No. 27066

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

IN THE MATTER OF an Appeal pursuant to section 135 of the *Customs Act*, S.C. 1986, c. 1. and IN THE MATTER OF an Action for declaratory relief

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Appellant (Defendant)

- and -

GRAND CHIEF MICHAEL MITCHELL, also known as KANENTAKERON

Respondent (Plaintiff)

- and -

THE MOHAWK COUNCIL OF KAHNAWAKE, THE ASSEMBLY OF FIRST NATIONS, THE UNION OF NEW BRUNSWICK INDIANS, THE ATTORNEY GENERAL OF NEW BRUNSWICK, THE ATTORNEY GENERAL OF MANITOBA, THE ATTORNEY GENERAL OF QUEBEC, THE ATTORNEY GENERAL OF BRITISH COLUMBIA

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PART I — STATEMENT OF FACTS

1. With the exception of the Introduction to his Statement of Facts, the Respondent accepts the Statement of Facts provided by the Appellant with the following additions.

2. The Respondent is a Mohawk of Akwesasne. The Mohawks of Akwesasne are a community of the Mohawk Nation and an Aboriginal people of Canada within the meaning of section 35(1) of the *Constitution Act, 1982*.

3. On March 22, 1988 Grand Chief Mitchell entered Canada at the Cornwall International Bridge, he stopped at the customs check point and notified officials there of the nature and quantity of goods he was transporting across the border. (Reasons, *Appellant's Record*, vol. 5, at 761)

4. The events of March 22, 1988 which gave rise to this appeal were prompted by the refusal of the Government of Canada to recognize the Respondent's right not to pay duty on goods brought across the border. The Mohawks of Akwesasne sought to negotiate with Canada ways in which to facilitate the exercise of their Aboriginal and treaty rights. Canada took the position that, in light of the 1956 decision of this Court in *R. v. Francis*, no rights existed and suggested that this issue be brought before the courts. (Reasons, *Appellant's Record*, vol. 5, at 761)

5. In this case, the Respondent argued "two separate and distinct, but mutually confirming sources of his right: an Aboriginal right and treaty rights" (McKeown J., Reasons, *Appellant's Record*, vol 5, at 763). The basis for and content of the Aboriginal right must be determined and analysed separately from the treaty right.

6. The trial in this matter lasted 35 days: the Respondent called nine witnesses, including three expert witnesses, and the Appellant called two expert witnesses. The transcripts of the hearing are over 5,000 pages long and over 14,000 pages of expert opinion and documents were filed with the Court.

7. On the basis of this evidence, McKeown J. concluded that the Respondent had proved that he had an existing Aboriginal right to cross the border with goods for personal and community use including trade with other First Nations without paying duties and taxes on these goods. The

Respondent was not successful in his claim for treaty rights and has not pursued that issue before this Court. This appeal is only about his Aboriginal right.

8. Based upon the evidence led at trial by the parties, the trial judge made the following findings of fact with respect to the Respondent's Aboriginal rights:

(a) The Respondent is a Mohawk of Akwesasne who is a descendant of the Mohawks of the Mohawk valley. Akwesasne is part of the Mohawk nation and is part of the Six Nations (Iroquois) Confederacy, which also includes the Oneida, Onondaga, Cayuga, Seneca and, after 1722, the Tuscarora. The Respondent, Grand Chief Kanentakeron Mitchell, is a faithkeeper who learned the traditional teachings and history of his people from his grandfather who was also a faithkeeper. He has studied Iroquois history since his youth and has held the title of faithkeeper for twenty-five years. (McKeown J., Reasons, *Appellant's Record*, vol. 5, at 771-772, 775-776,783);

(b) The Mohawks, whose homelands were in the Mohawk valley, prior to the arrival of the Europeans regularly travelled over, used, controlled and exploited the area in the upper St. Lawrence valley (including Akwesasne) which is now part of Canada. Trading and travelling freely made Mohawk society what it was. The activities of the Mohawks centred around travel, diplomacy and trade. This activity was integral and not incidental to Mohawk society. The Iroquois trading network was extended through warfare as was European trade at that time, and Aboriginal peoples should not be held to a different standard from Europeans on the use of warfare to expand trading rights and territory. (McKeown J., Reasons, *Appellant's Record*, vol. 5, at 780-782, 808-809, 795-800);

(c) The Mohawks travelled from their homeland in what is now the United States into what is now Canada for trade related purposes prior to the arrival of the Europeans, with their goods for personal and community use, without having to pay duty or taxes on those goods. (McKeown J., Reasons, *Appellant's Record*, vol. 5, at 810);

(d) The Respondent and the Mohawks of Akwesasne have established an Aboriginal right to pass and repass freely across what is now the Canada-U.S. boundary with goods for

personal and community use and for trade with other First Nations. (McKeown J., Reasons, *Appellant's Record*, vol. 5, at 810);

9. In concluding that trade was an integral part of Mohawk society and that the Mohawks travelled freely across what is now the area bisected by the Canada-U.S. border to expand trading territory, to obtain goods for the purposes of trade and to trade with other First Nations, McKeown J. relied, *inter alia*, on the following evidence:

(a) An account from Harmen van den Bogaert, whose journals form the earliest recorded European observations of Mohawk life and traditions, in which van den Bogaert observed the arrival of Iroquois women, perhaps Oneida, carrying dried salmon and green tobacco which they then sold in at least two Mohawk villages; van den Bogaert's journal also describes the presence of several kinds of European trade goods in the Mohawk villages; archaeological evidence shows that European trade goods had been present since around 1550, some 60 years before the date of first contact in 1603. (McKeown J., Reasons, *Appellant's Record*, vol. 5, at 787-788);

(b) Evidence, from the Respondent's expert witnesses, Professor Johnston and Dr. Venables, that the geographic position of the Mohawks enabled them to gain easy access to the St. Lawrence valley and the lower Great Lakes country for the purposes of trade and diplomacy. (McKeown J., Reasons, *Appellant's Record*, vol. 5, at 788-789);

(c) The accepted academic consensus that a peace treaty of 1645 between the Iroquois (including the Mohawks), the French and the Hurons and Algonquins (Aboriginal nations, located to the north, within present-day Ontario and Quebec) which was negotiated at Montreal, was a means to open access to trade between the parties. (McKeown J., Reasons, *Appellant's Record*, vol.5, at 792-794);

(d) Evidence from the report of the Appellant's expert witness, Dr. von Gernet, that, from the 16th century on, there was small scale long distance trade between the Iroquois people and that this trade was "vitally important to them". The Mohawks and the Iroquois travelled freely into the territory which today constitutes Canada in order to engage in commercially

motivated warfare and expand their control over trade. (McKeown J., Reasons, *Appellant's Record*, vol. 5, at 795-800);

(e) The Mohawks and other nations of the Iroquois Confederacy insisted that trading rights be included in a Treaty in 1664, the first treaty to be signed by Aboriginal peoples in North America with Europeans. (McKeown J., Reasons, *Appellant's Record*, vol. 5, at 794-795);

(f) Trade was a vital factor in the decision by a number of Mohawks to move from the Mohawk valley and establish a permanent community in Caughnawaga/Kahnawake near Montreal. The existence of an extensive trade network between Montreal and Albany during the 17th and 18th centuries in which the major Iroquois participants were the Mohawks of Mohawk valley and the Mohawks living in Kahnawake – it was Mohawks from these particular communities who established a permanent settlement in Akwesasne between 1747 and 1755 — and evidence that the Mohawks of Akwesasne were directly involved in the Montreal-Albany trade (McKeown J., Reasons, *Appellant's Record*, vol. 5, at 783-784,800-805);

(g) Oral traditions regarding Mohawk use of the area around Akwesasne and oral traditions regarding guarantees made to the Iroquois of the right to cross the border with goods. (McKeown J., Reasons, *Appellant's Record*, vol. 5, at 784, 835);

(h) The continuing effort by the Mohawks of Akwesasne to participate in their border-crossing activities throughout the 19th and 20th centuries. (McKeown J., Reasons, *Appellant's Record*, vol. 5, at 805-806).

10. The Appellant's appeal to the Federal Court of Appeal was based upon substantially the same issues that he invokes before this Court. The judgment of McKeown J. was upheld by the Court except that the Court specified the geographic area where the right could be exercised.

11. With respect to the issue of whether the Aboriginal right includes the right to trade goods

brought into Canada with other First Nations, the majority of the Federal Court of Appeal (Isaac C.J. and Sexton J.A.) concluded that "the trial judge properly considered the totality of the evidence of pre-contact trade before coming to his conclusion", and that "the evidence relied on by the trial judge is sufficient to ground his finding of pre-contact trade." (Sexton J.A., Reasons, *Appellant's Record*, vol. 5, at 854-855)

12. Noting that the issue at trial was not the existence of trading itself since "the fact that trading was an important part of the Iroquois Nations is well documented", the majority pointed out that the contested issue at trial was the geographic extent of the trade. On this issue, they concluded that "the trial judge made a full appraisal of the submissions of both parties on the existence of North-South trade before reaching his conclusion." (Sexton J.A., Reasons, *Appellant's Record*, vol. 5, at 855-856)

13. The dissenting judge on this issue, Letourneau J.A., did not disagree with the trial judge's findings on the historical evidence relating to the Aboriginal right. He concluded however that the wording of Article III of the Jay Treaty should be applied to limit the scope of the Aboriginal right to goods brought in at Cornwall Island for the personal use or consumption or for collective use or consumption by the members of the Mohawks of Akwesasne. Létourneau J.A. further held that the trial judge had erred in interpreting the wording of Article III of the Jay Treaty to include non-commercial scale trading. The majority disagreed with this approach, stating that "the Jay Treaty could not possibly be employed to limit the scope of the aboriginal right" because "the fact that aboriginals may have been granted a more limited form of the aboriginal right in an international treaty cannot serve to restrict the right which is protected by s. 35 of the Constitution Act, 1982." (Reasons, *Appellant's Record,* vol. 5, Létourneau J.A., at 873-877, Sexton J.A., at 853-854, 857-858)

14. The trial judge and all three judges of the Court of Appeal concluded that the Appellant had not satisfied the burden of proving extinguishment in this matter since it "had not satisfied the onus of demonstrating that the *Customs Act* exhibits the 'clear and plain intention' necessary to extinguish the aboriginal right".

