

**ABORIGINAL CUSTOM,  
COPYRIGHT &  
THE CANADIAN CONSTITUTION**

**Written by David Robbins, B.A., L.L.B.**

**The views expressed herein are solely the views of the author. David Robbins is currently a judicial law clerk of the British Columbia Supreme Court. He will be joining Woodward & Co. in Victoria, B.C. in the fall of 2000.**

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## SUMMARY

Under the Australian *Copyright Act*, aboriginal artists have brought lawsuits to stop the unauthorized use of their works in the manufacture of t-shirts, carpets, fabrics and bank notes. These aboriginal copyright cases reflect the now widespread problem of the misuse of aboriginal art in Australia and internationally. But the newfound popularity of aboriginal designs has raised legal questions well beyond copyright infringement. The Australian cases show that infringement of the customary law of aboriginal nations has moved to the forefront of related legal issues.

This paper considers the problem of domestic and international non-compliance with aboriginal customary law regarding traditional designs, ritual knowledge and other intellectual property. It begins by outlining the general failure of domestic and international copyright law to provide a legal solution. It follows with discussion of the Galinbingu people's recent success in the breakthrough Australian decision *Bulun Bulun v. R. & T. Textiles Pty. Ltd.* The author then argues that Canadian law provides a unique basis for solution as the rights of aboriginal peoples in Canada are protected under s. 35(1) of *Constitution Act, 1982*.

In particular, the Supreme Court of Canada's 1997 decision in *Delgamuukw v. British Columbia* infused greater flexibility into the law of aboriginal rights. Case law now suggests three general legal requirements exist for a successful novel claim under s. 35(1). In light of these requirements, this paper argues that aboriginal peoples in Canada have constitutional grounds to seek recognition of their customary intellectual property rights regarding crests, songs, dances, etc. For example, in accordance with the potlatch system of governance, it is arguable that members of the Mamalilikala nation of the Kwakwak'wakw could successfully claim an aboriginal right to exclusively use the Sisiutl and Sun crest.

In addition, this paper highlights some of the legal questions that an aboriginal rights claim resembling copyright would undoubtedly raise. In particular, it touches on the issue of whether aboriginal rights related to copying had been extinguished prior to constitutional protection in 1982. Further, the author reflects on the implications of aboriginal intellectual property rights for both Canadian statutes and international treaties such as the 1994 World Trade Organization agreement entitled *Trade Related Aspects of Intellectual Property* (TRIPS).

## TABLE OF CONTENTS

A.	Introduction...	...page 4
B.	Aboriginal Customary Law in State & International Copyright Law...	...page 6
	<i>Failings...</i>	...page 6
	<i>The Struggle for Solutions...</i>	...page 9
C.	Canadian <i>Constitution Act, 1982</i> : s.35(1) Aboriginal Rights Law...	...page 12
	<i>Introduction...</i>	...page 12
	<i>Section 35(1) Flexibility Post-<u>Delgamuukw</u>...</i>	...page 14
	<i>Three General Legal Requirements...</i>	...page 16
	<i>Interpretive Principles...</i>	...page 17
	<i>Mamalilikala Customary Law of Intellectual Property...</i>	...page 18
	<i>Application of s.35(1) Case Law...</i>	...page 21
D.	Note On Extinguishment...	...page 24
E.	Brief Reflections on a s.35(1) Aboriginal Right Effecting Copyright Law.....	page 25
F.	Conclusion...	...page 26

## A. Introduction<sup>1</sup>

In Australia, there is now widespread exploitation of aboriginal designs. These designs are being used commercially on tea towels, table mats, restaurant menus, posters, fashion items, interior decorations, shorts, sarongs, towels, etc.<sup>2</sup> Indeed, the making and selling of aboriginal art<sup>3</sup> in general is now a multi-million dollar industry in Australia.<sup>4</sup> Further, Australian governments regularly make use of aboriginal works in their promotion of tourism, cultural industries and nationalism.<sup>5</sup>

In this context, aboriginal artists in Australia have taken court action. Under the Australian *Copyright Act*, they have sought legal remedy for the unauthorized use of their artistic works in the manufacture of fabrics,<sup>6</sup> t-shirts,<sup>7</sup> carpets<sup>8</sup> and bank notes.<sup>9</sup>

But the legal problems associated with the growing popularity of aboriginal art go well beyond instances of copyright infringement. One of the central problems is that exploitation of an

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<sup>1</sup> I would like to thank Professor R. Howell, Professor S. Wright, Tom McMahon and Eamon Murphy for their helpful comments regarding previous versions of this paper.

<sup>2</sup> Puri, Kamal "Cultural Ownership and Intellectual Property Rights post-*Mabo*: Putting Ideas into Action", [December 1995] 9 *Intellectual Property Journal* 293 at 304.

<sup>3</sup> In this paper I use the word 'art' knowing that it does not likely capture any aboriginal perspective. In other words, the concept of 'art' is arguably one limited to western cultures that make the distinction between creating something for utilitarian purposes versus creating 'art' for its non-utilitarian aesthetic value. Works created by aboriginal 'artists' generally, if not always, have much more than aesthetic meaning to a people. Nonetheless, I did not see an easier way of proceeding.

<sup>4</sup> Wright, Shelly "Intellectual Property and the 'Imaginary aboriginal'," *Majah: Indigenous Peoples and the Law*, ed. Greta Bird, Gary Martin, & Jennifer Neilsen (The Federation Press, 1996), 129 at 142. Further, for a discussion locating the misappropriation of aboriginal art within the much broader context of cultural appropriation in general, see Ziff, B. & Rao, P. "Introduction to Cultural Appropriation: A Framework for Analysis," *Borrowed Power: Essays On Cultural Appropriation*, ed. Bruce Ziff and Pratima Rao (Rutgers University Press, New Brunswick, 1997).

<sup>5</sup> Wright, *ibid*.

