboriginal rights by virtue of their traditional equitable powers and their ability to strike down laws inconsistent with constitutional rights.

Ordering remedies to facilitate negotiation is not usually considered a remedial goal but it is one which makes sense in the Aboriginal rights context. Much Aboriginal rights litigation will rely on requests for declaratory relief. Judicial declarations of constitutional rights often set the stage for prompt and good faith attempts at implementation through negotiation. Even when stronger remedies are requested, negotiation can play an important role. The granting of interlocutory injunctions to enjoin encroachments on Aboriginal rights can provide incentives for the parties to reach a negotiated settlement before trial. The courts' equitable remedial powers with regard to breach of fiduciary duty are flexible enough to provide an opportunity for Aboriginal people and governments to negotiate the details of remedies. Even s. 35(1) of the *Constitution Act, 1982*[3] can be enforced in a manner that facilitates negotiation. Although striking down legislation inconsistent with Aboriginal rights is an important ultimate remedy to enforce s. 35(1), it may be appropriate to follow precedents in other constitutional cases of using transition periods and periods of temporary validity to otherwise unconstitutional laws to allow First Nations and other governments an opportunity to negotiate the details of a remedy that would satisfy the Constitution.

These remedial analogues may persuade judges that it is principled and prudent to use their remedial powers to facilitate negotiation between First Nations and Canadian governments. The most compelling justification for a remedial approach that facilitates negotiation, however, is that courts should take a purposive approach to the choice of constitutional remedies and should select remedies that "best vindicate the values expressed in the [constitutional rights] and to provide the form of remedy to those whose rights have been violated that best achieves that objective."[4] The text and history of Aboriginal

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[3] Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[4] *Osborne* v. *Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at 104 (referring to a purposive approach to remedies under s. 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* [hereinafter *Charter*] endorsed in *R.* v. *Gamble*, [1988] 2 S.C.R. 595 at 641.) See also *Schachter* v. *Canada* (1992), 93 D.L.R. (4th) 1 at 24 (S.C.C.) [hereinafter *Schachter*] ("the Constitution may encourage particu-

rights in the Canadian constitution[5] indicate a desire that First Nations and Canadian governments work out their relationship by making treaties. The abuses and failures of treaties in the past, the remedial purposes of giving constitutional protection to existing Aboriginal and treaty rights, and the unequal bargaining power between First Nations and governments all require the courts to play an active role in supervising the exercise of governmental power. Nevertheless, fair treaties, not court orders or calculations of damages, remain the purposive remedial goal for addressing violations of Aboriginal rights.

Remedial issues arise from Aboriginal rights litigation in several different contexts and any remedial approach will have to be sensitive to its context. The first part of this paper will examine attempts to obtain interlocutory injunctions to stop development that may affect Aboriginal peoples until the question of Aboriginal rights can be decided at trial. I will suggest that the present jurisprudence generally supports liberal use of such interlocutory injunctions and that this is a manageable and purposive use of judicial remedial power. Interlocutory injunctions can encourage the parties to return to negotiations, restrain the use of power to frustrate the negotiation process and provide incentives for the parties to reach a settlement that respects Aboriginal rights.

Moving away from the interlocutory context, the availability of remedies for the pre-1982 extinguishment or diminution of Aboriginal interests in land will be examined in the second part of this paper. I will suggest that courts should avoid the stark alternatives of holding either that there is no legal right to compensation or that encroachments on Aboriginal land should be compensated by damages calculated in terms taken from the law of expropriation. The third and more flexible alternative lies in the evolving notion of governments having a fiduciary duty towards First Nations, especially if they exercised their pre-1982 powers to extinguish or diminish Aboriginal title. Remedies for breach of fiduciary duty include monetary compen-

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lar kinds of remedies even if it does not mandate them").

[5] For example *The Royal Proclamation of 1763* (U.K.), reprinted in R.S.C. 1985, App. II, No. 1 indicates an intention to deal with Indian tribes on a government to government basis. Section 35(3) of the *Constitution Act, 1982* contemplates that rights acquired in modern treaties — land claims agreements — will become constitutionalized and enforceable under s. 35(1). Sections 37 of the *Constitution Act, 1982* and ss. 35.1 and 37.1 of the *Constitution Amendment Proclamation, 1983*, R.S.C. 1985, App. II, No. 46 contemplated constitutional conferences with representatives of Aboriginal peoples to identify and define Aboriginal rights.

sation and the transfer of property through constructive trusts and also allow for other creative remedies.

Finally, the range of constitutional remedies to respond to violations of s. 35(1) of the *Constitution Act, 1982* will be examined. After 1982, remedies for violations of Aboriginal and treaty rights will flow from s. 35 of the *Constitution Act, 1982*. The only explicit remedial provision governing s. 35 litigation is s. 52(1) of the *Constitution Act, 1982* providing "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."[6] Although the remedy of striking down laws will play an important role in enforcing s. 35, I will suggest that such a blunt and negative remedy will not always be immediately appropriate and that other remedies such as delayed declarations of invalidity, constitutional exemptions and various equitable remedies should also play a role.

## I. Interlocutory Remedies to Prevent Violations of Aboriginal Rights

The courts have more experience in dealing with applications for interlocutory injunctions than with any other remedy for violations of Aboriginal rights.[7] Interlocutory injunctions have typically been sought to stop large development projects that threaten Aboriginal communities. They are designed to provide speedy but temporary relief before a full trial of legal and factual issues is available. Interlocutory relief is especially important given both the time and money it takes to get a full trial in Aboriginal rights litigation and the nature of Aboriginal rights in relation to land and resources. Aboriginal rights can often be quickly and irreparably damaged by development such as logging, mining and hydro-electric development.

Although the legal tests to determine whether an interlocutory injunction should be granted proceed on the basis that it is a temporary remedy and that a full trial will follow, the reality, especially true in the Aboriginal rights context, is that this is often not the case. Given the desires of the parties to have the dispute resolved and the time required for a full a trial, settlements may well be negotiated in the shadow of the court's pre-trial decision.

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[6] Note that the broad remedial powers contemplated in s. 24(1) of the *Charter* do not explicitly apply to s. 35 rights which are not rights or freedoms guaranteed by the *Charter*.

[7] See generally R. Townshend, "Interlocutory Injunctions in Aboriginal Rights Cases" [1991] 2 C.N.L.R. 1.

The most famous case deciding whether to grant an interlocutory injunction in the Aboriginal rights context remains the decision of the Quebec courts concerning the James Bay I hydro-electric development. In 1973, Malouf J. of the Quebec Superior Court granted an interlocutory injunction to stop the massive James Bay hydro-electric development project. Following the case law of the early 1970s, he decided that the plaintiff, a chief representing the James Bay Cree, had met the significant burden of proving a *prima facie* case that the rights of the Cree would be infringed by the development.[8] He then concluded in the strongest of terms that an injunction was necessary before trial in order to prevent irreparable harm to the Cree's way of life. For example, flooding that would accompany the hydro-electric development would destroy many traditional activities.[9] Malouf J. held that he did not have to consider the balance of convenience because the plaintiffs' rights were clear but that, if he did, the balance favoured the Cree especially in consideration of the irreparable damage the development would cause and that Hydro Quebec would not be so damaged by a delay until a trial.[10]

A week after the interlocutory injunction against the development was issued, the Quebec Court of Appeal suspended the injunction until a full appeal could be heard.[11] They relied upon the fact that the defendant James Bay Corporation had been authorized by provincial legislation "to promote the development and exploitation of natural resources ... giving priority to Quebec interests" [12] and concluded:

> This statute was passed by the National Assembly elected by people of Quebec, and until it has been declared unconstitutional, it must be applied, except under absolutely exceptional circumstances. The statute indicates that the purpose of the legislator was to safeguard the interests of Quebec. It has not been shown that the Corporation in carrying out its functions has not given 'priority to Quebec interests'. The public and general interests of the people of Quebec are thus opposed to the interests of some two thousand of its inhabitants. It is our view at this stage of the proceedings these two interests are beyond comparison.[13]

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[8] *Gros-Louis* v. *Société de développement de la Baie James* (1973), 8 C.N.L.R. 188 at 340 (Que. S.C.) [hereinafter *Gros-Louis*].

[9] *Ibid.* at 345.

[10] *Ibid.* at 370.

[11] *James Bay Development Corporation* v. *Kanatewat* (1973), 8 C.N.L.C. 414 (Que. C.A.) (per Tremblay C.J., Casey, Turgeon JJ.) [hereinafter *Kanatewat*].

[12] *Loi de développement de la région de la Baie James*, S.Q. 1971, c. 34, s. 4.

[13] *Kanatewat*, *supra* note 11 at 415.

This decision ignored Judge Malouf's findings that the plaintiff had a strong case and would suffer irreparable harm that could not be compensated in damages should the development proceed. It relied on the notion of the balance of convenience and conceived that balance in crudely majoritarian (2,000 Cree compared to the interests of Quebec), if not implicitly racist, terms.

A year later, the Court of Appeal reversed Judge Malouf's decision on the merits. The Court of Appeal re-evaluated the extensive evidence Judge Malouf had heard as to the effect of the development and reversed him on all points. The Court of Appeal's decision will provide a starting point for considering the present state of the law.

### A. Strength of the Plaintiff's Case

The Quebec Court of Appeal concluded that there were serious doubts as to whether the plaintiffs had Aboriginal rights over the land in question.[14] They placed a very high standard on the plaintiff to prove clear rights to the land before trial. This high standard is inconsistent with the leading case *American Cyanamid Co.* v. *Ethicon Ltd.* (decided after the Court of Appeal's judgment), which states that the plaintiff should only be required to show "that the claim is not frivolous or vexatious; in other words that there is a serious question to be tried."[15] Despite concerns that in some contexts the *American Cyanamid* test is insufficiently qualitative,[16] in my view it sets an appropriate threshold for considering claims of Aboriginal rights. Such claims raise complex legal and factual questions such as the extent of Aboriginal use and occupation of land and whether and to what extent Aboriginal rights have been extinguished. Such issues can only be satisfactorily resolved at trial. Courts should not force plaintiffs to meet unrealistic standards of proof before adequate time to prepare their case through pleadings, discovery and the hearing of oral evi-

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[14] *Société de développement de la Baie James* v. *Kanatewat* (1974), 8 C.N.L.C. 373 at 386 per Turgeon J.A.; at 405 per Kaufman J.A.; at 406 per Crete J.A.; at 407 per Owen J.A. [hereinafter *Société Baie James*].

[15] [1975] A.C. 396 at 407–08 (H.L.) [hereinafter *American Cyanamid*]. Lord Diplock elaborated: "unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

[16] R.J. Sharpe, *Injunctions and Specific Performance*, 2d ed. (Toronto: Canada Law Book, 1992) at 2-11–2-20.

dence.[17] Courts may be tempted to resolve complex questions of law at the interlocutory stage, but it is best, given both the uncertain state of Aboriginal rights jurisprudence and its fact-specific nature, to simply decide as a threshold matter whether the claims are frivolous or vexatious.[18]

The lenient *American Cyanamid* test is also appropriate when plaintiffs claim that their constitutional rights will be violated. The Supreme Court of Canada in *Manitoba (A.G.)* v. *Metropolitan Stores Ltd.*[19] recently affirmed this test as appropriate in the constitutional context because "the factual situation as well as the law may be so uncertain at the interlocutory stage as to prevent the court from forming even a tentative opinion on the case of the plaintiff."[20] Given the remedial purposes of s. 35(1), it is especially appropriate to give those claiming Aboriginal rights the benefit of the doubt on matters of both fact and law.[21] Thus *American Cyanamid* and *Metropolitan Stores* clearly establish a lenient threshold for interlocutory relief in Aboriginal rights litigation.

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[17] The Quebec Court of Appeal relied on the notion that Aboriginal rights may well have been extinguished which is disturbing given the legal uncertainty over the proper test for extinguishment at the time and the factual nature of the extinguishment issue. Oral evidence from elders may be particularly important in establishing historical use and occupation. It is interesting that the *American Cyanamid* test arose in a context (patents) that was also factually and legally complex.