Létourneau J.A., Reasons, para. 47, *Appellant's Record,* vol. 5, at 878; McKeown

J., Reasons, *Appellant's Record*, vol. 5, at 844-846

15. While the judgment of the Court of Appeal clarified the geographic area over which the Respondent's Aboriginal right can be exercised, in essence the majority upheld all of the findings of fact and law of the trial judge. Even the dissenting judge underlined in his judgment that: "I would not want to conclude my analysis of the trial judge's decision without underlining the substantial effort required from him in reviewing the voluminous, and often conflicting, evidence adduced before him. Our intervention should not obscure the fact that his decision contains numerous factual and legal findings that we endorse." (Létourneau, J.A., Reasons, *Appellant's Record,* vol. 5, at 881-882)

16. The Order of the Federal Court of Appeal varied paragraph 1 of the Order of McKeown J. The final Order of the Appeal Court states:

> 1. the plaintiff as a Mohawk of Akwesasne resident in Canada has an existing aboriginal right which is constitutionally protected by sections 35 and 52 of the *Constitution Act, 1982*, when crossing the international border from New York to Ontario or Quebec, to bring with him to Canada, for personal use or consumption, or for collective use or consumption by the members of the community of Akwesasne, or for non-commercial scale trade with First Nation communities in Ontario or Quebec, goods bought in the State of New York without having to pay any duty or taxes to the government of Canada.
>
> As the plaintiff has explained, the aboriginal right does not include the right to bring into Canada any form of firearm, restricted or prohibited drug, alcohol, plants and the like. The aboriginal right is also limited to the extent that any Mohawk of Akwesasne entering Canada with goods from the United States will be subject to search and declaration procedures at Canadian Customs.
>
> 2. insofar as any provisions of the ***Customs Act*** are inconsistent with the plaintiff's aboriginal right, they are, to that extent, of no force or effect.

PART II — POINTS IN ISSUE

17. The Respondent submits that:

a. the Court of Appeal and the trial judge properly characterized the Aboriginal right and correctly interpreted the historical and contemporary evidence and legal issues on the Aboriginal practices which support the Aboriginal right;

b. the Court of Appeal correctly rejected the Appellant's contention that the Aboriginal right is incompatible with the sovereignty of the Crown;

c. the Court of Appeal and the trial judge correctly applied the law and the evidence to hold that the Aboriginal right had not been extinguished; and

d. the majority of the Court of Appeal correctly determined (i) that the trial judge had made a full appraisal of the evidence of both parties on this matter; (ii) that the trial judge had made no palpable and overriding error in appreciating the evidence in relation to that part of the Aboriginal right which relates to trade; (iii) that, in fact, the evidence of pre-contact trade supported the findings of the trial judge on this matter; and, (iv) that Article III of the Jay Treaty could not limit the scope of the Aboriginal right.

18. The Appellant's arguments on this appeal raise an additional issue: can the Appellant, having argued and accepted at trial that immigration matters were not an issue in this case, now insist that the right at issue be characterized as inevitably including and as being contingent upon such matters?

PART III — ARGUMENT

(A) Introduction

19. As the Respondent made clear in his Opening Statement at trial, his progress across the Cornwall International Bridge on March 22, 1988 "was ... not an act of defiance against Canadian sovereignty; it could by no stretch of the imagination be coloured as a menacing act for the Canadian state or its citizens" and further "Plaintiff and his people wish this Court to know that in mounting his case he is not attacking Canadian sovereignty. They only seek judicial confirmation of the reasonable limits to that sovereignty ... clearly dictated by the Constitution of Canada."

> Opening Statement, Transcript, at 17-18, 49-50, *Respondent's Record,* at 2-3, 6A-6B

20. The Appellant argues that the Respondent's case constitutes a Trojan Horse menacing to and incompatible with Canadian sovereignty. The case may look like one involving duty free entry of goods says Appellant but in reality lurking inside is "a mobility right of persons which includes as a non essential element the claim to exemption" (para. 19). In fact, it is the Appellant who seeks to alter the characterization of the Aboriginal rights at issue by transforming it into something — a right of access to Canada — not argued at trial or before the Federal Court of Appeal; it is not part of the Order of the trial judge or the Court of Appeal.

21. From the outset of the trial all of the parties clearly understood that the issue in this case is about, and only about, the right when entering Canada to bring in goods without paying duties or taxes on those goods.

> The plaintiff has characterized his claim as an aboriginal right to bring personal and community goods across the Canada-United States border, duty and tax free, and the right to trade those goods with other First Nations. (McKeown J., Reasons for Judgment (hereinafter "McKeown J., Reasons") *Appellant's Record*, vol. 5, at 768)

22. It has always been recognized that the Aboriginal right in this case is not absolute and is subject to reasonable limitations:

> The plaintiff does not claim any right to bring across the border any form of firearm,

> restricted or prohibited drug, alcohol, plants or the like, nor do the facts in this case raise the issue of the importation into Canada of commercial goods for the primary purpose of competing in Canada's commercial mainstream. Furthermore, the plaintiff recognizes that the Mohawks of Akwesasne, resident in Canada, will continue to be subject to search and declaration procedures at Canada Customs. (McKeown J., Reasons, *Appellant's Record*, vol. 5, at 768)

23. The right at issue in this Appeal, as determined after adjudication by two levels of the Federal Court of Canada, is clearly a right which applies when and if the Respondent enters into Canada. When the right at issue is properly understood, the Appellant's arguments on sovereignty and characterization fall away.

(B) The Courts Below Correctly Characterized the Aboriginal Right and the Evidence

1. Characterization of the Aboriginal Right

24. The Respondent was born on St. Regis Island, in the territory of Akwesasne located within Canada. The evidence led at trial demonstrates that, due to the unique geography of Akwesasne, Grand Chief Mitchell crosses the international border into Canada several times each day.

> Mitchell, Transcript, vol. 2, at 120,198-200, *Respondent's Record,* at 7,14-16, map of Akwesasne, Exhibit P-11, *Respondent's Record*, at 215

25. The Respondent's entry into Canada on March 22, 1988 was uncontested by Canadian authorities; it was never challenged by the Appellant either in the pleadings or at trial. The only activity undertaken by the Respondent on March 22, 1988 which conflicted with a law of Canada was his act of bringing goods into Canada without paying duties or taxes upon those goods. The only governmental regulation which was impugned was the *Customs Act*. The Courts below correctly characterized the Aboriginal right in light of these facts.

> It is clear that the right claimed by the respondent is the right to be exempt from the payment of customs duties when crossing the Canadian border for goods that he would have bought in the United States. The whole debate at the hearing before the trial judge turned on and was related solely to the scope and impact of the *Customs Act* on the respondent's right not to pay duties.

> Létourneau J.A., Reasons, *Appellant's Record*, vol. 5, at 868; Mitchell, Transcript,

vol. 2, at 270-271, *Respondent's Record*, at 33-35

26. At trial both parties proceeded upon the basis that the *Immigration Act* was not engaged by this proceeding. When counsel for the Appellant objected that a portion of the expert report of Joan Holmes, a witness for the Respondent, had improperly dealt with 'immigration issues', the Respondent agreed to dispense with that portion of the expert report.

Transcript, vol. 11, at 2044-2049; vol. 12, at 2063-2064, *Respondent's Record, at* 91-96, 97-98

27. At trial the Appellant acknowledged that issues in relation to immigration were not relevant to the pleadings. Having made his position clear at trial, it is not open to the Appellant now to insist that the Aboriginal right at issue "is dependent upon the establishment of an aboriginal right of free passage across the international boundary", and to accuse the Respondent of having improperly pleaded his case.

Transcript, vol. 11, at 2044-2045, *Respondent's Record*, at 91-92; Appellant's Factum, paras. 19, 28;

28. The issues in this appeal do not involve — and do not affect — Canada's ability to control who or what enters the country. The Appellant's reliance on this Court's decision in *R. v. Simmons* is misplaced. The issues in *Simmons* concerning the degree of personal privacy the defendant could expect to receive at customs are not relevant to this appeal.

2. Principles of Appellate Review in this Matter

29. Many of the Appellant's arguments relating to the characterization of the Aboriginal right and the evidence supporting it, as well as those relating to the trial judge's findings with respect to the right to trade, are directed towards findings of fact by the trial judge which have been confirmed through the judgment of the Court of Appeal. In a number of cases dealing with Aboriginal or treaty rights, this Court has cautioned that appellate courts should be extremely reluctant to interfere with the findings of fact made at trial.