<sup>6</sup> *Yangarriny Wunungmurra v. Peter Stripes Fabrics* (Federal Court of Australia, unreported, settled, 1985); *John Bulun Bulun & Anor. v. R & T Textiles Pty Ltd.*, (1998) Federal Court of Australia, found July 19<sup>th</sup>, 1999 at [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/1998/1082.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/1998/1082.html) [hereinafter *Bulun*].

<sup>7</sup> *Bulun Bulun v Nejlam* (Federal Court of Australia, unreported, settled, 1988).

<sup>8</sup> *Milpururru v. Indofurn Pty Ltd.* (1994), 54 F.C.R. 240 (Federal Court of Australia, N.T.) [hereinafter *Milpururru*].

<sup>9</sup> *Yumbulul v. Reserve Bank of Australia Ltd.* (1991) 21 I.P.R. 481 (Federal Court of Australia, Gen. Div.) [hereinafter *Yumbulul*].

aboriginal artwork can violate the customary law of the artist's aboriginal community. In the *Yumbulul* case, for example, the Reserve Bank of Australia reproduced an artistic work by Mr. Yumbulul on a \$10 note, a work that used the Morning Star Pole design of his community.<sup>10</sup> In doing so, the bank violated the customary restrictions placed on Mr. Yumbulul. These restrictions prohibited use of the Morning Star Pole design for anything other than ceremonial or educational purposes. Trained by his community in the sacred depiction of communally owned designs, Mr. Yumbulul had not been authorized to transfer to the bank the rights conferred by the *Australian Copyright Act*.

Obviously, this problem is not unique to Australia. It may arise wherever colonization of aboriginal peoples has been undertaken. Accordingly, in this paper I consider the problem of non-compliance with customary law regarding aboriginal art from a Canadian perspective.

I begin by outlining the general failure of both domestic and international copyright law to provide a legal remedy. I will then discuss the search for legal solutions, giving particular attention to the aboriginal rights of aboriginal peoples under s.35(1) of *Constitution Act, 1982*. I will argue that good grounds exist for an aboriginal right protecting customary rights akin to copyright. In order to give shape to a s.35(1) claim, I will discuss the law in light of Kwakwak'wakw potlatching as an aboriginal system of law. Before closing, I will address the issue of extinguishment. As well, I will briefly reflect on some legal implications, both domestic and international, of a successful s.35(1) claim regarding aboriginal intellectual property.

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<sup>10</sup> *Ibid.*

In writing this paper, I seek to do two things. First, outline a usable tool for aboriginal societies in Canada, and perhaps even internationally. Second, add to the growing discussion regarding intellectual property and indigenous peoples.

## **B. Aboriginal Customary Law in State and International Copyright Law**

In this section I will approach the problem of non-compliance with aboriginal custom by surveying the various sources of law and how they deal with or fail to deal with the issue.

### *Failings*

The failure of domestic *statute law* to address the requirements of aboriginal customs of intellectual property is well noted in the two Australian copyright cases *Yumbulul* and *Milpirrurru*.

As discussed above,<sup>11</sup> in *Yumbulul* the Reserve Bank of Australia violated the customary laws of an aboriginal artist's community by reproducing a communal design on a \$10 bank note. Upon complaint, the bank consented to a court order prohibiting such use of the design. In making its decision on other issues, however, the Federal Court of Australia commented on the failure of the *Copyright Act* to address aboriginal custom:

[I]t may also be that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin.<sup>12</sup>

[However,] the question of statutory recognition of Aboriginal community interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators.<sup>13</sup>

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, @ 489.

<sup>13</sup> *Ibid.*, @ 491.

In the well-known *Milpurrurru* case, various Australian aboriginal art works were reproduced on Vietnamese style carpets and imported into Australia for sale. The artists succeeded in a claim for infringement of their copyrights and the court used the aboriginal cultural context to provide progressive interpretation of the *Copyright Act* with respect to damages. However, the court also pointed out that the statute only provides protection for the individual author and not those people with rights under aboriginal custom.<sup>14</sup> It further stated,

The extent to which Aboriginal law and culture imposes limitations on the reproduction of Aboriginal artwork will vary according to the clans concerned....

The recognition of the sacred and religious significance of these painting, and the restrictions which Aboriginal law and culture imposes on their reproduction is only now being understood by the white community.<sup>15</sup>

In addition to this statutory failing, Australian courts have refused to find legal solutions in either the *common law* or aboriginal *customary law*. In the recent *Bulun Bulun* (1998) case, the Federal Court of Australia cited previous case law as clear authority that aboriginal custom is not a source of law enforceable by the Australia justice system.<sup>16</sup> Rather, aboriginal custom is limited to use as evidence for the foundation of rights recognised within this system, such as common law rights.<sup>17</sup> Unfortunately, common law rights regarding copying had long been extinguished under the Australian *Copyright Act* which made copyright solely a creature of statute.<sup>18</sup> Thus, insofar as any aboriginal customary rights related to copying had survived

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<sup>14</sup> *Supra*, note 8. Hence, the *Yumbulul* and *Milpurrurru* cases highlight one of the common disjunctions between copyright statutes and aboriginal custom: individual v. collective ownership. See *infra*, pp. 21.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Coe v. The Commonwealth* (1993) 118 ALR 193, cited in *Bulun*, *supra* note 2, at 15.

<sup>17</sup> *Bulun*, *supra* note 6 at 7.

<sup>18</sup> *Ibid.*, at 15. Notably, the statutory extinguishment of common law copying rights brought a change in the period of protection. At common law these rights endured in perpetuity; under statute, copyright subsists for a certain term. This points to a second major fissure between copyright statutes and aboriginal custom: temporary v. perpetual existence.