[18] Some judges have wrongly attempted to resolve the many outstanding issues left by the Supreme Court of Canada's division of opinion in *Calder* v. *British Columbia (A.G.)* (1973), 34 D.L.R. (3d) 145 and tried to resolve the thorny issue of provincial jurisdiction to regulate or extinguish Aboriginal rights. See *MacMillan Bloedel Ltd.* v. *Mullin*, [1985] 2 W.W.R. 722 (B.C.S.C.), rev'd [1985] 3 W.W.R. 577 (B.C.C.A.) [hereinafter *MacMillan Bloedel* cited to [1985] 3 W.W.R].

[19] [1987] 1 S.C.R. 110 [hereinafter *Metropolitan Stores*].

[20] Beetz J. went on to state: "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial." *Ibid.* at 130–131.

[21] By referring to uncertainties about facts and law, *Metropolitan Stores* has cast doubt on the notion that the lenient serious question test only applies to question of fact at least in all but the rare cases where constitutionality "will present itself as a simple question of law alone." *Metropolitan Stores*, *supra* note 19 at 133 *contra Bolton* v. *Forest Pest Management Institution* (1985), 34 C.C.L.T. 119 (B.C.S.C.) applying the lenient *American Cyanamid* test only to questions of fact and not law. For criticisms that *Bolton* requires lengthy and fact-specific determination of complex questions of law see Townshend, *supra* note 7 at 4–5.

**B. Irreparable Harm to the Plaintiff and Defendant**

The Quebec Court of Appeal reversed Malouf J.'s clear findings that the James Bay development would irreparably harm the Cree. The Court re-evaluated the evidence the trial judge heard as to the effects of the development on the environment and the wildlife in the region. Moreover, the Court approached the question of harm in a manner that was not sensitive to the priorities and aspirations of the Cree themselves. For example, Turgeon J.A. viewed the colonization of Aboriginal people and the abandonment of traditional ways of life in a favourable light and assumed that "[l]es autochones ont évolué rapidement vers un mode de vie qui est celui de tous les Québécois."[22] He suggested that the Cree would benefit economically from the development and that this was more important than the social and cultural effects of the development.[23] The Court of Appeal also stated that if the plaintiffs suffered harm in the future, damages would be available at that time.[24] This, of course, suggests that the harm suffered by the Cree could be compensated by money and would not be irreparable.

Subsequent cases have arguably been more sensitive in determining whether proposed development would result in irreparable harm to Aboriginal communities. In his decision ordering an interlocutory injunction against the logging of Meares Island, Seaton J.A. quoted with approval the affidavit of an anthropologist concerning "a revival and expansion of interest in traditional culture" and recognized the material, cultural and symbolic importance of the forest of that Island to the plaintiffs.

> The Indians wish to retain their culture on Meares Island as well as in urban museums ... The island has become a symbol of their claim to rights in land. Meares Island has also become symbolic for other British Columbia Indians.[25]

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[22] *Société Baie James, supra* note 14 at 399.

[23] "... il m'apparaît que la réalisation du projet de la Baie James sera bénéfique pour les Indiens, tant au point de vue économique qu'au point de vue social et culturel." *Ibid.* at 400.

[24] *Ibid.* at 400 per Turgeon J.A.; at 406 per Kaufman J.A.

[25] *MacMillan Bloedel, supra*, note 18 at 588–589. See also *Touchwood File Hills* v. *Davis* (1985), 41 Sask. R. 263 (Q.B.); *Mohawk Bands of Kahnawake* v. *Glenbow Alberta Institute*, [1988] 3 C.N.L.R. 70 (Alta. Q.B.) (interim injunctions to protect cultural and spiritual values).

MacFarlane J.A. also agreed that damages were not an appropriate remedy when a relatively small tract of land could be preserved by an interlocutory injunction. He did not accept damages as a preferred remedy in the Aboriginal rights context, noting that the eventual remedy could "be resolved in a number of ways-by granting title, by permitting use and occupation of various types, by recognizing hunting and fishing priorities, or by money damages."[26] If Aboriginal rights are considered as constitutional rights, there is no reason to believe that damages would be a preferred remedy. As H.S. Fairly has noted while "monetary compensation or damages is the major remedial quest in private law litigation ... [b]y comparison, the focus on money seems almost out of place in constitutional litigation ..."[27]

The Quebec Court of Appeal's approach to the question of irreparable harm unfortunately still has some followers. For example, the dissent of Craig J.A. in the Meares Island case was based on the idea that logging would not irreparably harm the Aboriginal plaintiffs and that any harm suffered could be compensated by damages. He stated that even if the impugned actions extinguished Aboriginal title

> the inevitable solution must be: what is fair and reasonable compensation for the land and interest already alienated and what should be fair and reasonable compensation for land and interest which the provincial Crown considers should be alienated or utilized for the welfare of all the citizens of the province?[28]

This did not answer the plaintiff's claims that Aboriginal title could not be extinguished without consent. Moreover, it assumes that monetary compensation is the only remedy for violation of Aboriginal title. As will be suggested later, stronger remedies such as the return of land and declarations of invalidity may also be justified. Aboriginal interests in land should not be thought of as a commodity that readily can be compensated with damages.

In *Ominayak* v. *Norcen*[29] the Alberta Court of Appeal held that the plaintiffs had not proven that exploration and drilling for oil would

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[26] *MacMillan Bloedel, ibid.* at 610.

[27] H.S. Fairly, "Private Law Remedial Principles and the Charter: Can the Old Dog Wag His New Tail" in J. Berryman, ed., *Remedies: Issues and Perspectives* (Toronto: Carswell, 1991) 313 at 326–27. The classic account of the inappropriateness of a remedial hierarchy based on a preference for damages in public law litigation is O. Fiss, *The Civil Rights Injunction* (Bloomington: Indiana University Press, 1978).

[28] *MacMillan Bloedel, supra* note 18 at 596.

[29] [1985] 3 W.W.R. 193 at 201 (Alta. C.A.).

irreparably harm Aboriginal people in their hunting and trapping activities. Kerans J.A. stated that the plaintiffs must show a causal relationship between the defendant's activities and "harm for which no fair and reasonable redress would be available after trial."[30] He elaborated:

> We do not accept that *any* reduction in the wildlife population in the hunting and trapping area, even assuming that the activities of the defendants are the cause of it, is irreparable harm. The reduction must be critical. On the appellants' own materials, the respondents' activities in 1979 through 1982, while intense in some areas, had not destroyed the commercial viability of the trapping nor caused any shortage of red meat ... In any event, the time-span here is sufficiently short that the plaintiffs could, if successful at trial, gain through damages sufficient moneys to restore the wilderness and compensate themselves for any interim losses.[31]

This test places a formidable burden on the plaintiff to demonstrate that the defendant's activities have caused or will cause damage to protected activities.[32] Moreover, the notion that harm must be critical is at odds with the cumulative nature of environmental degradation. Effects that are not "critical" at present may become disastrous before the years it takes most Aboriginal rights cases to reach a final judgment. Interlocutory injunctions should offer protection until the courts have finally decided whether Aboriginal rights have been violated. Finally, the assumption that damages can be used "to restore the wilderness" strains common sense.[33] In general, an assumption that monetary damages can compensate infringements of Aboriginal rights ignores that an important purpose of Aboriginal rights is to protect the collective ways of life of future generations as well as the threatening environmental, social and cultural context that many Aboriginal people find themselves in.

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[30] *Ibid.* at 201.

[31] *Ibid.* at 202–203 [emphasis in original].

[32] It might be thought that the defendant who causes a risk of harm should bear the burden of showing that its activities will not cause harm. *McGee* v. *National Coal Board*, [1972] 3 All E.R. 1008 (H.L.). For a reaffirmation of the traditional burden on the plaintiff to prove causation in tort law, however, see *Snell* v. *Farrell*, [1990] 2 S.C.R. 311.

[33] It is also inconsistent with other cases. In *Hunt* v. *Halcon Logging Services* (1986), 15 B.C.L.R. (2d) 165 at 176 (S.C.) [hereinafter *Hunt*] Trainor J. referred to "the nearly impossible task of assessing damages for the loss of aboriginal and treaty rights ..." In *British Columbia (A.G.)* v. *Wale*, [1987] 2 W.W.R. 331 at 345 (B.C.C.A.) McLachlin J.A. stated: "It is important to note that clear proof of irreparable harm is not required. Doubt as to the adequacy of damages as a remedy may support an injunction."

If a court concludes that a plaintiff seeking an interlocutory injunction will suffer irreparable harm, then the next question under the *American Cyanamid* test is whether the defendant will suffer irreparable harm should the interim injunction be entered but reversed after trial. Most often the harm that defendants face will be limited to the financial costs of delayed development. As Mahoney J. said in *Baker Lake* v. *Canada (Minister of Indian Affairs and Northern Development)*: "[t]he minerals, if there, will remain; the caribou, presently there, may not."[34] In almost all cases, there will be no question of whether damages are an adequate remedy for defendants delayed by interlocutory injunctions.[35] The crucial question may then be whether the plaintiff will be in a position to pay such damages.

It appears that damages caused by interlocutory injunctions to stop development can be considerable. A delay in one 30 day logging project was estimated to be $300,000 in capital expenditures and $2,000 a day in lost labour.[36] In the *Baker Lake* case, Mahoney J. found that damages of mining companies temporarily enjoined "would be readily measurable in damages although, in the particular circumstances, it may be questioned that an action to recover those damages from the plaintiffs could succeed and, if it did, whether the plaintiffs could satisfy it."[37] The decision that the harm of defendants will not be compensated is crucial because it forces the issue of whether to grant the interlocutory injunction on to where the balance of convenience lies.[38]

The appropriateness of requiring a plaintiff who secures an interlocutory injunction to make an undertaking for damages can be ques-

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[34] (1978), 87 D.L.R. (3d) 342 at 348 (F.C.T.D.) [hereinafter *Baker Lake*]. In *Bear Island Foundation* v. *Ontario* (1989), 70 O.R. (2d) 574 (H.C.) it was found that granting an injunction against logging and road building would irreparably harm the defendants largely because it would alter the status quo. Reliance on the status quo is problematic and confusing (Sharpe, *supra* note 16 at 2-29) especially in Aboriginal rights litigation. If it must be considered, existing Aboriginal rights are as much of the status quo as legislation authorizing their abrogation.

[35] Protesters against development may be able to argue that they would suffer irreparable harm should their actions be enjoined.

[36] *Hunt*, *supra* note 33 at 176.

[37] *Supra* note 34 at 347–8.

[38] The Supreme Court's decision in *Metropolitan Stores* casts doubt on this element of the *American Cyanamid* test as applied in the constitutional context by suggesting that courts should always consider the effects to the public of granting an interlocutory remedy that challenges the constitutionality of democratically enacted laws. This issue will be discussed in more detail below.

tioned in the Aboriginal rights context. The risk of having to pay for the costs imposed by the injunction as well as the defendant's legal costs may make much litigation too expensive for Aboriginal groups. Requiring plaintiffs to pay the costs of the injunction ignores that the court has authorized the interim injunction and that the plaintiffs may be acting in the public interest in trying to enforce Aboriginal rights.[39] In the *MacMillan Bloedel* case, the British Columbia Court of Appeal did not require the plaintiffs to undertake to pay any damages that MacMillan Bloedel might suffer as a result of the interlocutory injunction.[40] This seems to be an appropriate and just use of the court's discretion not to require an undertaking for damages. If courts do require an undertaking for damages, they should at least not be quick to inflate the real costs of the interim injunction. Given the length of time required for Aboriginal rights litigation, defendants should make every effort to mitigate the costs of delay. Moreover, courts should not be quick to assume that plaintiffs will not be able to make good on eventual damage awards should they be necessary.

### C. Presumption of Constitutionality

An important component of the Quebec Court of Appeal's decision both to suspend and eventually to overturn the interlocutory injunction against the James Bay Development was a presumption that a law authorizing the development was constitutional. In the suspension decision the Court stated that until the law "has been declared unconstitutional, it must be applied, except under absolutely exceptional circumstances."[41] Similarly, Turgeon J.A. relied on a presumption of constitutionality in overturning the injunction in 1974. He noted that the interlocutory injunction really attacked the validity of the law authorizing the development and cited cases supporting a presumption of constitutionality.[42]

The issue of whether a law challenged on an interlocutory basis should be presumed to be constitutional has now been settled by the

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[39] In *R.* v. *Horseman*, [1990] 1 S.C.R. 901 at 939 the Supreme Court stayed a prosecution in recognition that, in bringing a test case, the Aboriginal accused had acted in the public interest even though he lost on the merits of his claim. An analogy can also be drawn to cases in which the Crown is not required to enter into undertakings. See Sharpe, *supra* note 16 at 2-25.