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, paras. 78-80, Tab 3; see

also *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 81, Tab 21; *Ontario (A.G.) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, at 574-575, Tab 8

30. Based on his assessment of the testimony and the credibility of witnesses, McKeown J. was required to make findings of fact which were the object of dispute between the parties. This is clearly a case where the important policy of the protection of the autonomy and integrity of the trial process should be applied.

3. The Evidence Supporting the Aboriginal Right

31. Given the inherent evidentiary difficulties in proving that a practice, custom or tradition was integral to the distinctive culture of a First Nation before contact with Europeans, it would be contrary to this Court's judgment in *Van der Peet* (*supra,* para. 68, Tab 21) to require that historical evidence as to activities be artificially limited to the particular right claimed, or that the right claimed must reflect all the individual activities in evidence.

32. The Appellant's arguments regarding the alleged dissimilarity between pre-contact practices of the Respondent's ancestors and the Aboriginal right at issue in this appeal (paras. 48, 55) are predicated upon the Appellant's mistaken contention that, at its core, the right at issue is one of free passage "which is not limited in any way". There is no right of unregulated, free passage at issue. (McKeown J., Reasons, *Appellant's Record*, vol. 5, at 768)

33. The Appellant places great emphasis upon the fact that there were boundaries between Aboriginal nations in pre-contact times, that those nations asserted control over their territory and that they also recognized that those boundaries could change. The Appellant's arguments regarding the relevance of boundaries between Aboriginal peoples in pre-contact times fail to take into account the fact that there was no border in Mohawk territory in pre-contact times and the trial judge so found. He concluded that the territory over which the Mohawks travelled for trade and diplomacy, both before and after their contact with Europeans, extended to both sides of the border between Canada and the United States and that Akwesasne forms part of the territory "regularly exploited" by the Mohawks.

McKeown J., Reasons, *Appellant's Record*, vol. 5, at 782; Map of Akwesasne,

Mitchell, Transcript, vol. 2, at 198-202, *Respondent's Record*, at 215, 14-18

34. The sovereign authority to establish an international border between Canada and the U.S. is not the issue in this case. Rather, the issue is the effect of the Crown levying duties on the movement of goods through the territory at issue. The Appellant argues that the payment of customs duties at the border constitutes an aspect of the right. In the Respondent's submission, such a requirement constitutes an infringement of the right.

35. The Supreme Court has emphasized that the perspective of the Aboriginal peoples involved is crucial in assessing a claim for the existence of Aboriginal rights (*R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1112, Tab 20; *Van der Peet*, *supra*, para. 49, Tab 21). From the Aboriginal perspective, the establishment of borders as between colonial powers must be distinguished from recognition of boundaries as between Aboriginal peoples as explained by the Respondent's expert witness, Joan Holmes during cross-examination:

> A. Well, the way that I understand it is this, you've painted a picture which is I would say very generally accurate, that there were boundaries between territories, that there were tolls between Indian Nations and that that existed before Europeans came to North American [sic] and it continues to exist afterwards. That part I think is clearly understood.
>
> Now, the question of them having to pay tolls crossing European boundaries is another matter because I believe, and we see it pointed out in documents, that the view of the Indian Nations was that the boundary line between the European nations did not affect them.
>
> In a sense what you have, if you want to picture it visually, is you have a map of North America that is made up of a patchwork of Indian Nation territories and then on top of that, after Europeans came to North America and as they continued to shift their own boundaries, on top of that aboriginal map, if you would, is a map that has boundaries between the European nations.

Holmes, Transcript, vol. 14, at 2472-2475, *Respondent's Record*, at 136-138

36. The borders between European nations, from the time they were first drawn in North America, served as a definition of the respective European zones of influence. Great Britain, France and, later, the United States did not purport to impose the borders between them upon Indian nations. The Appellant's expert witness, Donald Graves, confirmed that European borders were not intended to affect the activities of the Indian nations.

> Graves Report, *Appellant's Record*, vol. 3, at 424; Graves, Transcript, vol. 20, at 3665, *Respondent's Record*, at 159

37. The Appellant's argument with respect to tolls is irrelevant as the area in issue is territory found by the trial judge to have been regularly used and exploited by the Mohawks for a variety of purposes including trade. The evidence of payment of tolls cited by the Appellant and by his expert witness, Dr. von Gernet, relates to the practices of the Algonquins who charged tolls to both the French and the Huron, and with respect to the Montagnais, another First Nation. It cannot be extrapolated to apply to the Mohawks. (*Appellant's Record*, von Gernet Report, vol. 3, at 570-571; von Gernet,Transcript, vol. 27, at 5013-5022, *Respondent's Record*, at 198-207)

38. Evidence of Algonquin and Montagnais practices cannot be used to delineate the Aboriginal rights of Mohawks. In *Van der Peet* this Court, confirming its earlier judgment in *Kruger and Manuel*, cautioned:

> ... the existence of an aboriginal right will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right. (emphasis in the original)
>
> *Van der Peet*, *supra*, paras. 69,130, Tab 21

39. The Mohawks certainly did not pay tolls to travel through their own traditional territory, and there is no evidence in the record that the Mohawks ever paid tolls to any Aboriginal nation. Not only did they not pay tolls, but as the trial judge found, the Mohawks went to war against the Mahicans in order to end the Mahicans' attempts to force the Mohawks to pay tribute. Tribute, tolls, and customs duties are each distinct concepts. Tribute is a physical manifestation of political submission; a toll is a charge on a person for the right to pass and customs duties are levied upon goods purchased outside a state's territory.

> McKeown J., Reasons, *Appellant's Record*, vol. 5, at 797; Holmes, Transcript, vol. 14 at 2469; von Gernet, Transcript, vol. 27, at 5015; *Respondent's Record*, at 132, 200

40. McKeown J. correctly concluded that evidence of regulation of boundaries in pre-contact times could not (i) serve to define or deny the Aboriginal right, or (ii) signify that regulation of the underlying activity by a Canadian law could not constitute an infringement of the Aboriginal right.

> The fact that an activity was regulated in pre-contact times in no way indicates that such activity cannot constitute an aboriginal right. For instance, if it could be shown that the Mohawks regulated who amongst them could fish or how members of their people could fish, how could this be used to argue that those rights could not be infringed under Canadian law? (Reasons, *Appellant's Record*, vol. 5 at 797)

41. The Appellant suggests (para. 56) that the Aboriginal right in this case is unlike other rights such as fishing rights which he says can be regulated without denying their very existence. The Aboriginal right in this case can be regulated without denying its existence. For example, it is subject to search and declaration procedures.

42. As for the Appellant's position that the Respondent could only prove the Aboriginal right at issue by leading evidence of receipt of an exemption from a border impost of some kind, this is tantamount to saying that an Aboriginal right to fish could only be established by leading evidence of receipt of an exemption from fishing regulations in pre-contact times.

(C) The Respondent's Aboriginal Right Is Not Incompatible with the Sovereignty of the Crown

43. At the beginning of this new century, it is important to reflect upon the dramatic evolution in the constitutional recognition of Aboriginal rights spearheaded by the jurisprudence of this Court. In *Sparrow* this Court traced that evolution in the period prior to 1982:

> For many years, the rights of the Indians to their aboriginal lands -- certainly as legal rights -- were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises.
> ...
> It is clear, then, that s.35(1) of the *Constitution Act, 1982*, represents the culmination

> of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights.
>
> *supra* at 1103, 1105, Tab 20; see also *R. v. Côté*, [1996] 3 S.C.R. 139, para. 53, Tab 12

44. In *Delgamuukw* (*supra*, para. 1, Tab 3) this Court referred to the "series of cases in which it has fallen to this Court to interpret and apply the guarantee of existing Aboriginal rights found in s. 35(1) of the *Constitution Act, 1982*" and the resulting jurisprudential framework.

45. The Appellant's arguments invoking Canadian sovereignty reflect an attitude and a time when deference to government authority over the pre-existing rights of Aboriginal peoples rather than reconciliation was the prevailing attitude. Led by this Court, the law has moved on.

46. The Appellant suggests that the practice relied upon by the Respondent, the practice of transporting goods, free of duties and taxes, from what is now New York State into what are now the provinces of Quebec and Ontario, is not reconcilable with Crown sovereignty (para. 30). This practice of duty-free importation of goods must be reconcilable with Crown sovereignty as it occurs often and increasingly under the Crown's own regulatory regime and international arrangements. (Létourneau, J.A., Reasons, *Appellant's Record*, vol. 5 at 872-873)

1. Section 35 *Constitution Act, 1982* Is the Relevant Sovereign Act

47. The Appellant defines sovereignty as the ability to exercise jurisdiction over a defined territory and a permanent population. In Canada the exercise of that sovereignty is circumscribed by the *Constitution Act, 1867*, which determines which level of government has jurisdiction over subject matters, and now by the *Constitution Act, 1982*, which enshrines fundamental rights in the *Charter of Rights and Freedoms* and in s. 35(1). Section 52, renders those rights supreme over any inconsistent law.