British assertion of sovereignty (by being taken up by the common law), they had likely been extinguished.<sup>19</sup>

What is more, the statutory failing regarding aboriginal custom is a reflection of the larger failings of *international law* of copyright. Domestic copyright statutes generally express the provisions of copyright treaties that most nation-states have entered into. Historically, the treaties of primary significance are the *Berne Convention for the Protection of Literary and Artistic Works*<sup>20</sup> and the *Universal Copyright Convention*<sup>21</sup>. These two treaties have been considered in two United Nations documents assessing the extent to which indigenous peoples can use existing international mechanisms for the protection of their intellectual property.<sup>22</sup> The 1992 report of the Secretary General concluded that copyright was an ineffective means of protection in large part because it failed to recognize the collective nature of aboriginal works.<sup>23</sup> Likewise, the 1993 report - by the Chairperson of the Working Group on Indigenous Populations - found that international and domestic copyright regimes were inherently unsuitable given their philosophical discord with aboriginal worldviews.<sup>24</sup>

In addition, the newest relevant international treaty - *TRIPS*<sup>25</sup> - arguably intensifies the problem.<sup>26</sup> Under the recently formed World Trade Organization, member states must establish

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<sup>19</sup> *Ibid.*

<sup>20</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised*, Paris (July 24, 1971), *reprinted* in American Intellectual Property Law Association, *Worldwide Protection of Intellectual Property* (1984).

<sup>21</sup> The Universal Copyright Convention of September 6, 1952, revised in Paris, July 24, 1971. Reproduced in Nordemann et al, *International Copyright: Commentary* (1990).

<sup>22</sup> Suagee, Dean B. "Human Rights and Cultural Heritage: Developments in the United Nations Working Group on Indigenous Populations," *Intellectual Property Rights for Indigenous Peoples: A Sourcebook*, ed. Tom Greaves (Society for Applied Anthropology, Oklahoma City, 1994) at 201.

<sup>23</sup> *Ibid.* The full name of the report is *Discrimination Against Indigenous Peoples: Intellectual Property of Indigenous Peoples – Concise Report of the Secretary General* (1992).

<sup>24</sup> *Ibid.*, at 202.

<sup>25</sup> Full name, *Trade Related Aspects of Intellectual Property Rights* (1994).

<sup>26</sup> Gana, Ruth L. "Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property" [1995] 24:1 *Denver Journal of International Law and Policy* 109.

particular forms of protection for intellectual goods as a condition to membership. Such cross-border protection under *TRIPS* primarily reflects the vulnerability of information-based capitalist economies to the demands of the market for pirated and counterfeited goods.<sup>27</sup> As part of the *TRIPS* regime, the copyright protections express the values of capitalism: individual liberty, property, private enterprise, capital accumulation, rapid consumption, etc..<sup>28</sup> Thus, by imposing these standards on all member states, global trade mechanisms impinge on the ability of a traditional society, as a constituent of a member state, “to observe and preserve the underlying values of its society as expressed through law. The state has conflicting obligations to these societies and to the international community under the *TRIPS* agreement.”<sup>29</sup> In short, *TRIPS* is a form of “passive coercion” insofar as it ignores and threatens the cultures of indigenous peoples present within member states.<sup>30</sup>

This is the legal context in which solutions to the non-recognition of aboriginal customary rights and obligations regarding intellectual property must be sought.

### *The Struggle for Solutions*

Internationally, indigenous peoples’ struggle for solutions has resulted in two declarations of rights. *The Mattaatura Declaration* (1993) came just after the Chairperson Study<sup>31</sup> and took an international intellectual property approach. The Declaration calls for the development of a new intellectual property regime that recognizes, amongst other things, collective ownership of aboriginal works.<sup>32</sup> By comparison, *The Draft Declaration on the Rights of Indigenous*

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<sup>27</sup> *Ibid*, at 119.

<sup>28</sup> *Ibid*, at 113.

<sup>29</sup> *Ibid*, at 112.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Supra*, note 24.

<sup>32</sup> *Supra*, note 22 at 203.

*Peoples*<sup>33</sup> has taken an international human rights approach. It calls for: “the restitution of cultural, intellectual, religious and spiritual property taken... in violation of their laws, traditions and customs”,<sup>34</sup> and; “...recognition of the full ownership, control and protection of their cultural and intellectual property”.<sup>35</sup> Problematically, neither of these documents is legally enforceable. Furthermore, their adoption by states is certainly not inevitable and even unlikely given state resistance to the very recognition of aboriginal peoples as politically coherent bodies within their borders.<sup>36</sup>

There is, however, cause for optimism. By far the most promising development in Australian or international law to date is the recent decision of *Bulun Bulun* (1998).<sup>37</sup> In this case, the Federal Court of Australia used the *law of equity* to craft a solution to the demands of aboriginal custom. The facts were that the defendant business used a representation of Mr. Bulun Bulun’s artistic work “Magpie Geese and Water Lillies at the Waterhole” in the printing of clothing fabric. Upon suit for copyright infringement the defendant withdrew the fabric from the market and settled the claim. However, the Galanbingu people continued in their claim, as the aboriginal community of the artist, to equitable ownership of the copyright in the artistic work as per their customary law.

The court found that Mr. Bulun Bulun had a fiduciary relation to his community with respect to the ritual knowledge embodied in the artistic work.<sup>38</sup> This fiduciary relationship placed two

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<sup>33</sup> This declaration is authored by the United Nations Working Group on Indigenous Populations.

<sup>34</sup> *Supra*, note 22 at 199, Article 12.

<sup>35</sup> *Ibid*, Article 29.

<sup>36</sup> For example, the UN Working Group is with respect to “Indigenous Populations” not “Indigenous Peoples”, the latter implying political coherence and arguably some sense of sovereignty.

<sup>37</sup> *Bulun*, *supra* note 6 at 20.