[40] *Supra* note 18 at 594. See also *Pasco* v. *C.N.R.* (1985), 69 B.C.L.R. 76 at 86 (S.C.), aff'd [1986] 1 C.N.L.R. 34 (C.A.) leave denied 64 N.R. 232.

[41] *Kanatewat*, *supra*, note 11 at 415.

[42] *Société Baie James*, *supra* note 14 at 395–396.

Supreme Court of Canada in *Metropolitan Stores*. The Supreme Court has rejected the notion that courts should presume that laws challenged in interlocutory proceedings are constitutionally valid on the basis that "the innovative and evolutive character of the Canadian Charter of Rights and Freedoms conflicts with the idea that a legislative provision can be presumed to be consistent with the Charter."[43] Although Aboriginal rights are not part of the *Charter*, there seems to be no reason not to apply the same reasoning to them. Section 35 of the *Constitution Act, 1982*, like the *Charter*, unsettles the status quo and provides a base for challenging laws that are inconsistent with its provisions.[44] Aboriginal rights are as evolving and innovative as any of the rights protected under the *Charter*.

Although the presumption of constitutionality that was used in the James Bay case has been decisively rejected in *Metropolitan Stores*, the Supreme Court has by no means rejected the idea that the public interest in existing legislation should be considered before granting interlocutory remedies. Thus some of the disturbing majoritarian and utilitarian implications of the James Bay decision — i.e. that "the common good" outweighs irreparable harm to Aboriginal people-may still be with us when courts consider whether the balance of convenience justifies ordering an interlocutory injunction.

### D. Balance of Convenience

The Supreme Court has affirmed that in constitutional cases the balance of convenience should be considered before granting interlocutory relief.[45] The notion of the balance of convenience can, however, be problematic in the constitutional context if it is interpreted in a manner that allows majority interests to overwhelm serious threats of irreparable harm to the rights of minorities. The contrasting approaches of the Quebec courts in the James Bay case again provides a good starting point.

In deciding to grant an interlocutory injunction, Malouf J. was reluctant to consider the balance of convenience because of his findings that the plaintiffs would suffer irreparable harm if an interlocu-

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[43] *Supra* note 19 at 122.

[44] *R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385 (S.C.C.) [hereinafter *Sparrow*].

[45] Beetz J. stated that even assuming s. 24(1) of the *Charter* applies to an application for interlocutory relief: "the public interest must be weighed as part of the balance of convenience: section 24 of the *Charter* clearly indicates that the remedy sought can be refused if it is not considered by the court to be 'appropriate and just in the circumstances'," *Metropolitan Stores*, *supra* note 19 at 149.

tory injunction was not granted and his assessment of the plaintiff's case as strong. When he did consider the balance of convenience, he did so in terms that were sensitive to his finding that the Aboriginal plaintiffs, unlike the defendant James Bay Corporation, would suffer irreparable harm should the development proceed. Malouf J. stated "[l]e droit des réquerants de poursuivre leur façon de vivre dans les terres sujettes au litige dépasse de loin toute considération pouvant être donnée a tout dommage monetaire."[46] His formulation of the balance of convenience was sensitive to the comparative harms that the parties will suffer.

In contrast, the Quebec Court of Appeal in its initial decision suspending the injunction relied on a comparison between the costs and benefits of the development on an utilitarian basis that did not consider the relative costs to Aboriginal people and others of proceeding with the James Bay development. The Court relied on the notion that "the public and general interests of the people of Quebec are thus opposed to the interests *of some two thousand of its inhabitants*."[47] As suggested above, such a majoritarian conception of the balance of convenience abdicates the court's responsibility to protect the legal and constitutional rights of minorities.

The Quebec Court of Appeal did not use such crudely majoritarian reasoning in its 1974 decision overturning the 1973 injunction on its merits. Nevertheless, they were still clearly influenced by the interests of the "people of Quebec" in the hydro-electric development. They applied a presumption of constitutionality to the authorizing legislation and noted the importance of the development at a time of an energy crisis. Unlike their 1973 decision, the Court of Appeal did consider the effects of the development on the plaintiff Cree, albeit in an ethnocentric manner that stressed the economic benefits to Aboriginal people and devalued the importance of its harmful social and cultural effects.

Subsequent cases have calculated the balance of convenience in a manner that is arguably more sensitive to Aboriginal interests. In the Meares Island case, for example, the possibility of irreparable harm influenced the assessment of the balance of convenience. Seaton J.A. stated:

> Meares Island is of importance to MacMillan Bloedel, but it cannot be said that denying or postponing its right would cause irreparable harm ... The position of the Indians is

[46] *Gros-Louis*, *supra* note 8 at 370–371.

[47] *Kanatewat*, *supra* note 11 at 415 [emphasis added].

quite different. It appears that the area to be logged will be wholly logged. The forest that the Indians know and use will be permanently destroyed ... . The courts will not be able to do justice in the circumstances. That is the sort of result that the courts have attempted to prevent by granting injunctions.[48]

In his concurring opinion, Macfarlane J.A. concluded that whether an interlocutory injunction should be granted depends on "the twin standards" of "justice and convenience" and that they both supported delays of even a few years so that the bands could have "a decision on the merits of their claim before destroying the forest involved in that claim."[49]

In *Westar Timber* v. *Ryan*[50] the British Columbia Court of Appeal upheld an interlocutory injunction against the expansion of logging activities into an unlogged area that was part of a larger land claim. This case can be interpreted as reaffirming the liberal approach to granting interlocutory relief in Meares Island and may in some respects expand its holding. Esson J.A. stated that their Meares Island decision stood for the propositions that courts would not grant interlocutory injunctions "if the economic consequences of doing so would have a serious impact upon the economic health of the province, the region or the logging company" but that relief may be granted "in respect of particular sites which have unique qualities."[51] The site in *Westar Timber* did not apparently have the same evidential, spiritual or symbolic significance of Meares Island, but Esson J.A. found that the fact it was "pristine" was sufficient.[52] The Court of Appeal did, however, vary the injunction to allow Westar to build footings for a bridge required to enter the area protected by the injunction and it confirmed that the adverse economic consequences of the injunction would be considered.

*Westar Timber* is particularly important because it continues to apply the liberal Meares Island approach to granting interlocutory

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[48] *MacMillan Bloedel*, *supra* note 18 at 591–2.

[49] *Ibid.* at 610.

[50] (1989), 60 D.L.R. (4th) 453 (B.C.C.A.) [hereinafter *Westar Timber*].

[51] *Ibid.* at 472.

[52] He noted that "[i]t is an area, small in relation to the whole of the land-claim area. where it is feasible to contemplate the Gitksan continuing in the same relationship to the land which they enjoyed before the coming of the whites." *Ibid.* at 475. Locke J.A. in dissent stated that unlike Meares Island "This is a case involving wilderness Crown land, only occasionally traversed by a trapper, unconnected with preservation of evidence or places of worship. No place could be more different." *Ibid.* at 490.

relief even after the Supreme Court's 1987 decision in *Metropolitan Stores*. In that case the Supreme Court unanimously affirmed that the balance of convenience should be considered before interlocutory relief is granted in a constitutional case. In overturning an interlocutory stay of labour legislation providing for the imposition of a first contract that had been challenged under the *Charter*, Beetz J. stated that no interlocutory relief should be issued to restrain the enforcement of laws "unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry."[53] This cast doubt that the *American Cyanamid* test can be applied strictly in the constitutional context because, as has been discussed above, that common law test can lead to granting interlocutory relief without consideration of the balance of convenience provided that the defendant can be compensated for any harm caused by the interlocutory injunction.

In order to give some structure to the vague concepts of balance of convenience and the public interest, Beetz J. made a conceptual distinction between cases in which interlocutory relief suspended the operation of laws with provisions which are "broad and general and such as to affect a great many persons" and those which only exempt "a relatively limited number of individuals and where no significant harm would be suffered by the public."[54] The standard for granting interlocutory relief in suspension cases that affect more people would generally be higher than in exemption cases.

As Jamie Cassels has shown, the *Metropolitan Stores* conception of the public interest relies on the problematic assumption that existing legislation always stands for the public interest and it can be manipulated so that a presumption of constitutionality is effectively retained.[55] The distinction between large-scale suspension cases and less intrusive exemption cases is suspect both as a proxy for where the

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[53] *Supra* note 19 at 149.

[54] *Ibid.* at 147.

[55] Professor Cassels argues that "[t]he assumption that only one party speaks for the public interest or that the public interests unambiguously points in any one direction, is simply an artificial attempt to squeeze Charter litigation back into the bi-polar mold ... If the public interest is, on some occasions, a factor weighing against an injunction, so will it on others, be a factor weighing in its favour." "An Inconvenient Balance: The Injunction as a Charter Remedy" in Berryman, ed., *supra* note 27, 271 at 305 and 311.

public interest lies and as a guide for constitutional reasoning.[56] Nevertheless, *Metropolitan Stores* remains the test and the suspension/exemption distinction can and should be interpreted to mitigate the potential majoritarianism of the balance of convenience concept.

To this end, interlocutory injunctions to protect Aboriginal people should generally be understood as less intrusive exemption cases rather than suspension cases which affect a great many people. Interlocutory injunctions to protect Aboriginal rights generally will only affect the interests of the development industry in a particular area. Courts should be reluctant to interpret these cases as wide-ranging suspension cases because of the economic benefits of development in general or the uncertainty that might result in other contexts from granting an injunction in a particular case. As was indicated in the Meares Island case, an interlocutory injunction is granted on the specific facts of a case and is not a precedent for injunctions in other cases.[57] Even if the effect of an interlocutory injunction is to disrupt general legislation, the disruption is localized. Esson J.A. recognized this in *Westar Timber* when he stated that an injunction against logging authorized by the *Forest Act*[58] in a specific area was not an attempt to suspend that Act but rather a restraint against "exercising certain of [a lumber company's] rights under the licenses granted under that Act until the conclusion of the litigation."[59]

If, as in the James Bay case, an interlocutory injunction suspends a law that authorizes a particular development, courts should not mechanically deny relief on the grounds that an injunction would suspend the law. They should go on to determine whether the benefits to the public of the law substantially outweigh the harms that will be

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[56] It "begs the moral question of how fair it is to deprive one group of a remedy because it is cheaper to do that than to extend it to a numerically larger group. It also entirely neglects complex questions about the fairness of who wins and who loses as a result of this outcome in the larger social context — and which remedy is more intrusive to whom." N. Duclos and K. Roach, "Constitutional Remedies as Constitutional Hints: A Comment on *R.* v. *Schachter*" (1991) 36 McGill L.J. 1 at 21.

[57] *MacMillan Bloedel*, *supra* note 18 at 593 per Seaton J.A.; at 610 per Macfarlane J.A. Thus granting the injunction will not have a precedential value that turns an exemption case into a broader suspension case. See *Metropolitan Stores*, *supra* note 19 at 147.

[58] R.S.B.C. 1979, c. 140.

[59] *Supra* note 50 at 469. Esson J.A. elaborated: "to enjoin Westar from exercising certain of its rights is not tantamount to finding that the Gitksan are entitled to act as though their asserted rights have been established, and does not have the effect of suspending or staying the application of the *Forest Act*." *Ibid.* at 476.

suffered by Aboriginal people.[60] They should also go on to reconsider the merits of the plaintiff's case as best they can from the record. It should not be forgotten that the case presented by the plaintiffs in *Metropolitan Stores* — that labour relations legislation infringed economic liberties protected under the *Charter* — while not frivolous or vexatious was nevertheless quite weak given the court's reluctance to protect economic rights. Although courts should not disqualify claims for interlocutory relief because the case is not strong, the strength of the case should not be ignored in determining the balance of convenience in difficult cases.