48. In the *Reference re: Secession of Québec* this Court examined in detail the historical and

legal underpinnings of the Constitution of Canada and a number of its underlying

constitutional principles. This Court linked the concepts of “sovereignty” and “the Constitution”.

> The Constitution is the expression of the sovereignty of the people of Canada. ... As this Court held in the *Manitoba Language Rights Reference*, *supra*, at p. 745, "[t]he Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government".
>
> *Reference re: Secession of Québec*, [1998] 2 S.C.R. 217, para. 85, Tab 22

49. The *Constitution Act, 1982* transformed the role of the Constitution in Canada:

> This Court has noted on several occasions that with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen* ... at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.
>
> *Reference re: Secession of Québec, supra,* para. 72, Tab 22

50. Sections 35 and section 52 of the *Constitution Act, 1982* provide for constraints on Crown power, reconciliation rather than Parliamentary supremacy and restoration of the honour of the Crown. They provide the Courts with the constitutional tools to hold the Crown “to a high standard of honourable dealing with respect to the aboriginal peoples of Canada”. This Court in *Sparrow* adopted the observation of Prof. Lyon that s. 35 "renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown."

> *Sparrow, supra*, at 1109, 1105-1106, Tab 20

51. In *R. v. Côté* Chief Justice Lamer stated that the entrenchment of Aboriginal ancestral and treaty rights in s. 35(1) "has changed the landscape of Aboriginal rights in Canada". In *R. v. Adams* and *Côté* the Supreme Court stressed the independence of the rights recognized and affirmed by s. 35(1) from any legal recognition or approval by governmental authorities.

Côté, *supra*, paras. 51-52, Tab 12; *Adams*, [1996] 3 S.C.R. 101, para. 33, Tab 9

52. The Crown's international treaty power is surely one of those "essential conditions of statehood" invoked by the Appellant (para.1). For example, the Crown may enter into and has entered into international treaties in which it commits itself to protect certain species of wildlife. According to the Appellant, if the exercise of this aspect of sovereignty at least prior to 1982 conflicted with Aboriginal practices, those practices would have to be considered irreconcilable with the Crown's sovereignty. The Crown in Right of the United Kingdom entered into just such a treaty with the United States of America in 1916, with respect to migratory birds, the *1916 Migratory Birds Convention*. Parliament enacted the *Migratory Birds Convention Act* to give effect to the international Convention in Canada prohibiting the hunting of migratory birds during certain times of the year and regulating certain other activities related to migratory birds and their habitats. These prohibitions conflicted with, indeed were irreconcilable with, Aboriginal and treaty rights to hunt.

R. v. Sikyea (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.) at 158, Tab 19, [1964] S.C.R. 642, Tab 18; *The Queen v. George,* [1966] S.C.R. 267, Tab 24

53. Although in cases decided prior to 1982 dealing with treaty rights of Aboriginal persons to hunt migratory birds, it was held that treaty rights were not justiciable in the face of conflicting federal regulatory provisions, as of 1982 what had been seen as irreconcilable was reconciled through the application of sections 35 and 52 of the *Constitution Act, 1982*.

R. v. Flett, [1989] 4 C.N.L.R. 128 (Man.Q.B.), Tab 13, [1991] 1 C.N.L.R. 140 (C.A.), Tab 14; *R. v. Arcand,* [1989] 2 C.N.L.R. 110 (Alta.Q.B.), Tab 10

54. Furthermore, in clear confirmation that reconciliation of Crown sovereignty with pre-existing Aboriginal societies and their activities is a <u>two way</u> street, (infra para. 59) Canada initiated negotiations with the United States of America to amend the 1916 Convention to bring it into line with the Aboriginal and treaty rights of the Aboriginal peoples of Canada as is explicitly recognized in the Protocol's preamble and the amendments brought to the Convention. Parliament repealed the *Migratory Birds Convention Act* replacing it with the *Migratory Birds Convention Act 1994*, to implement the amended Convention (s.4, s. 12(2)).

Protocol Between Canada and the United States of America Amending the 1916 Convention for the Protection of Migratory Birds in Canada and the United States, signed on December 14, 1995, preamble, sec. II 4(a), Tab 34; *Migratory Birds Convention Act 1994*, at ss. 2(3), 4, Tab 33

55. The Appellant cites an 1892 U.S. Supreme Court decision (*Ekiu*) in support of his assertion that a right of entry into a sovereign state not based on citizenship cannot be reconciled with the state's right to control its borders (paras. 31-32) . This decision must be analysed in light of the subsequent decision in *McCandless* which held that a Mohawk from Kahnawake had the right to enter into and remain in the U.S. despite the fact that he was not an American citizen. "American Indians born in Canada" are exempt from compliance with immigration requirements imposed by the U.S. Immigration Act.

McCandless v. Diabo (1928), 25 F. (2d) 71 (3d Cir. C.A.), Tab 7; U.S. *Immigration and Nationality Act*, 8 U.S.C.S. § 1359, Tab 36

56. In *Watt v. Leibelt*, the Aboriginal claimant, who was not a Canadian citizen, claimed that he had an Aboriginal right to enter and remain in Canada. The Crown made similar arguments regarding the irreconcilability of the Aboriginal right at issue in that matter as it makes in this Appeal. In response to that argument the Court of Appeal stated:

> Suffice it to say that while there is ample authority in international and common law for that proposition, a sovereign state may fetter itself as to the means by which, the circumstances in which, and the agencies of government by which, such power of control may be exercised. Canada has by its Constitution limited the exercise of governmental powers which may be inherent as a sovereign state. ... As long as the Constitution remains unamended, Canadian authorities are subject to this limitation on what would otherwise be an incident of sovereign power. In fact, in adopting section 35, Canada has exercised its sovereignty by establishing a hierarchy of rights exercisable in Canada: a hierarchy which can only be altered by another exercise of sovereign power, namely the amendment of the Constitution.
>
> [1999] 2 F.C. 455, para. 15, see also para. 16, Tab 25

57. Contrary to what the Appellant argues (para. 46), the Federal Court of Appeal in *Watt* did not view the Aboriginal right to remain in Canada "as a rejection of Canadian sovereignty in favour of aboriginal sovereignty" as it found such a right to be contemplated by s. 35(1).

58. At international law Parliament's sovereignty with respect to Canada's jurisdiction over its borders is not unlimited in relation to the imposition of duties and taxes as demonstrated by the *Vienna Conventions on Diplomatic Relations and on Consular Relations* under which Canada cannot levy customs duties and taxes on diplomats who enter Canada.

Foreign Missions and International Organizations Act, Tab 31

2. Reconciliation of Aboriginal Rights and Crown Sovereignty

59. In *Van der Peet*, this Court determined that the Aboriginal rights recognized and affirmed in s. 35(1) are best understood as providing the "constitutional framework" by which prior Aboriginal occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The Appellant attempts to explain this Court's statement in *Van der Peet* by suggesting that the process of reconciliation is a one-way street. Pre-existing Aboriginal societies and their rights that result, the Appellant contends, must give way to European sovereignty and be moulded in its image. This is not at all what Chief Justice Lamer was saying in *Van der Peet*. He was referring to a two-way street. Aboriginal societies and their rights, on the one hand, and Crown sovereignty, on the other, must accommodate one another.

> The challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined. . . . a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives. ...
>
> The Canadian, American and Australian jurisprudence thus supports the basic proposition put forward at the beginning of this section: the aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of these purposes;...

Van der Peet, supra, paras. 42-43, 49-50, 30-31 (emphasis added), Tab 21; see also *Delgamuukw*, *supra*, paras. 148,186, Tab 3

60. When Lamer, C.J. spoke of reconciling Aboriginal rights and Crown sovereignty, he was not assuming an automatic "reading-down" of Aboriginal rights to conform with Crown sovereignty. Rather, he stated that "[t]rue reconciliation will equally place weight on each" and that it is ultimately through negotiated settlements involving "give and take on all sides", reinforced by the judgments of the Supreme Court, that this reconciliation will be achieved. (*Delgamuukw, supra,*

paras. 148, 184-186 (emphasis added), Tab 3)

61. The evidence at trial revealed that the Respondent, and his people, believe that with Aboriginal rights come a responsibility to their community and their neighbours. Akwesasne sought to reach agreements with Canada to recognize and facilitate the exercise of the Aboriginal rights asserted in this case. Canada's response was to deny the existence of those rights and to reject initiatives for co-operative enforcement.

> Mitchell, Transcript, vol. 2, at 229-231, 237-240, 292; *Respondent's Record*, at 20-22, 24-27, 40

3. Disguised Arguments on Justification

62. In this case, the Appellant presented no evidence of justification at trial. The trial judge therefore correctly declined to "speculate about possible justifications for an infringement of Plaintiff's Aboriginal rights". In *Badger* Cory J. stated:

> In the present case, the government has not led any evidence with respect to justification. In the absence of such evidence, it is not open to this Court to supply its own justification.
>
> *R. v. Badger*, [1996] 1 S.C.R. 771, para. 98, Tab 11; McKeown J., Reasons, *Appellant's Record*, vol. 5, at 847

63. Now the Appellant is proposing to add a new element to the *Sparrow* test for establishing Aboriginal rights under s. 35(1) by suggesting that a claimant must prove a practice is consistent with Canadian sovereignty. *Sparrow* addresses the Appellant's concerns through the justification test which saves legitimate interference with s. 35 rights. The protection of the legitimate and justified exercise of sovereign power does not require the invention of a new element for establishing an Aboriginal right.

