



## **The Belief in the Right to Blockade**

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In *R. v. Manuel*, an April 3, 2008 decision of the B.C. Court of Appeal, the Court ruled against a defence of “colour of right” raised by protesters blockading the development of a ski resort on First Nations aboriginal title lands. Is an honest belief in Aboriginal title and rights to lands a defence to charges related to disrupting public order?

We get asked about what happens if people blockade a development or government action on First Nations land, which usually seems to arise when the client perceives that the court system is not adequately recognizing First Nations title and self-government. *R. v. Manuel* is one of the few cases that deals with this question.

The Court held that the rule of law did not include the right to a “self-help” remedy of blockading a highway, in this particular case, because the indigenous people involved (the defendants) did not have an honest belief that Aboriginal title permitted them to blockade the highway. What the Court did not say was that had they honestly believed that their Nation had title to the land on which they were blockading, or should have had title, in indigenous law, and for all purposes also in Canadian law, then they would not have been convicted of the Criminal Code offences they were charged with.

Constitutional scholar John Borrows (and others) have questioned the right and title of Canada to indigenous lands, and the assumptions made in Canadian law that the Crown has sovereignty and title, subject to Aboriginal claims. Does the belief then in Aboriginal title give rise to a right to occupy indigenous lands, free from prosecution in Canadian law?

In assessing whether the First Nations members had the honest belief that they had a legal right to block the road, the Court drew a distinction between a legal right and a “moral right,” indicating that upholding a moral right, could potentially be ruled as a legal defense. In this case the Court held that:

“The appellants testified that they were familiar with *Delgamuukw* and the concept of aboriginal law and aboriginal title. As such, they must be taken to be aware of . . . the processes for reconciliation of aboriginal and common law perspectives on land ownership, and that none of those processes includes blockades of highways. Such “self-help” remedies are not condoned anywhere in Canadian law, which includes aboriginal, common, and criminal law, and they undermine the rule of law.”

Therefore, if it is not found to be an honest belief under scrutiny by the Court, the Court found that there is no defence to the Criminal Code charges. While in this case, the Court found that there was not an honest belief in the right to blockade, the Court held that:

“Whether the appellants’ beliefs were *true* - that is, whether the Secwepemc Nation had title to

the land and could legally exclude all others from using it - was not in issue. Regardless of whether the appellants were mistaken about title and its consequences, if their beliefs were *honestly* held or there was a reasonable doubt that their beliefs were honestly held, the defence would be made out.”

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