**E. Interlocutory Relief as an Inducement to Negotiate**

The trend since the James Bay case has been towards granting interlocutory injunctions to stop developments which threaten Aboriginal rights. As we have seen, courts following *American Cyanamid* require only that there be a serious issue for trial that is not frivolous or vexatious. This recognizes that Aboriginal claims raise complex questions of fact and law that should be resolved at trial and that in any event, people alleging violations of their constitutional rights should be given the benefit of the doubt. Courts are beginning to interpret the irreparable harm requirement in a manner that is sensitive to the distinct interests and purposes that Aboriginal rights are meant to protect. The *MacMillan Bloedel* case stands as a precedent for not requiring Aboriginal plaintiffs to undertake to pay damages caused by interlocutory injunctions. Assessing the balance of convenience presents the risk of Aboriginal rights being sacrificed to the economic benefits of development, but the *Metropolitan Stores* test can be applied so that interlocutory injunctions to protect Aboriginal people are conceived as exemptions from laws that are limited to the particular facts of the case and not as more intrusive suspensions of laws that may threaten the common good.

In my view a liberal[61] approach to granting interlocutory injunctions to stop actions which threaten Aboriginal interests is a manageable and purposive use of judicial power. It must be remembered that

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[60] It must be noted that Beetz J. referred to the interlocutory injunction in the James Bay case as "a striking illustration of interlocutory relief which could have compromised the common good of the public as a whole." *Metropolitan Stores*, *supra* note 19 at 136. James Bay is an unique case and the passages of the Court of Appeal's decision that Beetz J. quoted with approval emphasized the energy crisis of the mid-1970s.

[61] For a definition of a liberal and a conservative approach to granting interlocutory injunctions see Cassels, *supra* note 55 at 279ff.

even when an interlocutory injunction ends the court's involvement in a case, it rarely will represent the final settlement of the complex social and economic issues raised by development. Judges have recognized that by entering interlocutory injunctions they are not spelling out a final settlement or finally deciding legal issues as to the existence and scope of Aboriginal rights. In the Meares Island case, Macfarlane J.A. commented:

> ... a temporary restraining order does not signal victory or defeat to either side. Whether aboriginal rights exist, or if they do how far they extend, will not be decided until the judicial process is exhausted. Even then, if the Indian bands are successful in establishing rights, the remedies may be varied ... the settlement of Indian claims 'could include a variety of terms such as the protection of hunting, fishing and trapping, land title, money, as well as other rights and benefits.' But the granting of an interlocutory injunction in this case cannot in any way signal the consequences which will flow generally from final judicial pronouncements on claims based upon alleged aboriginal rights ... I think it fair to say that, in the end, the public anticipates that the claims will be resolved by negotiation and by settlement. This judicial proceeding is but a small part of the whole of a process which will ultimately find its solution in a reasonable exchange between governments and the Indian nations.[62]

Although interlocutory injunctions can impose costs on the parties and the public, the court will hear evidence about these costs in determining the balance of convenience. An interlocutory injunction restraining development will most likely result in negotiations between First Nations and governments. The interests of third parties such as the development industry are not likely to be ignored, especially if they can appeal the interlocutory injunction or pursue the matter on the merits. In other Aboriginal rights cases, courts have recognized that a temporary injunction creates mutual incentives for the parties to negotiate.[63] An interlocutory injunction as a temporary and negative prohibition does not tax the institutional competence of the judiciary to nearly the extent that mandatory or structural injunctions do.

More important than the fact that they are manageable for the judiciary, interlocutory injunctions to restrain encroachments on Aboriginal rights advance the purposes of Aboriginal rights. Granting an interlocutory injunction forces the governments and First Nations back to the negotiation table. This allows Aboriginal people to exercise a degree of self-determination over the eventual remedy and recog-

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[62] *MacMillan Bloedel*, *supra* note 18 at 607.

[63] *Paul* v. *Canadian Pacific Ltd.* (1983), 2 D.L.R. (4th) 22 at 39–42 (N.B.C.A.) per La Forest J.A., rev'd on other grounds (1988), 53 D.L.R. (4th) 487 (S.C.C.) [hereinafter *Paul*].

nizes the importance of consensual treaty-making as the primary means of establishing the relation between First Nations and Canadian governments.

Temporary injunctions to ensure that the scope and content of Aboriginal rights are not decided by the unilateral exercise of power are, in my view, both manageable and purposive. In many cases, the interlocutory injunction will be sufficient inducement for the affected interests to reach a settlement. Should they not reach a settlement, the parties retain the option of going to trial where the legal and factual issues will be decided.

## II. Remedies for Pre-1982 Extinguishment or Diminution of Aboriginal Title

In *Calder*, the Nishga brought Canada's first modern Aboriginal rights litigation to establish Aboriginal title over territory in northwest British Columbia. Although the Nishga only sought a declaration of unextinguished Aboriginal title, all the parties were concerned about the consequences of such a declaration and the remedies available should Aboriginal title be extinguished. Hall J. in his dissent suggested that the ultimate remedial question would be dealt with in terms drawn from the law of expropriation.

> The precise nature and value of ... [Aboriginal] right or title would, of course, be most relevant in any litigation that might follow extinguishment in the future because in such an event, according to common law, the expropriation of private rights by the Government under the prerogative necessitates the payment of compensation: *Newcastle Breweries Ltd.* v. *The King* [1920] 1 K.B. 854. Only express words to that effect in an enactment would authorize a taking without compensation. This proposition has been extended to Canada in *City of Montreal* v. *Montreal Harbour Comm'rs* [1926] A.C. 299. The principle is so much part of the common law that it even exists in time of war as was made clear in *Attorney General* v. *DeKeyser's Royal Hotel Ltd.* [1920] A.C. 508 and *Burmah Oil Co. (Burmah Trading) Ltd.* v. *Lord Advocate* [1965] A.C. 75.[64]

For Justice Hall, Aboriginal title was a "private right" and extinguishment was the equivalent of expropriation. Thus a declaration of Aboriginal title would "have a most practical result, namely, the right of the Nishga to compensation if and when extinguishment should be attempted or takes place."[65]

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[64] *Supra* note 18 at 173 per Hall J. in dissent (Spence and Laskin JJ. concurring).

[65] *Ibid.* at 219. The earlier quote however suggests that the legislature could by clear words displace the presumption of compensation.

In contrast Justice Judson suggested that the Crown could extinguish Aboriginal title without any obligation or presumption that compensation would be paid. He based his conclusion on what he saw as the distinctive nature of Aboriginal title as compared to private property rights. Judson J. quoted with approval an American case holding that Aboriginal title did not constitute private property compensable under the Fifth Amendment because Aboriginal title

> is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians ... Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle.[66]

Such a position deprives the Aboriginal interest in land of legal significance; it is a matter of policy and perhaps constitutional convention[67] whether governments grant compensation for extinguishment of Aboriginal title. There is no right of compensation enforceable by the courts.

The contrasting remedial options entertained in *Calder* present a difficult choice of extremes. The *Tee-Hit-Ton* position endorsed by Judson J. is harsh in denying any legal right of compensation. Although it recognizes the political nature of treaties and the distinctive nature of Aboriginal title, it makes the differences between Aboriginal and other interests in land a reason for subordinating the Aboriginal interests. On the other hand, Hall J.'s insistence on monetary compensation drawn for the law of expropriation may not be appropriate when applied to vast areas of land subject to use and occupation of various intensity. In contexts of intense or vital use,

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[66] *Ibid.* at 167–168 (Martland and Ritchie JJ. concurring) quoting *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 at 279, 290–91 (1955) [hereinafter *Tee-Hit-Ton*]. *Tee-Hit-Ton* has been the subject of critical commentary see D. Kelly, "Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial" (1975) 75 Colum. L. Rev. 655 at 664ff.

[67] It could be argued that the practice of exchanging compensation for land in treaties made the payment of compensation a matter of constitutional convention. Such a finding would underline the moral and constitutional wrong of any failure to pay compensation, but it would still leave the enforcement of the convention to the relevant political actors (the governments and the tribes), not the courts. See *Reference Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

monetary compensation may be too weak a remedy and stronger remedies akin to specific performance may be appropriate. In contexts of infrequent and peripheral use, compensation may be too demanding a remedy.[68] Justice Hall's position also raises some procedural problems. How should compensation be calculated? Fair market value would be a possibility but it could be argued that one of the fundamental features of Aboriginal title is its inalienability except to the Crown. The relevance of statutes of limitations and Crown immunity would also have to be decided.

The dispute between Justices Judson and Hall on compensation for extinguishment of Aboriginal title has still not been definitely resolved.[69] In a case dealing with expropriation of reserve land, LaForest J.A. (as he then was) cited with approval the common law presumption of the payment of compensation:

> When a taking is, in fact, authorized by statute, it is presumed that compensation will be paid: see the *Fisherman's Wharf* case supra. This, like the presumption against taking, must apply with additional force to the taking of Indian lands because this affects the honour and good faith of the Crown.[70]

Despite approving the common law presumption of compensation, LaForest J.A. recognized that a negotiated settlement was preferable. He entered a 6 month interim injunction against an Aboriginal blockade of a railway right of way in the expectation that the temporary nature of the injunction would encourage both parties to negotiate a settlement.[71]

Although LaForest J.A. clearly favoured the Hall position on compensation, the Supreme Court on the appeal avoided settling the

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[68] If monetary compensation was considered too drastic a remedy, judges might be reluctant to conclude that Aboriginal title had been extinguished even if continued Aboriginal use of the land was not practically possible.

[69] In *Calder* the judges split 3:3 on the merits with Pigeon J. concurring with Judson J. on a procedural issue. Since that time, "there have been no decisions to date in Canadian cases advancing claims for compensation for expropriation or extinguishment of aboriginal title." J. Woodward, *Native Law* (Toronto: Carswell, 1989) at 220. In an important recent decision the High Court of Australia decided 4:3 against the presumption of compensation. See *Mabo* v. *Queensland* (1992), 66 A.L.J.R. 408 at 410 per Mason C.J. and McHugh J.; at 430ff per Brennan J.; at 462ff per Dawson J. (no presumption of compensation) and at 443–45, 452–53 per Deane and Gaudron JJ.; at 489–490 per Toohey J. (presumption of compensation) [hereinafter *Mabo*].

[70] *Paul, supra* note 63 (N.B.C.A.) at 34.

[71] *Ibid.* at 41.

outstanding division of opinion from the *Calder* case. They did, however, hint that there was a third option between the extremes of monetary compensation for expropriation and no legal right of compensation. The Court stated:

> The question whether the government of New Brunswick failed to carry out its obligations to the Band and whether the Band is entitled to damages or compensation as a consequence does not arise in this appeal. Those remain open questions. In this regard, we note the words of Dickson J. (as he then was) in the case of *Guerin* v. *The Queen*:
>
> > In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian lands places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty, it will be liable to the Indians in the same way and to the same effect as if such a trust were in effect.[72]

In *Guerin* v. *R.*, Dickson J. stated that the distinct nature of Aboriginal title including its inalienability except to the Crown meant that the Crown had a fiduciary obligation to deal with the land for the benefit of the Aboriginal people.[73] Although in *Guerin* there was an explicit surrender of Aboriginal land to the Crown, the case suggests that the Crown might because of an "unilateral undertaking" have a fiduciary obligation imposed on it.[74] Expanding on this, if the Crown exercised its discretionary pre-1982 powers to extinguish or diminish Aboriginal title unilaterally, courts can impose a corresponding fiduciary duty on the Crown to act in the best interests of the community whose rights were adversely affected.[75] The courts could then use

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[72] *Ibid.* (S.C.C.) at 503–504.

[73] (1984), 13 D.L.R. (4th) 321 at 339 [hereinafter *Guerin*].

[74] In *Guerin*, *ibid.* at 341, Dickson J. stated "that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered will become a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct."

[75] A fiduciary obligation would recognize that the distinct nature of Aboriginal title left it vulnerable to unilateral and discretionary extinguishment by the Crown. See the criteria for imposing fiduciary obligations in *Frame* v. *Smith*, [1987] 2 S.C.R. 99 at 136 per Wilson J. In *Delgamuukw* v. *British Columbia*, [1991] 3 W.W.R. 97 at 416 (B.C.S.C.) [hereinafter *Delgamuukw*] McEachern C.J.B.C. recognized that "a unilateral extinguishment of a legal right, accompanied by a promise, can hardly be less effective than a surrender as a basis for a fiduciary obligation." Given the vulnerable and inalienable nature of Aboriginal title as recognized in common law, specific promises should not be necessary to create a fiduciary relationship to govern the imbalance of power. In *Mabo*,

their equitable powers to regulate the manner in which the Crown used its discretionary powers and in particular remedy any unconscionable behaviour by the Crown.[76]

What are the implications of this third remedial option? If the Crown exercised its power to extinguish Aboriginal title, it would be bound by a fiduciary duty to act for the benefit of those whose land was adversely affected. Failure to fulfil this fiduciary duty ultimately could be remedied by the courts. The fiduciary duty approach by no means precludes the availability of court ordered financial compensation. In *Guerin*, the Court found that the Crown had breached its fiduciary duty in its administration of reserve land and approved a $10 million award for the Musquem Band. The award had been calculated by the trial judge as designed to restore the Band to the financial position they would have been in had the Crown administered the lands surrendered to it properly.