64. Many of the submissions about sovereignty presented by the Appellant are, in fact, simply arguments through which, given his failure to lead evidence on justification under the *Sparrow* test at trial, he now seeks to justify the application of the regulatory scheme of the *Customs Act* to the exercise of the Aboriginal right. The *Sparrow* test on justification was available to the Appellant at the time of trial. He elected not to invoke it. He cannot now introduce it by giving it a new name —

"incompatibility with Crown sovereignty".

65. Moreover, the Appellant introduces new aspects of government activities not raised at trial and for which no evidence was led. For example, at paragraphs 36 to 42 the Appellant raises arguments concerning the importance of protecting tariff revenue and the integrity of the domestic tax system. No evidence was led at trial in relation to the contemporary facts and policy concerns set out in these paragraphs. This factual and speculative analysis cannot at this late stage be introduced in the guise of legal argument.

66. Based upon pure speculation and not upon any of the facts which arise in this appeal, the Appellant focuses on the effect that the recognition of the Aboriginal right in this case may have upon hypothetical future cases (para.36) or cases already decided (para. 41). The evidence and facts in this appeal relate to non-commercial scale trade and not to commercial-scale trade in issue in the Appellant's examples (footnotes 43, 119).

67. The rights declared by the Courts below recognize and accommodate the need for Canada to control its borders. The manner in which the Respondent has explained his right at trial and the Order of the Court of Appeal take into account the concerns of the Appellant by stipulating that the Aboriginal right does not include the right to bring into Canada any restricted or prohibited goods and are "limited to the extent that any Mohawk of Akwesasne entering Canada with goods from the United States will be subject to search and declaration procedures at Canadian Customs". The concerns expressed in the *Jacques* and *Simmons* case are not relevant. (McKeown J., Reasons, *Appellant's Record*, vol.5, at 768, 848; Sexton J.A., Reasons, *Appellant's Record*, vol. 5, at 859; Transcript, vol. 1, at 17-20, *Respondent's Record* at 2-5)

68. This Court's statements concerning justification acknowledge at least the possibility of a *prima facie* incompatibility between Crown sovereignty and pre-existing Aboriginal activities. Where the Crown is concerned about such incompatibility, the remedy is for the Crown to establish that infringement of the exercise of the right is justified, not for the Court to deny the existence of the right. (*Sparrow*, *supra*)

69. Ultimately, with respect to the Respondent's submissions on the threat to Canadian

sovereignty posed by the declarations of the courts below, to paraphrase Hall J. in *Calder*, the Appellant is fighting an issue that does not arise in the case and is resisting a claim never made in the action. (*Calder v. A.G. of B.C.*, [1973] S.C.R. 313, at 411, Tab 1)

(D) The Courts Below Correctly Concluded That the Aboriginal Right Had Not Been Extinguished

1. Laws Relating to Customs

70. As McKeown J. remarked, at trial the Crown did not argue extinguishment except to a limited extent with respect to the Jay Treaty. Nor did the Crown lead evidence on the complex customs regime and Parliament's intention in enacting that regime. It was in the Court of Appeal that the Appellant first argued that if the Aboriginal right ever existed, it was extinguished by the *Customs Act* before the coming into force of s. 35(1) of the *Constitution Act, 1982*.

> McKeown J., Reasons, *Appellant's Record*, vol. 5 at 844, 846; *Watt, supra* at 467, para. 13, Tab 25

71. Extinguishment should not be lightly implied. Parliament must have demonstrated a "clear and plain intention" to extinguish the right in question. A general regulatory scheme which may affect and control the exercise of Aboriginal rights even to the point of making them unexercisable, does not extinguish them. It is the intent of a law and not its effect which is relevant to this issue and the required intent is the intent to effect a permanent settlement of the Aboriginal rights at issue. No evidence was led at trial on the intent to extinguish.

> *Sparrow*, *supra*, at 1097, 1098-1099, Tab 20; *R. v. Gladstone,* [1996] 2 S.C.R. 723, paras. 31, 38, Tab 16; see also *Arcand*, *supra, Tab 10; Flett, supra,* Tabs 13, 14

72. The repeal and lapse of the early enactments of the provinces of Upper and Lower Canada invoked by the Appellant are not indicative of any intention to effect a permanent settlement of Aboriginal rights: (i) lapse, or general repeal in the context of a consolidation cannot be said to evince a positive clear and plain intention to effect a permanent settlement of rights; (ii) the rights

provided for in those enactments were rights created by Art. III of the Jay Treaty, not Aboriginal rights; and (iii) in any event, the colonial governments of Upper and Lower Canada did not have legislative competence to effect a permanent settlement of Aboriginal rights.

> *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1999] O.J. No. 1406 (Q.L.) (Ont. S.C.J.), paras. 344-358, 597, Tab 2; *Easterbrook v. The King*, [1931] S.C.R. 1010, at 214, Tab 4

73. The Court of Appeal agreed with the trial judge's conclusions that the Appellant had not satisfied the onus of demonstrating that the *Customs Act* exhibits the clear and plain intention necessary to extinguish the Aboriginal right. The trial judge concluded:

> The specific duties and taxes imposed from time to time under the *Customs Act* are not permanent features required to maintain Canadian sovereignty. They are not, as like the constitutional enactment in *Horseman, supra*, aimed at a permanent settlement of the legal rights of the aboriginal peoples. In effect they change over time or are eliminated completely with respect to certain goods. The plaintiff's right to cross the border with personal and community goods without paying duty is not incompatible with the regime of the *Customs Act* or cannot co-exist with and within that regime.
>
> McKeown J., Reasons, *Appellant's Record* vol.5 at 846, Létourneau J.A., Reasons, *Appellant's Record*, vol. 5 at 878

74. The conclusions of the lower courts on this point are entirely in accord with the judgments of this Court. In *Sparrow*, this Court held that the Aboriginal right had not been extinguished by a permit system which was "simply a manner of controlling the fisheries, not **defining underlying rights**". In *Gladstone*, this Court held that the Crown had only demonstrated that it controlled the commercial fishery, not "that it has acted so as to ***delineate*** the extent of Aboriginal rights". The Appellant admits, in paragraph 66 of his factum, that "in the present case, the *Customs Act* never recognized the alleged right, let alone sought to control it, prior to 1982". Perforce, the Act has clearly not delineated the Aboriginal right; it has simply controlled the exercise of the right.

> Sparrow, *supra*, at 1099, Tab 20; *Gladstone*, *supra*, para. 34 (emphasis added), Tab 16; see also *Van der Peet*, *supra*, per McLachlin J. (as she then was), para. 289, Tab 21

75. The existence of comprehensive regulation of an Aboriginal or treaty right, even to the point of rendering the right unexercisable, does not extinguish that right. Prior to 1982, in *R. v. Sikyea* and *The Queen v. George* this Court held that the *Migratory Birds Convention Act* was a complete bar to the Aboriginal defendant's treaty rights. In *Sikyea* the Court of Appeal (whose conclusions on this point were explicitly adopted by this Court) held that:

> I have quoted s. 5(1) of the Regulations which says that "no person shall ... kill ... a migratory bird at any time except during the open season ...". It is difficult to see how this language admits of any exceptions. When, however, we find that reference in both the Convention and in the Regulations to what kind of birds an Indian and Eskimo may "take" at any time for food, it is impossible for me to say that the hunting rights of the Indians as to these migratory birds, have not been abrogated, abridged or infringed upon.
>
> *Sikyea*, *supra*, at 158, 162, Tab 19; S.C.R. at 646, Tab 18

76. With the entrenchment of Aboriginal and treaty rights through s. 35(1) of the *Constitution Act, 1982*, the treaty right to hunt migratory birds at all times was determined not to have been extinguished even though it had been subject to a regulatory scheme which prohibited Aboriginal peoples, like all other people, from hunting most species of migratory birds out of season.

> Parliament could pass legislation that has the effect of suspending or interfering with the exercise of the right and in doing so may have breached the treaty. It did not in my opinion extinguish the right.
>
> *Arcand*, *supra*, at 117, Tab 10; see also *Flett, supra*, at 131-132 (Leave to Appeal refused [1991] 1 C.N.L.R. 140), Tab 13

77. The Appellant argues (para. 63) that the decisions of this Court on extinguishment in *Gladstone* are not directly applicable since in these cases the fisheries regimes at issue "expressly acknowledged and specially regulated the Aboriginal right". On the contrary, there are very direct parallels between the applicable government regulatory scheme in this appeal and the regulatory scheme for commercial fisheries in *Gladstone*. According to the regulations at issue in *Gladstone*, between 1927 and 1955 all persons, including Aboriginal people, were prohibited from harvesting herring spawn for any purpose (*Gladstone*, paras. 31-34, Tab 16). There was no "specially regulated Aboriginal right".

78. The right at issue in *Gladstone* was the right to fish for commercial purposes. In that case, even after the regulations had been amended to grant special protection to the Aboriginal food fishing right, this was done at the expense of the Aboriginal commercial fishery. One of the Regulations at issue explicitly stated that the Aboriginal commercial fishery "should be prevented". The Regulation provided that Aboriginal persons attempting to sell fish caught pursuant to Indian food fishing permits would be in violation of the regulations.