<sup>38</sup> It is significant that the fiduciary duty related to the ritual knowledge as opposed to the artistic work. The aboriginal custom in this case dealt with the knowledge embodied in the work, as opposed to the work itself. This reflects a third major disjunction between copyright statutes and aboriginal custom: copyright subsists in the *form* of

restrictions upon him: (1) he could not use the artwork for a purpose violating Galanbingu custom; (2) he must act to prevent or stop any use of the work by others in violation of Galanbingu customary law. Had he violated either of these restrictions, then the Galanbingu people would be able to sue him for breach of fiduciary duty.<sup>39</sup>

In such case, different equitable remedies would be available depending on the nature of the breach of fiduciary duty. For example, if Mr. Bulun Bulun had violated custom the court could have imposed a constructive trust regarding the copyright with the Galanbingu community as beneficiary.<sup>40</sup> Further, if Mr. Bulun Bulun had complied with Galinbingu custom while a third party had violated it, then this would be a copyright infringement as Mr. Bulun Bulun inherently would not have transferred or licensed his copyright to the third party without imposing customary restrictions. Hence, Mr. Bulun Bulun could stop the violation of custom through a copyright infringement action. If Mr. Bulun Bulun refused to do so or could not be found, then this breach of fiduciary duty and the customary violation could be remedied by allowing the Galanbingu people to sue for copyright infringement in the place of Mr. Bulun Bulun.<sup>41</sup>

Thus, *Bulun Bulun* appears to be a creative legal solution to the problem of non-compliance with aboriginal customary law regarding aboriginal artworks. Because the basis of the decision is the law of equity, however, the case is apparently vulnerable to statutory override by Australian legislators. However probable this may be, it is well worth considering *constitutional law* as a source for solution.

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expression; aboriginal customary rights generally subsist in the *content* of expression (e.g. the information, ideas, designs, etc.). See *infra*, p. 21.

<sup>39</sup> Technically, the lawsuit was dismissed as no breach of fiduciary duty had occurred.

<sup>40</sup> *Bulun*, *supra* note 6 at 20-21.

<sup>41</sup> *Ibid.*

### C. Canadian Constitution Act, 1982: s.35(1) Rights of Aboriginal Peoples<sup>42</sup>

#### *Introduction*

In 1982, the aboriginal rights of the aboriginal peoples of Canada received constitutional protection under s.35(1) of *Constitution Act, 1982*. Thus, unlike in Australia and presumably most if not all other states, Canadian constitutional law may provide a solution.

In the *Sparrow* (1990) decision, the Supreme Court of Canada outlined a four-step framework for analyzing s.35(1) claims.<sup>43</sup> The claimant aboriginal group must first demonstrate it has an aboriginal right. If this is shown, the court then inquires as to whether the right was extinguished prior to constitutional protection. If not, the question arises whether the right has been infringed by the state. If so, the final issue is whether the state interference was justified. The Supreme Court subsequently, in *Van der Peet* (1996), sought to define what it means to be an aboriginal right under the first stage of the *Sparrow* analysis.<sup>44</sup> It began with a purposive interpretation of s.35(1) and concluded that

[i]n order to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.<sup>45</sup>

Under the *Van der Peet* test, appropriately characterized aboriginal rights claims have included the following activities: fishing,<sup>46</sup> hunting,<sup>47</sup> trapping,<sup>48</sup> using tobacco,<sup>49</sup> participating in

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<sup>42</sup> Parts of this section are derived from, Robbins, D. “The Spirits of Our Ancestors Speak Through the Trees: Aboriginal Cedar Forestry Rights on the Northwest Coast” (1999).

<sup>43</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [hereinafter “Sparrow”].

<sup>44</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 1-2.

<sup>45</sup> *Ibid*, at para 46.

<sup>46</sup> Recognized in *supra*, note 43; *R. v. Jack*, [1995] B.C.J. No. 2632 (B.C.C.A.) [hereinafter “Jack”]; *R. v. Sampson*, [1995] B.C.J. No. 2634 (B.C.C.A.); *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Cote*, [1996] 3 S.C.R. 139; *R. v. Adams*, [1996] 3 S.C.R. 101.

<sup>47</sup> Recognized in *R. v. Alphonse* and *R. v. Dick*, [1993] 4 C.N.L.R..

traditional community games,<sup>50</sup> gambling,<sup>51</sup> regulating gambling,<sup>52</sup> regulating child adoptions,<sup>53</sup> exchanging (i.e. trading),<sup>54</sup> and importing duty-free goods.<sup>55</sup> When successfully claimed, these activities have been protected only insofar as they are done for a certain purpose.<sup>56</sup> For example, the Musqueam people have a right to fish salmon “for food, social and ceremonial purposes”.<sup>57</sup> Further, aboriginal activity rights have been held to include incidental rights, including the right to teach the activity to future generations so as to perpetuate the culture.<sup>58</sup>

Aboriginal customary law has had an important place in the aboriginal rights case law. In *Casimel* (1993), an adoption in accordance with an aboriginal community’s custom was given legal recognition by the B.C. Court of Appeal.<sup>59</sup> In *Jack* (1995), the Court of Appeal recognized an aboriginal right to fish as specific to certain sites that were defined by the claimant chief’s customary rights.<sup>60</sup> Subsequently, in *Van der Peet*, the Supreme Court of Canada mandated that all aboriginal rights must be framed so as to take into account the general Canadian legal system and the perspective of the claimant aboriginal people.<sup>61</sup> Thereafter, in *Delgamuukw* (1997), the Supreme Court elaborated when it stated that aboriginal rights must be understood by reference

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<sup>48</sup> See *Westbank First Nation v. British Columbia*, [1996] B.C.J. No. 307 (B.C.S.C), where, in the context of an injunction application, an aboriginal right to trap raised a fair question to be tried. This case was discontinued prior to trial.

<sup>49</sup> In *R. v. Murdock and Johnson*, [1997] 1 C.N.L.R. 103 (N.S.C.A.), this was presumed for personal and ceremonial use but denied for trading purposes.

<sup>50</sup> Recognized in *R. v. Nelson*, [1998] 2 C.N.L.R. 137 (Mtba. Prov Ct.).

<sup>51</sup> Denied in *R. v. Jim*, [1996] 2 C.N.L.R. 229 (B.C.C.A.), *Pamajewon*, [1996] 2 S.C.R. 821, and *ibid*.

<sup>52</sup> Denied in *Jim and Pamajewon*, *ibid*.

<sup>53</sup> Recognized in *Casimel v. I.C.B.C.*, [1994] 2 C.N.L.R. 22 (B.C.C.A.).