Although it does not preclude financial compensation, the fiduciary duty approach opens up other remedial possibilities. It does so by moving the questions of remedies from the common law to equity. The hallmark of equity is its flexibility which resides in the broad discretion of the trial judge to order remedies. As La Forest J. has stated in a recent case:

> Where a situation requires different policy objectives, then the remedy may be found in that system that appears most appropriate. This will often be equity. Its flexible remedies such as constructive trusts, accounting, tracing and compensation must continue to be moulded to meet the requirements of fairness and justice in specific situations. Nor should this process be confined to pre-existing situations.[77]

Remedial approaches taken from equity are in many ways better suited to responding to the innovative and varied problems of providing remedies for violations of Aboriginal rights than those which focus on the payment of damages based on common law principles.

What would be the range of equitable remedies available to respond to breaches of the Crown's fiduciary responsibilities to First Nations?

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*supra* note 69 at 493 Toohey J. stated that a fiduciary relationship arises from the discretionary power of the Crown to extinguish native title.

[76] "The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal." *Guerin*, *supra* note 73 at 344.

[77] *Canson Enterprises* v. *Broughton* (1992), 6 B.C.A.C. 1 at 43 (S.C.C.) [hereinafter *Canson*] See also *Norberg* v. *Wynrib* (1992), 9 B.C.A.C. 1 at 69ff (S.C.C.) per McLachlin J.

In a judgment that was otherwise quite hostile to the notion of legally enforceable Aboriginal rights, McEachern C.J.B.C. in *Delgamuukw* indicated a wide range of ways the Crown could fulfil its fiduciary obligations. These include reasonable consultation with Aboriginal people and the assignment of priority and alternative user rights to them. Although he did not welcome judicial intervention, Chief Justice McEachern recognized that should the Crown not fulfil its fiduciary obligations, there is no principled reason why the courts should not ensure compliance.[78] Brian Slattery has recently stated the Crown could discharge the fiduciary obligations by taking actions which

> strike a fair balance between the public good and the Aboriginal interests in dealing with Aboriginal lands. Ideally, this balance would best be struck through voluntary agreements with the First Nations affected. Failing that, the Provincial Crown would have the power to make its own determinations, subject to the supervision of the courts, which could enforce the fiduciary duties and grant appropriate remedies.[79]

The judicial remedies that Professor Slattery contemplates include nullification of Crown grants, monetary compensation where third party interests would be harmed by nullification of grants and orders diverting resource revenues to First Nations.[80]

The range of remedies for breach of the Crown's fiduciary responsibilities is virtually limitless. It is possible that a court could order the Crown to make good faith efforts at negotiation in order to fulfil its fiduciary obligations. This would be in keeping with the non-adversarial trust-like relations between the Crown and Aboriginal peoples that the concept of fiduciary duty is meant to capture and promote. In order to facilitate negotiations aimed at meeting the Crown's fiduciary obligations, courts would likely rely on their broad and flexible powers to make declarations. In a recent case involving Métis land claims, the Supreme Court of Canada refused to strike out a claim for declaratory relief based on allegations that land grants between 1871 and 1886

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[78] *Delgamuukw*, *supra* note 75 at 422–425. McEachern C.J.B.C. limited the fiduciary duty to traditional sustenance activities on unoccupied Crown land and subjected it to the general laws of the provinces. As I will suggest below, there is nothing implicit in the notion of fiduciary duties and remedies for their breach that would restrict remedies to the narrow terms contemplated by Chief Justice McEachern.

[79] "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 at 291–292.

[80] The notion of orders diverting revenues may seem especially innovative but it does find support in the concept of constructive trust to be discussed below.

violated commitments in the *Manitoba Act*.[81] The Court recognized "that declaratory relief may be granted in the discretion of the court in aid of extra-judicial claims in an appropriate case."[82]

Should negotiations fail to discharge the Crown's fiduciary duty, the courts will be responsible for providing a remedy for the breach of that duty. As mentioned, the court's remedial discretion would be unfettered because of the breadth of its equitable remedial powers. At the strong end of the scale, the court could effectively order certain lands transferred to Aboriginal people by way of a constructive trust.[83] La Forest J. has recently articulated principles for when a constructive trust would be an appropriate remedy that could be adapted to the Aboriginal rights context. For example, courts should consider the government's conduct, the uniqueness of the property at stake and the appropriateness of damages including the ease of assessment. They should not be restricted in creating constructive trusts by the fact that the Aboriginal interest in land may not be a property right, as traditionally understood.[84]

Other remedies for breach of the Crown's fiduciary duty could be the assignment of user rights through injunctions, declarations or equitable liens.[85] As *Guerin* demonstrates, damages could be calculated on equitable principles which are not necessarily bound by restrictive tort or contract principles for calculating damages[86] or by statutes of limitations.[87] In some instances, courts might conclude

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[81] (Can.), 33 Vict., c. 3, reprinted in R.S.C. 1985, App. 2, No. 8.

[82] *Dumont* v. *Canada (A.G.)* (1990), 67 D.L.R. (4th) 159 at 160 (S.C.C.) [hereinafter *Dumont*].

[83] See for example *Lac Minerals Ltd.* v. *Corona Resources*, [1989] 2 S.C.R. 574 [hereinafter *Lac Minerals*]. In *Mabo*, *supra* note 69 at 453 Deane and Gaudron JJ. in dissent stated that "the circumstances of a case may be such that, in a modern context, the appropriate form of relief is the imposition of a remedial constructive trust framed to reflect the incidents and limitations of the rights under the common law native title."

[84] *Lac Minerals*, *ibid.* at 676ff per La Forest J. (in dissent but not on this point).

[85] See generally J. McCamus, "Remedies for Breach of Fiduciary Duty" Law Society of Upper Canada *Special Lectures 1990* (Toronto: Law Society of Upper Canada, 1991) at 63ff.

[86] *Nocton* v. *Lord Ashburton*, [1914] A.C. 932 (H.L.); *Canadian Aero* v. *O'Malley*, [1974] S.C.R. 592; *Guerin*, *supra* note 73 at 362–63; *Lac Minerals*, *supra* note 83 at 632; *Canson*, *supra* note 77 at 46 (S.C.C.) per McLachlin J. (in dissent) ("equity is concerned, not only to compensate the plaintiff but to enforce the trust which is at its heart.")

[87] *Guerin*, *supra* note 73 at 344–45 (equitable fraud excusing missed limitation period).

that the government's efforts at negotiation, recompense and giving priority to Aboriginal use fulfilled its fiduciary duty.

Unlike the doctrine of compensation examined above, breach of the Crown's fiduciary duty might not be tied to the act of extinguishment. Unilateral actions of the Crown short of extinguishment might result in a breach of the Crown's fiduciary duty and remedies for its breach. The Supreme Court has recognized that some of the most important impacts on Aboriginal rights do not fit within a model based on compensation for expropriation of land.[88] Some Crown use of land or regulation of Aboriginal rights might breach the Crown's fiduciary duty even though it did not result in injury that can be compensated for by damages. A breach of fiduciary duty is more likely if the use or regulation was undertaken without consultation and without making attempts to accommodate Aboriginal use. Remedies for the breach might include the consultation and accommodation that should have taken place in the first place.

The fiduciary duty approach to remedying pre-1982 extinguishment or diminution of Aboriginal rights can be criticized from various perspectives. The notion of Aboriginal people being the beneficiary of Crown protection can be said to be demeaning in comparison to their treatment under the compensation principle.[89] In *Guerin*, however, the Court was careful to stress the unique nature of fiduciary duties in the Aboriginal rights context. It is not necessary that the fiduciary concept carry the same connotations of dependence and inability to manage one's affairs that it does in the private law context. Thus in *Guerin* one of the reasons the Crown breached its fiduciary obligation was that it failed to consult with the Musquem about the changed terms of the lease. The implication is that if there had been proper consultation, the decision would have been up to the band. The Crown would not have to engage in the paternalistic exercise of determining

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[88] In *Kruger* v. *R.*, [1978] 1 S.C.R. 104 at 108 Dickson J. stated that restrictions on Aboriginal hunting were not subject to the presumption of compensation for expropriation. He stated: "Most regulation imposing negative prohibitions affects previously enjoyed rights in ways deemed not compensatory. The *Wildlife Act* illustrates this point. It is aimed at wildlife management and to that end it regulates the time, place and manner of hunting game. It is not directed to the acquisition of property." In *Sparrow*, *supra* note 44 at 416 Dickson C.J. indicated that compensation would only be available "in a situation of expropriation."

[89] See for example Patrick Macklem's criticisms of the fiduciary duty concept as based on a hierarchical relationship in which First Nations are seen as dependent on the Crown. "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382 at 448–449.

whether the Band was acting in its best interests.[90] In any event, imposition of a fiduciary duty reflects that in the pre-1982 common law context, the Crown had the extraordinary and discretionary power to extinguish Aboriginal title on a unilateral basis. Judicial efforts to remedy abuses of that imbalance of power should not be tainted by objections to the imbalance.

Another criticism of the fiduciary concept is that it allows the Crown to do less than pay fair market value compensation for the lands it has taken or used. The fiduciary obligation is a vague one to act in the best interests of First Nations and it will not necessarily require acre by acre compensation for land that has been extinguished or made incompatible with Aboriginal use. Full compensation as a remedial goal is related to the notion of corrective justice. The goal of corrective justice is to restore the status quo ante by transferring what one party has wrongfully taken and restoring it to the party who has suffered the loss. Applied in the Aboriginal rights context, governments would attempt to restore Aboriginal people to the position they occupied prior to European settlement. The make-whole aspiration of corrective justice is morally compelling but it is often unrealistic. Although the position of Aboriginal people before European settlement and the resulting harms they suffered should not be forgotten, they cannot easily be used as realistic standards for measuring remedies for the future.

Rather than concentrating on corrective justice through the payment of compensation, the fiduciary approach has its origins on equity. Equity is known for its ability to be flexible and innovative in devising remedies and as discussed above, courts could order powerful remedies such as constructive trusts to respond to egregious breaches of the Crown's fiduciary duties. On the other hand, equity is also committed to balancing the affected interests before ordering remedies and not ordering remedies that are impractical or unduly harsh to any of the interests affected by them. I have argued elsewhere that equity has significant potential as well as dangers for the victims of struc-

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[90] "When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the band to explain what had occurred and seek the band's counsel on how to proceed" *Guerin, supra* note 73 at 344 per Dickson J. *Contra* to the fears expressed in D. Waters "Equitable Doctrines: Canadian Experience" in T. Youdon *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 421.

tural injustices.[91] Equity provides the flexibility to devise meaningful remedies that can recognize some of the present needs of First Nations. The focus would not be the retrospective one of compensation for each acre of Aboriginal title that had been proven to be extinguished in the past. Rather the focus would be the prospective goal of requiring the Crown to make reasonable efforts to fulfil its ongoing fiduciary obligation by responding to the present needs of Aboriginal communities and the opportunities for reform.

Despite its promise, it cannot be denied that the fiduciary approach described above relies on the discretion of first the Crown and later the judiciary to order remedies that will deal with Aboriginal lands in the best interests of First Nations. Equity's commitment to balancing the affected interests can justify giving Aboriginal people less than an insistence on full compensation requires. An insistence of full compensation, however, may lead to narrow interpretation of the harms to be remedied. Some Crown actions short of extinguishment that adversely affect Aboriginal communities may only be remedied through the fiduciary duty approach. Moreover, the compensation approach assumes that Aboriginal people can and want to be restored to their original positions and the remedial obligations of governments eventually terminated. Unless the harms suffered by First Nations are conceived in artificially narrow terms, this again seems an unrealistic goal.