Gladstone, *supra,* para. 35, Tab 16

79. This Court concluded that the Regulations suggested that the government had two purposes in enacting the amendment to the existing scheme: conservation, and protection of the Indian food fishery:

> The government attempted to meet these goals by making it clear that no special protection was being granted to the Indian commercial fishery and that, instead, the Indian commercial fishery would be subject to the general regulatory system governing commercial fishing in the province.
>
> *Gladstone*, *supra,* para. 35, Tab 16

80. Nevertheless, this Court held that the explicit negation of the right to fish for commercial purposes in favour of the right to fish for food was not enough to evince a clear and plain intention to extinguish.

> The government's purpose was to ensure that conservation goals were met, and that the Indian food fishery's special protection would continue; its purpose was not to eliminate aboriginal rights to fish commercially. ***It is true that through the enactment of this regulation the government placed aboriginal rights to fish commercially under the general regulatory scheme applicable to commercial fishing, and therefore did not grant the aboriginal commercial fishery special protection of the kind given to aboriginal food fishing***; however, the failure to recognize an aboriginal right, and the failure to grant special protection to it, do not constitute the clear and plain intention necessary to extinguish the right. (*Gladstone, supra*, para. 36, Tab 16)

81. For extensive periods of time during the late nineteenth and twentieth centuries Aboriginal persons, including Mohawks of Akwesasne, were not assessed duty on their personal goods. And, as

noted by the Federal Court of Appeal.

> ...local customs officials were not acting alone, but were following the instructions of high ranking officials. The evidence demonstrates that different levels of officials condoned and encouraged such treatment of the aboriginals with respect to the paying of duties. As late as 1951, the Deputy Minister of Justice believed that aboriginals had the right to bring in personal goods duty free.
>
> Létourneau J.A., Reasons, *Appellant's Record*, vol. 5 at 880-881; Holmes, Transcript, vols. 11, 12, at 2253-2284, *Respondent's Record*, at 99-130

82. Contrary to what is argued by the Appellant (para. 71), the Court of Appeal's conclusion on this point does not suggest that the provisions of the *Customs Acts* became unenforceable due to actions of government officials. However, the actions, or inactions, of those officials do indicate that those entrusted with the application and enforcement of the Act did not believe that the Act was inconsistent with preferential treatment with respect to the duty-free importation of goods by Aboriginal peoples. The Court of Appeal relied upon these actions or inactions as a further factor demonstrating that the right had not been extinguished. It is, of course, the entrenchment of those rights in s.35(1) of the *Constitution Act, 1982* which made the relevant sections of the *Customs Act* unenforceable against the Respondent, not the actions of customs officials.

> Létourneau J.A., Reasons, *Appellant's Record,* vol. 5 at 878, para. 48

83. The Appellant argues (para. 61) that s. 22(1) of the *Customs Act* requires duties to be paid. When read in the context of the entire Act, s. 22(1) requires only that duties be paid on dutiable goods. The Act clearly contemplates circumstances where duties are not payable; therefore, for example, the provisions establishing a duty to report and identify goods brought into Canada have historically applied "whether goods are dutiable or not".

> McKeown J., Reasons, *Appellant's Record*, vol. 5 at 761, Létourneau J.A., Reasons, *Appellant's Record*, vol. 5 at 867; *Customs Act, 1970*, ss. 9, 18, Tab 27 (see *Appellant's Authorities*, Tabs 48-52 for historical precursors to these provisions of the *Customs Act*)

84. The Court of Appeal concluded that the *Customs Act, 1970* is not an absolute bar to duty-free entry of goods and pointed to the fact that s. 22(3) enables the Governor in Council to regulate the application of duties. The Appellant argues that if s. 22(3) constitutes a broad power to regulate, the

more specific powers to regulate duty-free entry of goods in the *Customs Act* and the *Customs Tariff* would be redundant. The fact is that there have been multiple provisions over the years exempting or granting remissions for the payment of duties as in the *Customs Act, 1970*, the *Customs Tariff, 1970* and the *Financial Administration Act, 1970*. For instance, the Governor in Council may make general remission orders pursuant to s. 22(3) *Customs Act* and s. 17 of the *Financial Administration Act*, and more specific orders pursuant to s. 273 *Customs Act* and ss. 11, 12 and 19(1) of the *Customs Tariff*. As Létourneau J.A. pointed out, this flexiblity in the regulatory scheme is integral to the customs regime.

> *Customs Act, 1970,* ss. 6, 22(3), Tab 27; *Customs Tariff*, *1970*, s. 11, s. 20, Tab 28; *Financial Administration Act*, *1970,* s. 17, Tab 30; *Ballet Shoes Remission Order, amendment*, 1980, Tab 26; *Titanium Anode Remission Order No. 2, Amendment,* 1982, Tab 35

85. The overall customs regime, which contemplates both (in the Appellant's words) "limited, highly specific" exemptions and general exemptions in the form of deductions, remissions, drawbacks and refunds, is a flexible one. These flexible features have been continued in more recent statutory enactments relating to customs duties. For instance, s. 101 of the *Customs Tariff*, R.S.C. 1985, c. 41 (3rd Supp.) as am. (since repealed and replaced), provides a general discretionary power to grant relief from the payment of customs duties — "the Governor in Council may ... by order, remit duties". Yet, notwithstanding this general power, the Governor in Council is enabled to remove or reduce duties on goods imported from any country by way of compensation for concessions granted by that country (s. 62) and to reduce or remove customs duties in respect of specific materials (s. 68). The existence of specific powers of remission does not preclude the general power or render it nugatory.

> *Customs Tariff, 1985*, s. 62, s. 66, s. 68, s. 77, s. 101 as am., Tab 29; *Akwesasne Residents Remission Order*, *Appellant's Authorities*, Tab 42

86. In *Delgamuukw* this Court, in examining the issue of whether provincial laws of general application could extinguish Aboriginal rights, held that laws evincing a sufficiently clear and plain intention to extinguish Aboriginal rights would have to be laws clearly contemplating "Indians and Indian lands" or Aboriginal rights or title. The *Customs Act* is no such law.

> 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, supra*, at para. 34) the standard is still quite high. My concern is that the only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands.
>
> *Delgamuukw, supra*, para. 180 (emphasis added), Tab 3

87. While the Chief Justice was referring to provincial laws of general application, this does not detract from the fact that this Court has held that the law must express specific intention in relation to Indians or Indian lands. There is no reason for a lower threshold to be applied to federal laws. Consistent with the jurisprudence from this Court, such specific intention must demonstrate that the Crown intended to “define underlying rights” or to “delineate” those rights or to provide for “a permanent settlement” for those rights.

88. The Appellant’s claim (para. 73) that Aboriginal persons are only exempt from taxes pursuant to statute relies upon judgments which deal solely with interpretation of provisions of the *Indian Act*; no arguments with respect to Aboriginal rights were before those courts. The allegation that statutory exemptions are the only manifestation of Aboriginal rights to tax exemption ignores the effect of s. 35(1) and the jurisprudence of this Court which suggest no such requirement.

89. In essence, the Appellant's argument on extinguishment is that if an Aboriginal right is not specifically dealt with or regulated in a statute it must not exist or it must cease to exist by reason of such statute. Despite the Appellant’s disavowal (para. 64), this is a perverse way of presenting the argument, long discarded by this Court, that for an Aboriginal right to exist it must be recognized by the Crown.

> *Calder, supra*, at 390, 392, 404, Tab 1; *Guerin v. The Queen,* [1984] 2 S.C.R. 335 at 376-379, Tab 5; *Sparrow, supra*, at 1101, Tab 20; *Delgamuukw, supra*, para. 180, Tab 3; *Adams, supra*, para. 33, Tab 9; *Côté, supra*, para. 52, Tab 12

2. This Court's Conclusions in *Francis* Are No Bar to the Respondent's Aboriginal Right

90. The Mohawk perspective on the relationship between Aboriginal rights and treaty rights was related in testimony by former Grand Chief Roundpoint:

> The source of those rights, in my view, do not stem from any treaty or any written word as put down by any European person. These rights are there since we have been here since time immemorial. It is a right that I have been born with, one that I have passed to my children. It is something that was given to me by my forefathers.

Roundpoint, Transcript, vol. 10 at 1890, *Appellant's Record,* vol. 1 at 114

91. The Appellant relies upon Kerwin J.'s judgment in *Francis v. The Queen* to argue that s. 49 of the 1949 *Act to Amend the Income Tax Act and the Income Tax War Act* was held to have extinguished rights under Article III of the Jay Treaty. From this he draws the remarkable conclusion (para. 76) that "if the alleged treaty right has been extinguished, then of course the aboriginal right, which amounts to the same thing, met the same fate". As the trial judge acknowledged, the Respondent argued at trial on the basis of two separate and distinct sources of rights. The Courts have recognized the distinct and independent character of Aboriginal rights and treaty rights. Absent specific treaty language, Aboriginal rights are not subsumed in treaty provisions. No such specific language is found in Article III. (*Simon v. The Queen* , [1985] 2 S.C.R. 387 at 401-402, Tab 23)

92. This Court's ruling in *Francis* is only relevant to a treaty based right. No Aboriginal right was pleaded in *Francis* and the Court did not address the matter of Aboriginal rights. The judgment has no application to the matter of Aboriginal rights.