<sup>54</sup> Recognized in *R. v. Gladstone*, [1996] 2 S.C.R. 723, and *Mitchell v. M.N.R.*, [1999] 1 C.N.L.R. 112 (F.C.A.); denied in *supra* note 44, and *R. v. N.T.C. Smokehouse*, [1996] 2 S.C.R. 672.

<sup>55</sup> Recognized in *Mitchell*, *ibid*.

<sup>56</sup> This is what it means to protect “an *element* of a practice, tradition or custom...”.

<sup>57</sup> *Supra*, note 43.

<sup>58</sup> *Cote*, *supra* note 46.

<sup>59</sup> *Supra*, note 53.

<sup>60</sup> *Jack*, *supra* note 46.

<sup>61</sup> *Supra*, note 44 at para 49.

to both common law and aboriginal perspectives, including the pre-existing legal system of the aboriginal nation.<sup>62</sup>

There is no case law to date, however, that has considered whether aboriginal customary intellectual property rights are protected under s.35(1). This may well be due to the *Van der Peet* decision. That is, advancing a s.35(1) claim for intellectual property rights seems problematic if the test that must be met is one that protects physical activities such as fishing, hunting, etc. I will assume this to be the case. However, constitutional protection is still possible. This is apparent from *Delgamuukw* which held the *Van der Peet* activity rights test is *not* exhaustive of the aboriginal rights protected by s.35(1).

#### *Section 35(1) Flexibility Post-Delgamuukw*

In *Delgamuukw*, the Supreme Court of Canada held that, in addition to activity rights, aboriginal title is protected in its full form by s. 35(1).<sup>63</sup> In doing so, the Court ruled that the content of aboriginal title could be summarized in two propositions:

first, that aboriginal title encompasses the right to *exclusive use* and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.<sup>64</sup> [Emphasis added.]

In reaching its decision, the Supreme Court of Canada also discussed the corresponding need to adapt the test laid down in *Van der Peet*:

To date, the Court has defined aboriginal rights in terms of *activities*. ... Aboriginal title, however, is a *right to the land itself*. ...

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<sup>62</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 112, 114, and 147-8. Also note, at para 115 the Supreme Court of Canada specifically refers to aboriginal peoples as “nations”.

<sup>63</sup> *Ibid*, at para 133.

<sup>64</sup> *Ibid*, at para 117.

This difference between aboriginal rights to engage in particular activities and aboriginal title requires that the test I laid down in *Van der Peet* be adapted accordingly. I anticipated this possibility in *Van der Peet* itself, where I stated (at para. 74):

*Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose site of other factors relevant to the identification and definition of aboriginal rights.*

Since the purpose of s.35(1) is to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty, it is clear from this statement that s.35(1) must recognize and affirm both aspects of that prior presence – first, the occupation of land, and second, the prior social organization and distinctive cultures of aboriginal peoples on that land. To date the jurisprudence under s.35(1) has given more emphasis to the second aspect. To a great extent, this has been a function of the types of cases which have come before this Court under s.35(1) – prosecutions for regulatory offences that, by their very nature, proscribe discrete types of activity.<sup>65</sup> [Emphasis in text.]

Hence, s.35(1) is flexible enough to accommodate novel aboriginal claims. This conclusion is also supported by the Supreme Court's statement in *Van der Peet* regarding Metis rights: "the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Metis are defined."<sup>66</sup> Further, the Court also stated in *R. v. Adams* that "[t]he aboriginal rights recognized and affirmed by s. 35(1) should not be understood or defined in a manner which excludes some of those the provision was intended to protect."<sup>67</sup> In addition, the very idea of a spectrum of rights ranging from culturally integral activities to land title, as posited in *Delgamuukw*, suggests a new type of right may exist within this spectrum:

The picture which emerges from *Adams* is that the aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. ... In the middle, there are activities which, out of necessity, take place on land and indeed, might be ultimately

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<sup>65</sup> *Ibid*, at paras. 140-141.

<sup>66</sup> *Supra*, note 44 at para 141.

<sup>67</sup> *Adams*, *supra* note 46 at 27. See generally paras. 27-29. NB: in making this statement the Court in *Adams* also relied on the same paragraph from *Van der Peet*, *supra* note 65.

related to a particular piece of land. ... At the other end of the spectrum, there is aboriginal title itself. ... What aboriginal title confers is the right to the land itself.<sup>68</sup>

### *Three General Legal Requirements*

Given that the category of s.35(1) claims is not closed, three conclusions can be drawn from the case law regarding requirements for any novel claim such as one regarding intellectual property rights.

- (i) The basis of the right must be found in the *historic presence* of aboriginal societies living on and occupying the land.

In *Van der Peet*, the time for identification of aboriginal activity rights is the time of first contact; in *Delgamuukw*, the time for identification of aboriginal title is the time at which the Crown asserted sovereignty over the land.<sup>69</sup>

- (ii) The nature of the right must include an aspect that is *integral to the distinctive aboriginal culture*.

In *Van der Peet*, the activity must have been integral to the distinctive culture of the aboriginal society.<sup>70</sup> In *Côté*, the incidental right to teach an integral activity ensured the perpetuation of the distinctive culture.<sup>71</sup> In *Delgamuukw*, land subject to aboriginal title was assumed to be integral to the distinctive culture given that proof of title requires evidence of prior occupancy.<sup>72</sup> Further, the inherent limit of aboriginal title ensures that land use decisions will not undermine the cultural integralness of the land for future aboriginal generations:

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<sup>68</sup> *Supra*, note 62 at 138.

<sup>69</sup> *Supra*, note 62 at para 142.

<sup>70</sup> *Supra*, note 44.

<sup>71</sup> *Supra*, note 46.

<sup>72</sup> *Supra*, note 62 at para 142.