A different type of criticism of the fiduciary duty approach is that it will strain judicial competence by inviting the court to order remedies restoring land, assigning user rights and compelling the parties to negotiate agreements. It can be argued that the judiciary should not and cannot undertake a managerial role in supervising relations between First Nations and Canadian governments.[92] There are a number of responses to such criticisms. A court will not have to decide what remedies to order unless it is faced with clear signals that the Crown will continue to refuse to fulfil its fiduciary obligations. Given Canadian traditions of governmental compliance with court orders, declarations concerning the scope and content of Aboriginal rights will often be sufficient to ensure that governments comply with

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[91] See K. Roach, "The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies" (1991) 33 Ariz. L. Rev. 859.

[92] The leading critiques of activist, managerial remedies are L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353; D. Horowitz, *Courts and Social Policy* (Washington: Brookings Institute, 1977). For an interesting Canadian critique of judicial activism see R. Knopff & F.L. Morton, *Charter Politics* (Scarborough: Nelson, 1992).

their fiduciary duties. In many instances, the Crown should be given a reasonable opportunity to discharge its fiduciary obligations. The Crown in consultation with First Nations can then make difficult distributional decisions about the allocation of scarce resources. At most, courts will have to judge the sufficiency of the balance of interests that is struck.[93]

Should governments not comply with their fiduciary duties, then courts should not, in my view, back down from the challenge of devising innovative remedies. Using the breadth and flexibility of their equitable powers, courts have devised a wide array of innovative remedies in the commercial context including injunctions and constructive trusts. Surely, Aboriginal rights deserve the same type of judicial commitment and creativity.

In short, there are three remedial options for dealing with pre-1982 extinguishment or diminution of Aboriginal title. As opposed to the options which stress that Aboriginal interests in land have no legal status deserving compensation or should be compensated in terms borrowed from the private law of expropriation, I find the notion that governments have a fiduciary obligation to act in the best interests of First Nations to be the most purposive and flexible. It allows governments in consultation with First Nations to pursue whatever options are available to act in the best interests of the Aboriginal communities whose lands have been extinguished or adversely affected. Should this consensual process fail and the conduct of the Crown not meet fiduciary standards, courts will then have to provide a remedy. They can do so by selecting the most appropriate and just of a wide range of remedies available for breach of fiduciary duties.

## III. Remedies for Violations of s. 35(1) of the *Constitution Act, 1982*

After the Supreme Court's landmark decision in *Sparrow*, it is clear that s. 35(1) of the *Constitution Act, 1982* will be enforced like any other constitutional provision. In *Sparrow*, the Court affirmed that s. 35(1) would be interpreted as a constitutional right that could invalidate laws and regulations to the extent of their inconsistency. Dickson C.J.C. quoted with approval from the *Reference Re Language*

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[93] Such an approach would be consistent with the approach taken to judicial review under the *Charter*. See *Operation Dismantle* v. *R.*, [1985] 1 S.C.R. 441; *Irwin Toy* v. *Quebec (A.G.)*, [1989] 1 S.C.R. 927; *McKinney* v. *University of Guelph* (1990), 76 D.L.R. (4th) 545.

*Rights under the Manitoba Act* that "as s. 52 of the *Constitution Act, 1982* declares, the 'supreme law' of the nation, [is] unalterable by the normal legislative process and unsuffering of laws inconsistent with it." and that the duty of the judiciary is "to ensure that the constitutional law prevails."[94] The ultimate remedy for the violation of Aboriginal rights is striking down state authority to the extent of its inconsistency with those rights. This having been said, Chief Justice Dickson hastened to add that the constitutional status of s. 35(1) "does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*."[95] In addition to the issue of whether a law affecting Aboriginal rights is justified, the reference to the *Manitoba Language Reference* signals that even when laws unjustifiably infringe Aboriginal rights, courts may not simply strike them down. In the *Manitoba Language Reference*, the Supreme Court gave unconstitutional unilingual laws temporary effect in order to prevent a legislative vacuum and protect the rule of law. Striking down legislation may also be an inappropriate means to remedy violations of positive obligations that the state owes to First Nations under treaties or as part of its fiduciary obligations.[96]

Remedies for the violation of s. 35(1) of the *Constitution Act, 1982* will arise in different contexts. First, remedial issues in litigation to secure Aboriginal rights over land, resources and persons will be examined. Next, the remedies available when s. 35(1) is used as a defence when the state prosecutes Aboriginal people will be outlined. Although s. 35(1) does not at present explicitly recognize an inherent right of Aboriginal self-government, the remedial issues in enforcing such a right are likely to be fairly similar.[97]

### A. Remedies in Litigation to Secure Aboriginal Rights

Litigation to secure Aboriginal rights over land and resources will present courts with many remedial dilemmas. Declaring state grants of ownership or use over land and resources to be of no force or effect

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[94] *Sparrow*, *supra* note 44 at 407 quoting *Reference Re Language Rights under the Manitoba Act, 1870* (1985), 19 D.L.R. (4th) 1 at 19 (S.C.C.) [hereinafter *Manitoba Language Reference*].

[95] *Sparrow*, *ibid.* at 409.

[96] See generally *Schachter*, *supra* note 4.

[97] A delay period of the justiciability of a self-government provision as well as recognition of its inherent nature may, however, suggest that court sanctioned remedial delay is not appropriate.

because they are inconsistent with Aboriginal rights is a blunt remedy. Awarding damages may be a means to recognize conflicting third party interests, but it may not provide a basis for securing Aboriginal rights for future generations. It is possible that courts will play an active and continuing remedial role in which they issue structural injunctions to enforce Aboriginal rights. Such a remedial role might, however, strain judicial competence and produce remedies that are not satisfying to any of the affected interests.

The remedial alternatives of striking down state authority, awarding damages or issuing structural injunctions have so far not played an important role in Aboriginal rights litigation. The prime remedy sought in such litigation has been a judicial declaration of existing Aboriginal rights. Preference for declaratory relief can partly be explained for procedural reasons. Governments may enjoy an immunity from injunctions especially if claims of Aboriginal rights are not made under s. 35(1) of the *Constitution Act, 1982*.[98] Damage claims may encounter similar procedural obstacles in the form of Crown immunities and statutes of limitations. The Supreme Court has taken a flexible approach to the awarding of declaratory relief holding that it "is a remedy neither constrained by form nor bounded by substantive content which avails persons sharing a legal relationship." Declarations can be issued when they are "capable of having any practical effect in resolving the issues in the case"[99] or even "in aid of extra-judicial claims" such as claims for a land claims agreement.[100]

Declaratory relief can also be defended as a purposive remedy for violations of Aboriginal rights. Declarations of constitutional rights proceed on the assumption that the parties and especially governments will comply with their letter and spirit.[101] This assumption of voluntary compliance is especially appropriate in the Aboriginal rights

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[98] *Grand Council of Crees* v. *Canada* (1979), 124 D.L.R. (3d) 574 (F.C.A.). If a violation of the constitution is alleged, however, the Crown may no longer be immune from mandatory relief. See *Air Canada* v. *British Columbia (A.G.)*, [1986] 2 S.C.R. 539; *Levesque* v. *Canada (A.G.)* (1985), 25 D.L.R. (4th) 184 (F.C.T.D.) See generally P. Hogg, *The Liability of the Crown*, 2d ed. (Toronto: Carswell, 1989) at 22–23.

[99] *Solosky* v. *R.* (1979), 105 D.L.R. (3d) 745 at 753 (S.C.C.).

[100] *Dumont supra* note 82 at 160.

[101] *Mahe* v. *Alberta* (1990), 68 D.L.R. (4th) 69 at 106 (S.C.C.) [hereinafter *Mahe*]; *Dixon* v. *British Columbia (A.G.)* (1989), 59 D.L.R. (4th) 247 at 281–82 (B.C.S.C.) [hereinafter *Dixon*]; *Re Hoogbruin and British Columbia (A.G.)* (1986), 24 D.L.R. (4th) 718 at 722–23 (B.C.C.A.).

context, where the honour and good faith of the Crown is at stake. Lazar Sarna has commented that the non-coercive nature of declaratory relief can help "the parties to the dispute to resolve the issues without an excessively hostile or adversarial approach"[102] and this is appropriate given the non-adversarial, trust-like relationship Canadian governments are supposed to have with Aboriginal people.

Declarations concerning the general nature of constitutional rights allow the parties the flexibility to apply general constitutional principles in particular local circumstances. In *Mahe* the Supreme Court recognized that declarations of general constitutional rights were appropriate in dealing with minority language rights which, like Aboriginal rights, require a fact-specific, community by community determination of their precise scope and content. The Court stated in *Mahe* that they could not

> give an exact description of what is required in every case in order to ensure that the minority language group has control over those aspects of minority language education which pertain to or have an effect upon minority language and culture .... At this stage of early development of s. 23 jurisprudence, the appropriate response for the courts is to describe in general terms the requirements mandated. It is up to the public authorities to satisfy these general requirements.[103]

The Court recognized that such an approach might require further litigation and remedies if governments did not comply or exercised their powers to deny minority language rights. Nevertheless, they decided that this was better than running "the real risk of imposing impractical solutions."[104] The Court's approach to declaratory relief was justified both by the nature of the right in question and considerations of its institutional competence.[105] Justice McLachlin has stated that

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[102] *The Law of Declaratory Judgments*, 2d ed. (Toronto: Carswell, 1988) at 121 & 223.

[103] *Supra* note 101 at 93.

[104] *Ibid.* at 98.

[105] The Court stated that a general declaration would "ensure that the appellants rights are realized while, at the same time, leaving the government with the flexibility necessary to fashion a response which is suited to the circumstances. As the Attorney-General of Ontario submits, the government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met; the court should be loath to interfere and impose what will be necessarily procrustean standards, unless [the government's] discretion is not exercised at all or is exercised in such a way as to deny a constitutional right." *Mahe*, *supra* note 101 at 106.

The Ontario Court of Appeal stated in its *Reference Re Minority Language Education Rights* (1984), 10 D.L.R. (4th) 491 at 532: "The judiciary is not the sole guardian of the Canadian Constitution. Parliament and the provincial Legislatures are equally respon-

"the use of a general declaration instead of specific instructions" was "a solution predicated on recognition of the complementary roles of the courts and legislatures and on the belief that governments will in good faith comply with court directives."[106] Similar considerations would apply in the Aboriginal rights context.

Declarations of constitutional rights are not designed to provide a final remedy. They presume that subsequent action will be undertaken to implement them. In the case of declarations of invalidity, the subsequent actions are usually quite simple. Unconstitutional laws are not to be applied and should be repealed. In other contexts, the subsequent actions are more complex. Declarations of Aboriginal rights, like declarations of minority language rights, may require positive governmental action such as the provision of enabling legislation and resources. Negotiations between governments and the communities intended to benefit from the rights will often be necessary to determine the best means to implement the general principles of the declarations.

How have the courts responded in the Aboriginal rights litigation that has been brought to date? Again, assessment is difficult because few cases have been litigated and even fewer have considered the question of remedies. In the *Calder* litigation, the plaintiff representing the Nishga sought only a declaration of unextinguished Aboriginal title. Such a declaration would play a crucial role in subsequent land claims negotiation and may, as discussed above, trigger a presumption of compensation should extinguishment occur.

A preference for declaratory relief and an assumption that negotiations should proceed in light of declarations of rights has also been present in more recent land claims litigation. In *Delgamuukw*,[107] the plaintiffs representing the Gitksan and Wet'suwet'en requested declarations that they had rights of ownership and jurisdiction over the territory in question including declarations that British Columbia

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sible to ensure that the rights conferred by the Charter are upheld. Legislative action in the important and complex field of education is much to be preferred to judicial intervention."

[106] B. McLachlin, "The Charter: A New Role for the Judiciary" (1991) 29 Alta. L. Rev. 540 at 558.