93. Furthermore, *Francis* does not stand for the proposition that rights under Art. III have been extinguished. Kerwin J. held that rights under Article III had not been incorporated into Canadian law and were therefore not justiciable in Canadian courts. As the decision concluded that there were no rights at issue under Art. III of the Jay Treaty, the judgment cannot possibly constitute authority for the proposition that s. 49 extinguished those rights. Moreover, the references to s. 49 in Kerwin J.'s decision relied upon by the Appellants were not adopted by the majority; only three of the seven judges in *Francis* made any reference to s. 49 of the 1949 Act. In any event, s. 49 was directed only to rights arising from pre-Confederation statutes in the context of Newfoundland entering Confederation and could not possibly have addressed any treaty rights under Article III of the Jay Treaty, or Aboriginal rights.

Francis v. The Queen, [1956] S.C.R. 618 at 621-622, *Appellant's Authorities*, Tab 9

94. Finally, section 49 contemplates continuing tax exemptions through federal legislation. Even if that section were applicable, which is denied, it does not meet the high standards the Courts have established to demonstrate a clear and plain intention to extinguish Aboriginal rights.

(E) The Aboriginal Right Includes the Right to Bring Goods Into Canada Duty-Free For the Purposes of Non-Commercial Scale Trade

95. The Appellant's arguments contesting the trial judge's conclusions that the Respondent's Aboriginal rights includes the right to bring goods into Canada duty free for the purposes of non-commercial scale trade with other First Nations focus only on certain specifics, including the assessment of credibility and expertise of certain expert witnesses, the trial judge's interpretation of specific pieces of evidence, and the trial judge's conclusions on the evidence in comparison to those reached in *R. v. Adams*.

96. The trial judge carefully reviewed and analysed an enormous amount of evidence before reaching his conclusion on this point. The majority of the Court of Appeal concluded that McKeown J. had "properly considered the totality of the evidence of pre-contact trade before coming to his conclusion," that "the evidence relied on by the trial judge is sufficient to ground his finding of pre-contact trade" and that he had made no palpable and overriding error. (Sexton J.A., Reasons, *Appellant's Record*, vol. 5 at 855-856)

97. Under reserve of this general response, the Respondent addresses below the Appellant's selective reading of the evidence.

98. The Appellant contends (para. 81) that there was no element of trade with other First Nations in the intended use of the imported goods because, other than the motor oil which was destined for commercial sale in Akwesasne, the goods were given as a gift to the Mohawk community of Tyendinaga. However, the evidence clearly demonstrated, and the trial judge found, that the giving of gifts to Tyendinaga signified a renewed commitment to trade; when a trade agreement is reached with communities of the Iroquois Confederacy gifts are

exchanged to seal the agreement. (McKeown J., Reasons, *Appellant's Record*, vol. 5 at 762)

99. While McKeown J. held that the wording of Article III of the Jay Treaty reinforces the characterization of the Aboriginal right as one that is exercised on a non-commercial scale, it is clear that he employed the wording of that Article as "reinforcement" for the characterization of the Aboriginal right which he had adopted pursuant to the evidence and not as the source of the right or as a limitation of the right.

> I have already determined that the Jay Treaty is not a "treaty" within the meaning of section 35(1) of the Constitution and therefore does not serve as an independent source of a constitutionally protected right for aboriginal peoples. It follows therefore, that the Jay Treaty, because it is not enforceable in Canada cannot serve as a limitation on a constitutionally protected aboriginal right. If the Jay treaty is not a treaty within the meaning of section 35(1) of the Constitution, partly because it is a treaty between two sovereign powers, one of which is not the First Nations, how can its wording be an indication of the content of the aboriginal right being claimed in this case?
>
> McKeown J., Reasons, *Appellant's Record*, vol. 5 at 843 (emphasis added)

100. McKeown J., correctly interpreted the scope of Article III of the Jay Treaty. However, the analysis of the Aboriginal right put forward by the Appellant and by Létourneau J.A. renders the Aboriginal right dependent upon and qualified by Article III of the Jay Treaty. With respect, Létourneau J.A. simply substituted his own interpretation for that adopted by the trial judge without explaining why the trial judge had erred in law in adopting his interpretation. The correct analysis is that of the majority of the Court of Appeal.

> Létourneau, J.A. Reasons, *Appellant's Record*, vol. 5 at 873-877

101. The majority of the Court of Appeal stated that "it is important to emphasize that the finding that the aboriginal right includes the right to duty-free trade is not dependent on his [McKeown J.'s] conclusion that Article III of the *Jay Treaty* grants the identical right." The majority went on to analyse in detail the trial judge's reasons on this matter:

> With respect, I cannot agree that the trial judge improperly relied on his interpretation of the *Jay Treaty* to support his finding that the aboriginal right

> included the right to duty-free trade. As seen above, the *Jay Treaty* is not addressed in his initial analysis of the aboriginal right. After finding that the respondent's aboriginal right included the right to duty-free trade, the trial judge turned his mind to the issue of treaty rights. It is not until after this discussion, at page 98, that he concluded that the wording of the *Jay Treaty* reinforced his characterization of the aboriginal right. It should be noted that these comments were made *in obiter* while addressing the relationship between aboriginal rights and treaty rights. As has been illustrated above, at this point in his judgement the trial judge has already recognized the existence of the aboriginal right to duty-free trade.
>
> Sexton J.A., Reasons, *Appellant's Record*, vol. 5 at 857-858 (emphasis added)

102. The Appellant commits two errors when, in paragraphs 82-83, he seeks to limit the Respondent's Aboriginal right to only those activities which can be supported by the wording of the Jay Treaty. First, the Appellant seeks to narrow the interpretation of Article III which the trial judge had adopted based on the evidence of the Respondent's experts (McKeown J., Reasons, *Appellant's Record*, vol. 5 at 819-820,843). Second, he employs those narrowed terms of Article III to limit the scope of the Aboriginal right. Yet, as noted by Sexton J.A., it has never been argued in this case that Article III limited or effected a partial extinguishment of the Aboriginal right. In any event, as emphasized by the Court of Appeal, any such argument must fail:

> In my view, the *Jay Treaty* could not possibly be employed to limit the scope of the aboriginal right. As the trial judge rightly points out at page 98, the *Jay Treaty* "cannot serve as a limitation on a constitutionally protected aboriginal right". Once it has been determined that the test for the existence of an aboriginal right established in *Van der Peet, supra,* has been satisfied, this right is protected by the Constitution unless the right has been extinguished. In these proceedings, the appellant has not argued that the *Jay Treaty* or its implementing legislation extinguished the aboriginal right. In any event, it is clear that this argument would have failed: the fact that aboriginals may have been granted a more limited form of the aboriginal right in an international treaty cannot serve to restrict the right which is protected by s. 35 of the *Constitution Act, 1982*.
>
> Sexton J.A., Reasons, *Appellant's Record*, vol. 5 at 857-858

103. The Appellant argues that there was no "direct evidence" which established that the Mohawks traded with First Nations in what is today Canada (para. 84). The Appellant's assumption is that the only relevant evidence on this point must pre-date contact. This assumption is contrary to the principles established by this Court. McKeown J.'s analysis and use of the evidence is in accord with the principles elaborated upon by the Chief Justice in *Delgamuukw*:

> ... [G]iven that many aboriginal societies did not keep written records at the time of contact or sovereignty, it would be exceedingly difficult for them to produce (at para. 62 [*Van der Peet*]) "conclusive evidence from pre-contact times about the practices, customs and traditions of their community". Accordingly, I held that (at para. 62 [*Van der Peet*]):
>
> > The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact.
>
> *Delgamuukw*, *supra*, para. 83 (emphasis in the original), Tab 3

104. The Appellant's arguments on “direct evidence” ignore the importance of the 1645 Treaty between the Iroquois including the Mohawks, the French and the Hurons regarding the type of trading activities which are at issue in this appeal. The trial judge found that the 1645 Treaty constitutes "the best description available of what Iroquois treaty processes were like before being modified by the influence of the Europeans." (Reasons, *Appellant's Record*, vol. 5 at 793-794)

105. The 1645 Treaty is clearly about trade between the Mohawks and other Iroquois, the French and the Algonquins and Huron, the latter two definitely situated in present-day Canada. While the 1645 Treaty postdates the date of first contact, the early date of the treaty and its consistency with pre-contact Iroquois treaty-making make it a vital piece of evidence in respect of Mohawk trading practices before contact. Dr. Venables describes the treaty council of the 1645 Treaty in his Report and further explained its importance in his examination-in-chief. The trial judge relied upon it as important evidence of trade. (Venables, Report, *Appellant's Record*, vol. 2 at 215, Venables, Transcript, vol. 6 at 1052-1053, *Respondent's Record,* at 75-76; McKeown J., Reasons, *Appellant's Record*, vol.5 at 792-794)

106. Similarly, in *Adams*, this Court examined the contact and post-contact period 1603-1650's in order to assess whether Mohawks were fishing in Lake St. Francis in the pre-contact period. (*Adams, supra*, paras. 41, 44-45, Tab 9; McKeown J., Reasons, *Appellant's Record*, vol. 5 at 774-775)