[I]n my view, lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place. ... If the lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture.<sup>73</sup>

- (iii) Recognition of the right must take into account the general Canadian legal system and the perspective of the claimant aboriginal people, including the pre-existing aboriginal legal system.<sup>74</sup>

This includes the important role for aboriginal custom as discussed above.<sup>75</sup>

### *Interpretive Principles*

Beyond these conclusions, consideration of a novel claim to an aboriginal right must return to first principles for the interpretation of s.35(1). Case law has set out five such principles:

- (iv) Section 35(1), like other constitutional provisions, must be understood “in light of the interests it was meant to protect.” The substantive rights that fall within the scope of s.35(1) must be defined in light of its purpose.<sup>76</sup>
- (v) The purpose of s.35(1) is “the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America Aboriginal peoples lived on the land in distinctive societies, with their own practices customs and traditions,” with the sovereignty of the Crown.<sup>77</sup>
- (vi) Constitutions are, by their very nature, documents aimed at the country's future as well as its present. Thus, like other constitutional provisions, s.35(1) must be interpreted in a manner which renders it capable of growth and development over time to meet new social, political and historical realities often not imagined by the framers.<sup>78</sup>
- (vii) The fiduciary obligation of the Crown to aboriginal peoples means that in dealings between the government and aboriginals the honour of the Crown is at stake. Consequently:

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<sup>73</sup> *Ibid*, at paras 125-128.

<sup>74</sup> *Supra*, note 62.

<sup>75</sup> *Supra*, notes 59-62.

<sup>76</sup> *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295, referred to in *supra*, note 44 at paras. 3, 21 and 31.

<sup>77</sup> *Supra*, note 44 at paras. 44 and 31.

<sup>78</sup> *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, referred to in *supra*, note 44 at para 21.

- (a) Section 35(1) should be given a generous and liberal interpretation in favour of aboriginal peoples.<sup>79</sup>
- (b) Where there is any doubt or ambiguity with regards to what falls within the scope and definition of s.35(1), such doubt and ambiguity must be resolved in favour of aboriginal peoples.<sup>80</sup>

These requirements and principles provide the substantive legal context in which any future aboriginal rights claim must be made. The factual grounds for a claim based on intellectual property rights under customary aboriginal law undoubtedly exist.<sup>81</sup> In Australia, the case law clearly shows the existence of aboriginal custom regarding intellectual property rights.<sup>82</sup> As Puri has stated, “aboriginal communities follow the custom of tribal ownership of art forms and designs, whereas the right to depict designs is determined by tribal customs and practices.”<sup>83</sup> In the United States, all Native American groups reportedly recognized intangible property, including rights to songs, dances, formulas and myths.<sup>84</sup> In Canada, perhaps the best known source of intangible property rights under aboriginal customary law is the Kwakwak’wakw potlach system. To give some shape to a novel s.35(1) intellectual property claim, I will briefly discuss customary law of the Mamalilikala nation of the Kwakwak’wakw.

#### *Mamalilikala Customary Law of Intellectual Property*<sup>85</sup>

The Kwakwak’wakw are an aboriginal linguistic group - Kwakwak’wakw literally means “the Kwak’wala-speaking peoples”. Since time immemorial, Kwakwak’wakw peoples have occupied

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<sup>79</sup> *Supra*, note 43, applied in *supra*, note 44 at paras. 23-24.

<sup>80</sup> *R. v. Sutherland*, [1980] 2 S.C.R. 451, referred to in *supra*, note 44 at para 25.

<sup>81</sup> This goes beyond the incident to native title argument circulating in Australia and discussed in *Bulun*, *supra* note 6 at 14.

<sup>82</sup> *Supra*, notes 8 and 9; *Bulun*, *supra* note 6.

<sup>83</sup> *Supra*, note 2 at 305. Presumably the author was referring to aboriginal peoples of Australia.

<sup>84</sup> *Supra*, note 26 at 131.

<sup>85</sup> For this section, I am very grateful and indebted to Lou-ann Neel for her willingness to disclose and explain the information contained herein. Lou-ann has also edited this section and contributed to parts of it. In addition, I am thankful to both Lou-ann and Dianne Biin for their help in general discussion of this section.

territories in the coastal region of what is now the southwest of British Columbia, Canada. Fifteen village based nations comprise the linguistic group, including the Mamalilikala, Ma'amtagila, Kwaguilth, and Namgis peoples. These political communities currently contain up to 6 *na'mima* each. A *na'mima* might be best described to the western mind as an extended family or series of nuclear families. For example, one Mamalilikala *na'mima* is made up of the Flanders, McDougall and Matilpi nuclear families. Internally, each *na'mima* has a social-political structure that can be described as including a head-chief, sub-chiefs, chief speakers, matriarchs, and other family members.

The Kwakwak'wakw nations have always used the potlatch system as a system of aboriginal customary law. While there are inter-nation protocols for inter-nation affairs, each nation conducts its own form of potlaching and thus has its own customs. Potlatch proceedings generally take place in traditional Big Houses and include ceremonial performances, dance, song, speeches, gift-giving and various participants and witnesses, depending on the nation and the occasion. Potlatch business includes the conferring and removal of names, titles, rights and obligations as well as dispute resolution and sanction imposition. For a particularly dark period in Canadian history, namely 1884-1951, the government of Canada outlawed the potlatch as part of its assimilationist strategy.<sup>86</sup>

Within each *na'mima* people are given names, often different names over the course of their life, that entail a certain rank or status and define that person's identity. For example, Lou-ann Neel has two Kwaguilth names, *Ikyagwega* and *Gaastalas*, both derived from her paternal uncle's

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<sup>86</sup> For example, see *Indian Act*, R.S.C. 1906, c.81, s.149.

lineage.<sup>87</sup> *Ikyagwega* is used when the Kwaguilth side of Lou-ann's *na'mima* potlatches and the name denotes her rank position and role; *Gaastalas* is an everyday name used outside of the potlach context. Each position or name carried by a Kwakwak'wakw person entails a bundle of rights and obligations. For instance, Lou-ann also carries the Mamalilikala name *Kidiklelowgw* which is derived from her maternal lineage. The *Kidiklelowgw* name carries with it a certain set of privileges as per her rank, as well as responsibilities for which she is accountable. Many of these rights are in regard to what can be considered products of intellect. For example, the social position inherent within the name *Kidiklelowgw* includes rights regarding crests, dances, songs, types of ceremonial regalia, etc.