[107] The reader should know that I worked as a consultant on remedial issues for the law firm Arvay, Finlay which was hired in March, 1992, along with Swinton and Company, to argue the appeal of this case before the British Columbia Court of Appeal for the Attorney General of British Columbia. The opinions expressed about the case are mine alone.

could not interfere with Aboriginal rights and title. The plaintiffs also requested the court to retain jurisdiction to resolve all outstanding disputes between the parties as to the implementation of its declarations.[108]

A limitation of declaratory relief is that it usually represents the end of a court's involvement in a case. The Court assumes but cannot know if and when there will be subsequent compliance with its declarations. In the *Mahe* case, for example, the Supreme Court recognized that subsequent litigation might be necessary either to seek further definitions of minority language education rights or to respond to a refusal by a government to implement such rights. Nevertheless, the Court did not retain jurisdiction over the case and further litigation would require the minority language community to spend the time and money to commence further court proceedings. Given the difficulty of mounting Aboriginal rights litigation, courts should seriously consider retaining jurisdiction over a case to ensure that their declarations of Aboriginal rights are in fact implemented.[109]

In *Delgamuukw* the plaintiffs asked for fairly precise declarations of the scope of their Aboriginal rights and the restrictions that such rights placed on the province. Still, it is apparent that they believed that declaratory relief would be a prelude to negotiation. Interestingly, the plaintiffs made an innovative attempt to incorporate negotiations more directly in the court's remedy. At one point, they sought to amend their statement of claim to request a declaration that they "have a constitutional right to negotiate a land claims agreement" and that the defendants are "constitutionally obligated to negotiate with the plaintiffs a settlement of the relationship between the plaintiffs and the defendants based on the plaintiff's rights" including a direction that the defendant "meet with the plaintiffs forthwith to

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[108] They also originally sought a declaration of entitlement to damages for the wrongful appropriation and use of their land without their consent. The issue of damages will be discussed below.

[109] On the appeal before the British Columbia Court of Appeal both the appellants and the respondent asked the Court to make declarations concerning the appellant's Aboriginal rights and then to adjourn the appeal and retain jurisdiction to decide outstanding issues. The parties disagreed on the scope of the declarations that should be made with the Attorney General of British Columbia asking that the Court declare a temporary transition period in the anticipation that the appellants' claims will be resolved and the precise location, scope, content and consequences of their rights be further defined and implemented through negotiation.

negotiate in good faith a settlement."[110] The British Columbia Court of Appeal decided to strike this remedial request from the statement of claim with Hutcheon J.A. stating:

> If the plaintiffs are successful then it would follow without more that they would have the right to negotiate a land claim agreement with respect to the territory. I can find no jurisdiction in law and, in my view, the Supreme Court has no jurisdiction to declare that the defendants are obligated to negotiate. No one doubts, however, that must of necessity be done. Still less has the Supreme Court the power to direct the defendants to meet with the plaintiffs and negotiate in good faith ...[111]

The Court of Appeal was reluctant to order the parties to negotiate a settlement but the plaintiff's requests were somewhat extravagant in mandating the parties not only to negotiate in good faith but to come to an agreement.

Even if courts are reluctant to order the parties to negotiate, it is not likely that they will be eager to devise their own remedies to restructure the relationship between a particular Aboriginal community and other governments. A claim to self-government often lies at the heart of Aboriginal rights claims.[112] First Nations plaintiffs may in effect be asking to be exempted from a wide array of governmental regulation over land, resources and people. If a court did decide that such regulation violated Aboriginal rights, it might determine that the effects of striking down the regulation would be too drastic. As in the *Manitoba Language Reference*, a declaration that important pieces of state regulation did not apply to Aboriginal people might create a legal vacuum and undermine the rule of law. This would justify the court in giving otherwise unconstitutional laws legal validity during a temporary transition period. The practice of giving unconstitutional laws temporary effect was originally tied to findings of a constitutional emergency[113] but it has also been applied in several non-emergency

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[110] *Delgamuukw* v. *British Columbia (A.G.)* (5 December 1986) Ca 006460,006495 (B.C.C.A.) [unreported].

[111] *Ibid.* at 7–8 McFarlane, McLachlin JJ.A. concurring.

[112] See generally P. Macklem, *supra* note 89.

[113] *Manitoba Language Reference*, *supra* note 94 at 29, (emergency because of legislative vacuum if all unilingual laws struck down); *Dixon*, *supra* note 101 at 283, (emergency because of impossibility of holding an election if electoral boundaries struck down).

situations.[114] All of these cases provide precedent for temporarily refusing to strike down unconstitutional laws that violate Aboriginal rights.[115] This would allow a negotiation process between First Nations and governments to devise the most appropriate means to secure compliance with the Aboriginal rights.

Giving unconstitutional legislation temporary effect is not a remedy that courts should use lightly. Use by courts of their suspensive powers should not take away from the constitutional principle that should a constitutionally adequate settlement not be produced during a temporary transition period, then the Court will have to fulfil its obligation under s. 52 of the *Constitution Act* to strike down state authority to the extent of its inconsistency with Aboriginal rights. As in the *Dixon* case, such a remedy would be the minimum remedy a court could enter.[116] A court should follow the examples of the *Manitoba Language Reference*, *Dixon* and *Swain* cases and retain jurisdiction over the matter in order to ensure it can devise final remedies should a constitutionally adequate settlement not emerge during the temporary transition period. During this period, a court might exercise its discretion to order remedies akin to interlocutory injunctions to

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[114] In *R.* v. *Brydges*, [1990] 1 S.C.R. 190 at 217 the Court declared a 30 day transition period to allow the police to respond to a ruling that s. 10(b) requires that a person be informed of the availability of legal aid. In *R.* v. *Swain*, [1991] 2 S.C.R. 933 at 1021 and *R.* v. *Bain* (1992), 69 C.C.C. (3d) 481 at 513 (S.C.C.) the Court declined to strike out unconstitutional *Criminal Code*, R.S.C. 1985, c. C-46 provisions for a 6 month period in order to provide Parliament time to reform the legislation. In *Sinclair* v. *Quebec (A.G.)* (1992), 89 D.L.R. (4th) 500 at 511 (S.C.C.) the Court exercised "its suspensive powers" to declare unconstitutional unilingual legislation valid for one year "to permit the National Assembly to take what steps it sees fit to remedy the constitutional deficiencies."

[115] Somewhat more restrictive views of when transition periods and delayed declarations of invalidity should be ordered have been expressed in two very recent cases. See *R.* v. *Morin*, [1992] 1 S.C.R. 771 at 798 (transition period "implies a fixed period during which unreasonable delay will be tolerated while the system adjusts certain Charter rights" and "a moratorium on Charter rights"); *Schachter*, *supra* note 4 at 26 (giving unconstitutional laws temporary effect "is a serious matter from the point of view of the enforcement of the Charter [because it] ... allows a state of affairs which has been found to violate standards embodied in the Charter to persist for a time despite the violation.")

[116] *Dixon*, *supra* note 101 at 284. See generally K. Roach, "Reapportionment in British Columbia" (1990) 24 U.B.C. L. Rev. 79 at 93ff. Additional remedies in the Aboriginal rights context might include constructive trusts, damages and structural injunctions.

prevent further encroachments on Aboriginal rights.[117] The court could also provide interim guidelines to guide behaviour during the transition period.

In the *Manitoba Language Reference* the Supreme Court rejected a remedial proposal that "would make the executive branch of the federal government, rather than the courts, the guarantor of constitutionally entrenched rights" or one that relied upon "a future and uncertain event."[118] The Court retained jurisdiction, set a schedule to govern the translation of Manitoba's laws and made it clear that new laws that did not respect language rights would be struck down. They subsequently made rulings elaborating on their judgment.[119] In my view a similar approach could be justified in the Aboriginal rights context especially when the claims to Aboriginal rights are of such a generalized and powerful nature that simply striking down state authority under s. 52(1) of the *Constitution Act, 1982* would not be satisfactory. A transition period, perhaps accompanied with interim guidelines to facilitate good faith efforts at negotiation and prohibitions of new encroachments on Aboriginal rights, would allow the difficult and interconnected problems of devising a new relationship between the parties to be achieved through negotiation, a process that is much more flexible than adjudication. Although the courts have the ultimate responsibility to enforce the Constitution, they should allow governments reasonable opportunities to comply with their constitutional rulings. Such a response would be justified not only on the grounds of judicial deference. By allowing First Nations to participate in the formulation of the remedy, such a process would advance the distinct purposes and interests of Aboriginal rights.

The Supreme Court's decision in *Sparrow* suggests that the availability of fair compensation will play a role in justifying some infringements of Aboriginal rights so that they do not result in violations of s. 35. Dickson C.J. stated that:

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[117] In the *Delgamuukw* appeal, the appellants requested that, during a transitional period of not more than 2 years, the Province make no grants over land and resources in the area of the claim without their consent or a court order.

[118] *Supra* note 94 at 25–26 (discussing reliance on disallowance power and obtaining a constitutional amendment respectively).

[119] *Order: Manitoba Language Rights*, [1985] 2 S.C.R. 348 (establishing translation schedule); *Order: Manitoba Language Rights*, [1990] 3 S.C.R. 1417 (extension of temporary validity of laws in order to make a ruling elaborating on original judgment); *Reference Re Manitoba Language Rights* (1992), 88 D.L.R. (4th) 385 (S.C.C.) (elaboration of original judgment and extension of period of temporary validity).

> Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include ... 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.[120]

This passage suggests that compensation should not focus on judicial assessment of damages, but rather involve a process where a government takes steps to ensure that "fair compensation is available." Fair compensation determined in this fashion will require negotiation between First Nations and Canadian governments. Following the precedent of land claim agreements and treaties, compensation will likely involve the assignment of land and priority user rights to First Nations as well as the payment of monetary compensation. Courts may have a role in supervising the negotiation of fair compensation. As discussed above, they could give laws that unjustifiably infringe Aboriginal rights temporary force to allow the negotiation of fair compensation and they might restrain activities that will infringe Aboriginal rights during this period.

Should declaratory relief, temporary transition periods and efforts to negotiate fair compensation fail to produce a constitutionally adequate settlement of Aboriginal claims, courts will have to consider issuing more intrusive forms of relief. Such relief could include various types of equitable remedies, damages and striking down state regulation to the extent of its inconsistency with Aboriginal rights. As discussed above, striking down laws will play an important role in enforcing s. 35(1). Nevertheless, the nature of Aboriginal rights will often require the courts to consider ordering more positive remedies. Although courts may be reluctant to deal with the complexities of Aboriginal rights and competing interests by ordering structural injunctions, American courts that have ordered such relief in desegregation and institutional reform cases have been able to rely on negotiation between the parties to supply content to their detailed decrees. Abram Chayes has recognized that a feature of public law litigation in the United States is that "the remedy is not imposed but negotiated"[121] and early Canadian experience also affirms the importance

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[120] *Supra* note 44 at 416–417.

[121] "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281. Subsequent empirical studies generally confirm Professor Chayes' observation. See P. Cooper, *Hard Judicial Choices* (New York: Oxford University Press, 1988). Note, however, that some desegregation decrees have been criticized for not taking into account the desires of minority communities. See D. Bell, "Serving Two Masters: Integration

of negotiation to fill in the details of structural injunctions.[122] The Canadian Bar Association has noted that the American practice of having courts decide basic legal issues but then relying on negotiations "in the shadow of the court" to resolve complex details is a promising approach to Aboriginal rights litigation.[123]

The role that damages will play as a remedy for violations of s. 35 will in part depend on how courts characterize Aboriginal interests in land. As discussed in the last section, courts may equate Aboriginal title to private law property rights and require compensation on the basis of fair market value. They may also enforce s. 35 through equitable remedies including restoring property by means of constructive trusts. In any event, courts are not likely to follow the Judson position in *Calder* that compensation for violations of Aboriginal land interests is a matter of governmental grace. Such an approach would make s. 35 a constitutional right without a remedy.

In short, courts have a wide variety of remedial options in responding to successful Aboriginal rights claims. Although there is a danger in creating any remedial hierarchy, it appears likely that declarations concerning the scope and content of Aboriginal rights will remain the primary remedy. They are the least intrusive judicial remedy but they can also advance the purposes of Aboriginal rights by providing Aboriginal people an opportunity to negotiate a constitutionally adequate settlement. Delayed declarations of invalidity, temporary transition periods and the negotiation of fair compensation can also provide similar opportunities for Aboriginal people to exercise a degree of self-determination by participating in the formation of constitutionally adequate settlements. If courts are unable to rely on the parties to implement their declarations, however, more intrusive forms of relief are available. They include injunctions, constructive trusts, damages

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Ideals and Client Interests in Desegregation Litigation" (1975) 85 Yale L.J. 470.