I will use the crest, as an object of Mamalilikala customary rights and obligations, to further this discussion. A crest, roughly speaking, is a certain historic design, often portrayed in a certain style. For example, the Sisiutl and Sun crest within the Mamalilikala side of Lou-ann's family is the image of a double-headed serpent depicted either in a circle or semi-circular pattern, with a sun in the middle of the circle. Shapes called "ovoids" and "split-U" form the basis of each component of the crest design. In different crest-pieces, these shapes provide distinguishing stylistic characteristics which affirm the village and *na'mima* origins of the design.

Many of the customary rights regarding crests can resemble the intellectual property rights of non-aboriginal law, including copyright. For example, customary rights may include the unlimited right to use the crest, including the right to produce a version of it.<sup>88</sup> As *Kidiklelowgw*, Lou-ann has this right to use the Sisiutl and Sun crest. However, such rights are generally, if not

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<sup>87</sup> The *Ikyagwega* and *Gaastalas* names were transferred to Lou-ann's paternal uncle through a customary marriage dowry.

<sup>88</sup> *Copyright Act*, R.S.C. 1985, c.42, s.3(1), as amended.

always, non-transferable. Further, user rights may also have strict limitations, such as a prohibition on use for commercial purposes or outside of certain potlatches hosted by the nation.

Customary rights, including those resembling western intellectual property rights, are often held by a certain group of people. Some are held by all members of one or more *na'mima*. For example, the unlimited right to use the Sisiutl and Sun crest is exclusively held by all Mamalilikala members of the Flanders *na'mima*. Indeed, part of the significance of a crest may come from the fact that it recounts, reflects and expresses the sacred origin stories of the respective *na'mima* and nation. However, some rights are held only by the high-ranking members of one or more *na'mima*. Further, some intellectual products are subject to initial (or primary) rights held by high-ranking members and secondary rights held by lower-ranking members. In addition, some rights are held exclusively by an individual person.

#### *Application of s.35(1) Case Law*

If anyone outside of the Flanders *na'mima* uses the Sisiutl and Sun crest, Mamalilikala customary law is violated.<sup>89</sup> Yet, if a person outside the Flanders *na-mima* uses the Sisiutl and Sun crest in producing an original work, the person would have a copyright in the work as its author.<sup>90</sup> Thus, Canadian copyright law would not only fail to stop this infringement of an aboriginal custom, it encourages it by conferring copyright as an economic right of the artist.

I submit that in situations like this, it is clearly arguable that s.35(1) could be the basis of a judicial remedy for customary rights holder(s) – e.g. the Flanders *na'mima*. In particular, I will consider the following claim:

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<sup>89</sup> Other similar fact patterns would have the same result. For instance, an artist from the Flanders *na'mima* would have the customary right to use the crest within a work yet violate custom by transferring any copyright to another party.

An aboriginal right to exclusively use the Sisiutl and Sun crest for any purpose that is reconcilable with the special bond that the Flanders *na'mima* has had with the crest such that the crest is integral to the distinctive culture of the Mamalilikala.

First, the basis of the right must be found in the historic presence of claimant aboriginal society on the land [see (i), p.16]. The Mamalilikala have occupied their traditional territory through the *na'mima* system since time immemorial. The very meaning of the Sisiutl and Sun crest captures this fact as the crest expresses an origin story of the Flanders *na'mima* and the Mamalilikala nation. Further, the customary rights regarding the crest are a product of the potlatch system that has always been used by the Mamalilikala to order their society. Customary rights regarding the crest have presumably been passed down through the generations since well before European contact.

Second, the nature of the right must include an aspect that is integral to the distinctive aboriginal culture [see (ii), p.16]. Again, the very fact that the Sisiutl and Sun crest expresses an origin story and the rights to use it are exclusively held by certain people indicates how this crest defines the cultural identity of the rights holders. The right to use the crest is a sign of the social fabric or order within Mamalilikala society. It is a symbol of one's rank or status and all its accompanying privileges and obligations. Breach of the customary right brings legal sanction under the Mamalilikala potlatch system.

Third, recognition of the right must take into account the general Canadian legal system and the perspective of the claimant aboriginal people, including the pre-existing aboriginal legal system [see (iii), p.17]. As discussed above, the exclusive right to use Sisiutl and Sun crest is rooted in

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<sup>90</sup> *Supra*, note 88, s.13(1).

the customary legal system of the Mamalilikala. It also resembles the exclusive right to produce an original artwork that is conferred by the *Copyright Act* upon authors.<sup>91</sup> This statutory right itself has its historic origins in common law copying rights. But the exclusive right to use the Sisiutl and Sun crest does diverge from copyright in certain ways. For example, it is non-transferable and collectively held. This is not problematic, however, as can be seen by the recognition of aboriginal title as a s.35(1) right even though it is non-transferable and collectively held.<sup>92</sup>

Fourth, the substantive rights that fall within the scope of s.35(1) must be defined in light of its purpose [see (iv), p.17]. The purpose of s.35(1) is to protect and reconcile the interests arising from the prior presence of distinctive aboriginal societies with Crown sovereignty [see (v), p.18]. It is clear that the Mamalilikala are a distinctive aboriginal society with a presence that pre-dates European contact and Crown sovereignty. Further, the Mamalilikala undoubtedly have an interest in ensuring the proper and respectful use of their intellectual property, including the Sisiutl and Sun crest.

Finally, lest there be any doubt about this novel claim, additional s.35(1) interpretive principles support it. As a constitutional provision, s.35(1) must be interpreted as if it were a living tree – i.e. capable of growth and development over time [see (vi), p.17]. Further, s.35(1) must be interpreted liberally and charitably in favour of aboriginal peoples, at least where dealings are with the Crown [see (vii), p.17].

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<sup>91</sup> *Supra*, note 88.

<sup>92</sup> *Supra*, note 62 at paras. 113-115.