[122] After he issued a structural injunction requiring a school board to enforce minority language educational rights by adding facilities to a specific school, Sirois J. approved a different remedy (moving francophone students to another better equipped school) as meeting the requirements of his judgment. The eventual remedy was negotiated by representatives of the minority language community on the school board. *Marchand* v. *Simcoe County Board of Education* (1986), 55 O.R. (2d) 638 (H.C.); *Marchand* v. *Simcoe County Board of Education no. 2* (1987), 61 O.R. (2d) 651 (H.C.).

[123] Report of the Canadian Bar Association *Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: Canadian Bar Association, 1988) at 85–86. See *U.S.* v. *Washington*, 384 F. Supp. 312 (1974).

and declarations that the state authority that infringes Aboriginal rights is invalid.

**B. Remedies in Prosecutions against Aboriginal Rights**

Given the difficulty and expense of litigation to secure Aboriginal rights, it is likely that the most frequent judicial remedies for violations of Aboriginal rights will be defensive ones to shield Aboriginal people from state prosecutions for exercising their rights. The landmark *Sparrow* case is a case in point. Sparrow was prosecuted for violating the *Fisheries Act*[124] by using a drift net longer than his license allowed. He raised the complex issue of Aboriginal rights to fish as a defense to the prosecution. The Supreme Court ordered a new trial to determine whether there was a *prima facie* infringement of the Aboriginal right to fish for food and whether the restrictions contained in the license were justified. If it was determined that there was an unjustified infringement of Aboriginal fishing rights, Sparrow would presumably be acquitted of the offence charged. The Court could strike down the *Fisheries Act* to the extent of its inconsistency and perhaps fashion a constitutional exemption for Aboriginal people from the legislation.

The legitimacy of asserting Aboriginal rights as a defence to criminal or regulatory prosecutions has recently been affirmed in *R.* v. *Bob*.[125] In that case, Aboriginal people charged with keeping a common gaming house successfully raised a defense that they were wrongfully deprived of a provincial license (which would have provided a defense to the charge) because they would not submit to a tax on the earnings that was prohibited under the *Indian Act*.[126] Bayda C.J.S. recognized that the accused could have directly challenged the decision of the licensing authority by way of a declaratory judgment or an application for mandamus but concluded that it was legitimate for them to "chose to live in accordance with their understanding of their

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[124] R.S.C. 1985, c. F-14.

[125] (1991), 3 C.R. (3d) 348 (Sask. C.A.) [hereinafter *Bob*] But note there may be some limits on the relief that is available in criminal trials: *Rahey* v. *R.* (1987), 33 C.C.C. (3d) 289 (S.C.C.) (damages not available at criminal trial); *R.* v. *Daniels* (1991), 93 Sask. R. 144 (C.A.) (order prohibiting an Aboriginal woman from being imprisoned in Prison for Women exceeds the jurisdiction of a criminal court).

[126] R.S.C. 1985, c. I-5, s. 87.

rights."[127] This view is to be preferred to that of the minority which stated that the accused should have sought a civil remedy against the licensing authority. The majority's view affirms the right of Aboriginal people, like all others, to chose to live in accordance with their understanding of their rights and then use their rights as a defence to prosecutions. It also recognizes the practical reality that it will often be much quicker and less expensive to assert Aboriginal rights as a defence in criminal or regulatory prosecutions than in civil proceedings. In *Bob* the ultimate remedy was the acquittal of the accused.[128]

The issue of exempting Aboriginal people from otherwise valid laws has arisen with some frequency in the application of s. 100 of the *Criminal Code* which provides for a mandatory 5 year prohibition on the use of firearms when a person is convicted of an indictable offence involving violence or the threat of violence. This law is unobjectionable in many of its applications but can have serious effects on people, some of whom will be Aboriginal, who make their living hunting and trapping and thus require use of a firearm for that purpose. Although Courts of Appeal have required an accused to show that his or her livelihood would be threatened,[129] they have exempted some accused from the operation of s. 100 if they determined that in the circumstances its application would constitute cruel and unusual punishment. Thus in *R.* v. *Chief*[130] and *R.* v. *McGillivary*[131] Aboriginal people have been granted constitutional exemptions under s. 24(1) of the *Charter* from the operation of s. 100 of the *Criminal Code*. Although these cases relied upon the broad remedial discretion con-

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[127] *Supra* note 125 at 362. He elaborated: "In the case of a dispute over the power of the state to do what it claims it may do, it is perfectly appropriate to live according to one's understanding of the law and to take one's chances. This is in fact one of the traditional ways that certain segments of our society (found mainly within the minorities, the underprivileged, the iconoclasts, as well as others) have challenged statutory provisions they deemed to interfere with their rights."

[128] Bayda C.J.S. stated that an acquittal "would put the defendants in the position they would have occupied had there been no violation — which is one important test of the appropriateness of a remedy." *Ibid.* at 361.

[129] *R.* v. *Wellayon* (1985), 17 C.R.R. 101 (N.W.T.C.A.); *R.* v. *Rogers* (1987), 30 C.R.R. 87 (N.W.T.C.A.).

[130] (1989), 51 C.C.C. (3d) 265 (Y.C.A.).

[131] [1991] 3 C.N.L.R. 113 (Sask. C.A.) Note, however, that in *R.* v. *Kelly* (1990), 41 O.A.C. 32 the Ontario Court of Appeal held that s. 100 either had to be struck down as a whole or applied in every case.

templated under s. 24(1) of the *Charter*, there is no reason why similar results could not be obtained under s. 52(1) of the *Constitution Act, 1982* should a court conclude that application of an otherwise valid law violated Aboriginal rights under s. 35.[132]

Section 52 only requires courts to strike down laws to the extent of their inconsistency. In *R.* v. *Denny*[133] the Nova Scotia Court of Appeal held that three Aboriginal accused "enjoy a limited immunity from prosecution under the provisions of the *Fisheries Act* and Regulations. To the extent that the provisions under which they have been charged are inconsistent with the constitutional rights of the appellants, s. 52 of the *Constitution Act, 1982* renders them of no force or effect." In other cases the courts have reached similar results which have in effect given accused Aboriginal persons the benefit of constitutional exemptions from otherwise valid laws.[134]

As has been seen, many defensive remedies to vindicate Aboriginal rights and stop a particular prosecution amount to constitutional exemptions from the application of otherwise valid legislation. The nature of Aboriginal rights supports constitutional exemptions as a remedy. For example, assuming that there was unjustified violation of Aboriginal fishing rights in *Sparrow*, there would be nothing in such a decision to suggest that the impugned fishing restrictions were not constitutional as applied to other people. Given scarcity of resources, net length restrictions might well have to be preserved in force for non-Aboriginals in order to ensure that the Aboriginal right to fish was meaningful. One of the purposes of s. 35 is to give priority user rights to First Nations and this may require that laws that are unconstitutional when applied to Aboriginal people be enforced against others. Preserving general resource regulation that is only invalid when it unjustifiably infringes Aboriginal rights will in most cases

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[132] *Schacter*, *supra* note 4 at 29 ("[I]f a court takes the course of reading down or in, a s. 24 remedy would probably only duplicate the relief flowing from the action that court has already taken").

[133] [1990] 2 C.N.L.R. 115 at 134 (N.S.C.A.). quoted with approval in *Sparrow*, *supra* note 44 at 415 on the basis that s. 35(1) provides a "basis for restricting the power to regulate."

[134] *R.* v. *Nikal*, [1991] 1 C.N.L.R. 162 at 174 (B.C.S.C.) "I find that the Indian food fish license imposed upon the respondent and all the Wet'suwet'en people who fish in the Moricetown canyon infringes upon their aboriginal rights as protected in s. 35 of the *Constitution Act, 1982*. This infringement is not justified and, therefore, by s. 52 of the *Constitution Act, 1982* is of no force or effect." *R.* v. *Joseph*, [1992] 2 C.N.L.R. 128 at 138 (Y.T.C.) (fishing regulations of "no force or effect in relation to native persons who angle for food pursuant to their Aboriginal right").

also respect legislative intent and demonstrate an appropriate deference to the legislature.

The use of constitutional exemptions to protect those who exercise Aboriginal rights can be defended even in light of recent restrictions the Supreme Court has placed on that remedy. In *R.* v. *Seaboyer*[135] the Court held that fashioning constitutional exemptions from rape shield provisions only in those cases where an accused's constitutional right to full answer and defence was violated was not an appropriate remedy. Rather the provisions restricting the admissibility of evidence in sexual assault trials should be struck down in their entirety and admissibility should be determined on the basis of guidelines issued by the court. McLachlin J. held that using constitutional exemptions as a remedy in that case was inappropriate because "it would not achieve the end of substantially upholding the law which Parliament enacted";[136] it would only achieve what striking down the law would do in any event; and that it would amount

> to saying that [the law] should not be applied when it should not be applied, unless some criterion outside the Charter is found. On this reasoning, no law would be required to be struck down under s. 52 of the *Constitution Act, 1982*; the matter could always be resolved by the simple means of instructing trial judges not to apply laws when their effect would be violative.[137]

McLachlin J. did note that the Court had left open the option of using constitutional exemptions when faced with arguments that certain groups should be exempted from the operation of the legislation. The criterion of group membership could provide "certainty and predictability" apart from the ultimate issue of whether the constitutional right was violated.[138] The example she cited was those who close their businesses for religious reasons on days other than Sunday. The question of whether a person was an Aboriginal person exercising Aboriginal rights is at least as certain and predictable as such questions of religious observance. Exemptions for Aboriginal persons

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[135] (1991) 66 C.C.C. (3d) 321 (S.C.C.) [hereinafter *Seaboyer*].

[136] *Ibid.* at 404. Similarly in *Osborne* v. *Canada (Treasury Board)*, *supra* note 4 at 105 reading down was rejected as a remedy on the basis that the constitutional defects of the impugned law were so many it would "bear little resemblance to the law that Parliament passed."

[137] *Seaboyer*, *ibid.* at 404–405.

[138] *Ibid.* at 405.

would in many cases not defeat the legislative purposes of impugned statutes while recognizing the purposes of Aboriginal rights.

In *Schachter* Chief Justice Lamer suggested that in deciding whether to read in provisions to unconstitutional laws the "twin guiding purposes" are "respect for the role of the legislature and the purposes of the Charter."[139] General regulatory schemes would not in most cases be fundamentally altered by reading in a constitutional exemption for Aboriginal people and the nature of the exemption read in would "flow with sufficient precision from the requirements of the Constitution,"[140] namely the scope of Aboriginal rights that were not justifiably limited. Most importantly, *Schachter* recognizes that in devising remedies, courts should consider the purposes of the relevant constitutional right. The need for distinctive treatment of Aboriginal people lies at the heart of Aboriginal rights and those rights encourage, if not mandate, exemptions for Aboriginal people from otherwise valid laws.

## V. CONCLUSION

THE PROMISE THAT ABORIGINAL rights will be protected as legal and constitutional rights can only be fulfilled when courts become comfortable with the enforcement of such rights. The problems of remedying violations of Aboriginal rights should not be underestimated. Remedial problems may adversely affect the outcome of Aboriginal rights litigation and make litigation an unattractive alternative for Aboriginal people. Thus it is important to demonstrate that remedies for violations of Aboriginal rights can be both manageable and purposive.

Judicial remedies for violations of Aboriginal rights should attempt to avoid the extremes of requiring courts, on the one hand, to push the limits of judicial competence by imposing solutions on the difficult problems raised by Aboriginal claims to self-government and, on the other, to abdicate their constitutional responsibilities by leaving implementation of Aboriginal rights to an unregulated political process of negotiation.

Remedies such as temporary interlocutory injunctions to protect Aboriginal rights, temporary validity of laws that violate Aboriginal rights and declarations about the general nature of Aboriginal rights

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[139] *Schacter*, *supra* note 4 at 25.

[140] *Ibid.* at 19.

are manageable remedies for courts because they do not attempt to provide a final settlement of the complex problems raised in determining the appropriate relationship between First Nations and Canadian governments. They provide temporary remedies which can induce the parties to negotiate a constitutionally adequate settlement. Moreover, they respect the purposes of Aboriginal rights by allowing First Nations to negotiate their relations with Canadian governments. Such remedies are principled because they do not abdicate the court's ultimate responsibility, should negotiations and interim remedies fail, to enforce Aboriginal rights by striking down laws to the extent of their inconsistency with Aboriginal rights, by awarding damages and by ordering a wide variety of equitable remedies including structural injunctions and constructive trusts.