#### D. Note On Extinguishment

As noted above, the analytical framework for s.35(1) provided by *Sparrow* also requires consideration of extinguishment, infringement and justification issues.<sup>93</sup> Although these issues are beyond the scope of this paper, I am optimistic that they would not create insurmountable barriers for aboriginal peoples. However, a brief comment should be made regarding the apparent problem of extinguishment that was effectively raised by the Federal Court of Australia in *Bulun Bulun* (1998).<sup>94</sup>

In addition to their arguments based on equity, the Galanbingu people advance a secondary claim. They submitted that their customary rights and obligations that restricted copyrights were actually an incident of native title,<sup>95</sup> title having already received legal recognition in Australia. The court found this claim problematic. It reasoned that any aboriginal customs relating to copying would likely have been extinguished by the Australian *Copyright Act* provision that had extinguished all common law rights with respect to copying.<sup>96</sup> Such provision is common to copyright statutes so as to make copyright solely a creature of statute, thereby creating certainty.

The current Canadian provision reads:

No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.<sup>97</sup>

In Canada, a statute must express a clear and plain intent to extinguish an aboriginal right before it has the effect of doing so.<sup>98</sup> Only the government of Canada, not the provinces, had the power

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<sup>93</sup> *Supra*, note 43.

<sup>94</sup> *Supra*, notes 16-19.

<sup>95</sup> *Bulun, supra* note 6 at 12-14.

<sup>96</sup> *Ibid*, at 14-15.

<sup>97</sup> *Supra*, note 88, s.89.

<sup>98</sup> *Supra*, note 43 at 1099.

to extinguish aboriginal rights.<sup>99</sup> Since the constitutional protection of aboriginal rights in 1982, Canada no longer has the jurisdiction to do this.<sup>100</sup> But the *Copyright Act* is a federal statute that existed well before 1982. Thus, it arguably could have extinguished any related aboriginal intellectual property rights prior to 1982 protection. The threshold, however, is not an easy one to cross:

While the requirement of clear and plain intent does not, perhaps, require that the Crown “use language which refers expressly to its extinguishment of aboriginal rights” (*Gladstone*, at para. 34), the standard is still quite high.<sup>101</sup>

Arguments exist against extinguishment of aboriginal customary rights akin to copying. For example, Howell suggests that s.89 does not necessarily even extinguish all common law rights regarding copying given that s.7 of the Canadian *Copyright Act* expresses a contrary intention with respect to unpublished works.<sup>102</sup> It is also arguable that s.89, presumably like predecessor statutes, only applies to individual persons and thus does not extinguish any communally held or derived rights related to copying.<sup>103</sup> Further, “nothing in [s.89] shall be construed as abrogating any right or jurisdiction in respect of a breach of trust...”. Thus, given that the Crown is a fiduciary in its dealings with aboriginal peoples and ambiguity is thereby resolved in their favour,<sup>104</sup> extinguishment of aboriginal rights resembling copyright is not clear and plain.

### **E. Brief Reflections on a s.35(1) Aboriginal Right Effecting Copyright Law**

A successful aboriginal right such as the one discussed with respect to the Mamalilikala would almost undoubtedly unearth many legal issues. It would certainly impact on application of the

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<sup>99</sup> *Supra*, note 62 at paras. 173-174, 180.

<sup>100</sup> *Supra*, note 43.

<sup>101</sup> *Supra*, note 62 at para 180.

<sup>102</sup> Howell, R. as communicated during lectures in Law – 347: *Intellectual Property*, Summer Term 1999, University of Victoria, Faculty of Law.

Canadian *Copyright Act*. It would also raise questions as to similar claims and the validity of other intellectual property statutes such as the *Patent Act*, *Industrial Design Act*, *Trade-Marks Act* and the *Plant Breeders' Rights Act*. Common law torts such as passing off may also be touched. Liberal rights such as free expression may have to be curtailed.<sup>105</sup> The national treatment principle of international trade treaties could be effected.

However, the most compelling potential implication for aboriginal peoples *worldwide* would be the obligation such a s.35(1) claim may place upon the Canadian government. That is, perhaps the Canadian government, as a fiduciary with respect to Canadian aboriginal peoples, must seek to extend any domestic protection provided by s.35(1) onto the international level. Should that day come, then the constitutional law of Canada will force the intellectual property rights of indigenous peoples everywhere onto the global trade agenda. Aboriginal peoples around the world would gain leverage in forcing states to introduce protective measures domestically.

## **F. Conclusion**

The widespread popularity of aboriginal art has raised legal questions beyond copyright infringement. Non-compliance with aboriginal community customs regarding traditional designs, ritual knowledge and other intellectual property has become a problem. While aboriginal peoples in Australia have been the first to seek legal remedy, both Australian domestic law and international law have lacked solutions. The recent Australian decision in *Bulun Bulun* (1998), however, holds promise for remedial action through the law of equity.

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<sup>103</sup> This would depend on any statutory definition of “person” that had been used during the history of s.89 and its predecessors. Nonetheless, it would seem that insofar as the initial copyright statute(s) in Canada replicated British statute law, there was no intention to extinguish collective rights as presumably none existed in Britain.

<sup>104</sup> *Supra*, note 80.

<sup>105</sup> The individual liberal rights protected in the Canadian *Charter of Rights and Freedoms*, such as freedom of expression, can not abrogate or derogate from any aboriginal right: *Constitution Act, 1982*, s.25.

Canada's *Constitution Act, 1982* also provides potential remedy upon violation of aboriginal customs of intellectual property. Since the Supreme Court of Canada's decision in *Delgamuukw*, there is greater scope as to the aboriginal rights protected under s.35(1). Aboriginal peoples in Canada, such as the Mamalilikala nation of the Kwakwak'wakw, now have good constitutional grounds to seek recognition of their customary rights regarding crests, dances, songs, etc. While it is arguable that any such right was extinguished prior to being constitutionally enshrined, this is less than clear and plain. If such rights do exist under s.35(1), the legal implications both within Canada and for aboriginal peoples internationally could be profound.