107. The majority of the Court of Appeal agreed that the trial judge had properly analysed the evidence on trade:

> [T]he trial judge properly considered the totality of the evidence of pre-contact trade before coming to his conclusion. Despite his finding that there was little direct evidence, he found, after applying the evidentiary principles established by the Supreme Court for aboriginal cases, that the evidence supported the right to duty-free trade. In *R. v. Van der Peet*, ... and *Delgamuukw v. British Columbia*, ... the Supreme Court recognized that it would be exceedingly difficult to produce conclusive evidence from pre-contact times of traditional practices of the community. Thus, the trial judge was entitled to rely on post-contact evidence that was directed at demonstrating that the Mohawks engaged in the pre-contact practice of trade across what is now the Canada - United States border.
>
> In my view, the evidence relied on by the trial judge is sufficient to ground his finding of pre-contact trade.
>
> Sexton J.A., Reasons, *Appellant's Record*, vol. 5 at 854-855

108. As for the Appellant's reliance upon the 1641 map, which he admonishes the trial judge for overlooking (para. 85), a closer examination reveals why the trial judge chose to disregard it. As was acknowledged by the Appellant's own expert witness, the "little-known Algonquin people" which is shown as purportedly occupying the north shore of the St. Lawrence River between Lake Ontario and Montreal in the 1641 map was so little known that (1) he did not believe that this group had ever been referred to before the reference on this map; (2) he did not know whether this group could be connected to any known bands after this map; and (3) even his contention that this group was Algonquin was based upon inference by process of elimination. (von Gernet, Transcript, vol. 25 at 4592-4594, *Respondent's Record*, at 185-187)

109. The trial judge relied upon oral history to find that the Mohawks used the area around Akwesasne in pre-contact times. The Appellant's allegation that the 1641 map is consistent with Iroquois oral tradition misinterprets Dr. von Gernet's evidence which related to the actions and beliefs of what he refers to as "a group of militant Mohawks" in 1974.

> von Gernet, Report, *Appellant's Record*, vol. 3 at 539-540; McKeown J., Reasons, *Appellant's Record*, vol. 5 at 784, 835

110. The Appellant takes issue with the manner in which McKeown J. analysed and interpreted an article written by Daniel Richter and included in the report of the Appellant's expert, von Gernet. Rather than being the "principal" evidence relied upon by the trial judge, as the Appellant suggests, this is only one of the many documents upon which the trial judge relied in order to come to his conclusion regarding trade. He found that it reinforced his conclusion. The Court of Appeal concurred:

> This article, which was submitted by the appellant's expert witness, demonstrated that the Iroquois living in what is now the State of New York traded in copper which originated from the north shore of Lake Superior. Justice McKeown recognized that this was clear archaeological evidence of North-South trade across what is now the Canada - United States border. He concluded that the Richter article confirmed that trade was of vital importance to the Iroquois and that it was evidence of long distance trade.
>
> Sexton J.A., Reasons, *Appellant's Record*, vol. 5 at 856-857

111. The Appellant (para. 90) minimizes and misconstrues the importance of the entry in the diary of van den Bogaert. This account is of vital importance because it constitutes the earliest recorded European observations of Mohawk life, culture and traditions. The trade that van den Bogaert describes is of every-day, material goods and takes place between the Mohawks and women from another Iroquois nation, perhaps the Oneida. As Dr. Venables stated:

> What I think is remarkable about that is that the trade is coming in this dried fish, but it also seems to be, from the evidence, that these women are unescorted, that they feel perfectly comfortable trading within the Confederacy without escort, without a police or military escort. There doesn't seem to be any apprehension on their part that this is unusual. When they show up, no one seems to find this remarkable, so I would suggest that this is one of the indications of what trade looked like prior to the arrival of the Europeans.
>
> Venables, Transcript, vol. 6 at 1050, *Respondent's Record,* at 73

112. The nature of this evidence is very similar to the evidence of trade in *Gladstone*, also provided through the journal of an early observer. In that case, this Court held the evidence sufficient to establish the existence of an Aboriginal right to trade in fish. (*Gladstone*, *supra,* paras. 26-27, Tab 16)

113. The Appellant (paras. 91-92) refers to the trial judge's reasons in support of his assertion that the trial judge found "frailties" in the theory of Dr. Venables. This portion of the judgment must be read in context. The trial judge is not referring specifically to the evidence of Dr. Venables, but to inferences which had to be drawn from the Respondent's evidence on a particular issue — the issue of the extension of the Mohawk trading network in the 17th century. As this Court has cautioned, such inferences from the evidence are inherent in the subject matter before the Court in cases involving Aboriginal rights. Moreover, the Appellant does not mention that McKeown J., after noting this problem, added:

> It is significant, however, that the warfare described by Dr. von Gernet was commercially motivated. The evidence demonstrates that one of the major concerns of the Mohawks during the 17th century was securing control over and expansion of trade territory and trade routes, particularly in the territory that is now on the Canadian side of the boundary. I find the Mohawks frequently travelled across what became the Canada/United States boundary in pursuit of trade.
>
> Reasons, *Appellant's Record*, vol.5 at 799-800 (emphasis added); *Van der Peet*, *supra*, paras. 62,68, Tab 21

114. McKeown J. was relying upon both the testimony and expert report of Dr. Venables, and that of Appellant's expert witness Dr. von Gernet who agreed that the warfare described was "commercially motivated", in order to reach his conclusions on this issue. The trial judge recognized that warfare was a legitimate mechanism for the Mohawks and other Iroquois to expand their trading network and found that the Appellant's expert witness committed the error of concentrating too much on raiding activities. The Appellant makes the same error.

> McKeown J., Reasons, *Appellant's Record*, vol. 5 at 795, 798-799

115. The Appellant (para. 92) seeks to limit Dr. Venables' expertise to the 18th and 19th centuries. This is not how Dr. Venables was qualified. He was qualified "as a cultural historian with particular expertise on the history of the Iroquois Confederacy, colonial frontier history and the history of Indian/European contact and relations during the colonial period and the era of the American Revolution, with special emphasis on the 17th and 18th Centuries." The Appellant concurred in the

qualification of Dr. Venables. While special emphasis was placed upon Dr. Venables' expertise in the 17th and 18th centuries, his qualification as an expert was not limited to that time period and included expertise on the Iroquois Confederacy pre-contact. Dr. Venables' special expertise in the 17th century includes the time of early contact between the Mohawks and the Europeans which the trial judge found was in 1609.

> Venables, Transcript, vol. 6 at 940-952 (qualifications), 1016-1019 (the founding of the Iroquois Confederacy), *Respondent's Record*, at 41-53, 55-58

116. The Appellant (para.94) objects to the trial judge's use of statements made by Professor Johnston during cross-examination. These statements referred to general Iroquois trading activities and practices and were made in response to a question by the Appellant's counsel regarding Iroquois trading practices in the late 18th and early 19th centuries. Professor Johnston was qualified as an historian, and his expertise included the Iroquois of Grand River. Iroquois trading practices are within that expertise and it is consistent with the evidentiary principles set out by this Court in Aboriginal rights cases for McKeown J. to have relied upon Professor Johnston's statement as evidence of Aboriginal practices post-contact which was directed at demonstrating which aspects of the Iroquois society have their origins pre-contact. (Johnston, Transcript, vol. 15 at 2717-2718, vol. 16 at 2938, 2943, *Respondent's Record,* at 140-141, 143)

117. The Appellant suggests that the trial judge's conclusions on the issue of north-south trade are inconsistent with the findings made by this Court in *R. v. Adams*. The issue is not inconsistency between this case and *Adams* but rather the difference between the two cases. *Adams* concerned fishing rights, not trading rights and this determined the historical record in that case. In any event, the Courts below found *Adams* important and relevant on the issue of Mohawk use and occupation of the territory in issue. Contrary to the Appellant's analysis of *Adams*, this Court in fact found two bases to support an Aboriginal right:

> This general picture, regardless of the uncertainty which arises because of the witnesses' conflicting characterizations of the Mohawks' control and use over this area from 1603 to 1632, supports the trial judge's conclusion that the Mohawks have an aboriginal right to fish for food in Lake St. Francis. Either because reliance on the fish in the St. Lawrence River for food was a necessary part of their campaigns of war, ***or because the lands of this area constituted Mohawk hunting and fishing grounds***, ...
>
> *Supra*, para 45 (emphasis added), Tab 9

118. The Appellant states (para.96) that the expert testimony and the findings of fact in *Adams* are consistent with the view expressed in this case by his witness, Dr. von Gernet. This contention is incorrect as the trial judge concluded that on at least two key issues, Mohawk control of the upper St. Lawrence valley prior to 1603 and Mohawk use of Lake St. Francis, Dr. von Gernet directly contradicted the evidence of Dr. Trigger, the expert witness for Mr. Adams. Dr. von Gernet himself acknowledged this contradiction. (McKeown J., Reasons, *Appellant's Record*, vol. 5 at 780-781; von Gernet, Transcript, vol. 23 at 4207-4210, 4220-4226, vol. 25 at 4575-4578, 4589-4591, *Respondent's Record,* at 161-164, 165-171, 176-179, 182-184)

119. The rejection of findings of fact which were based upon extensive historical evidence tested during a three month trial in this case can not be justified by the suggestion of the Appellant that the historical record is "impermanent". Of course, historical research continues but, as Mr. Justice Binnie concluded in *R. v. Marshall*, "The reality, of course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can."

> *R. v.Marshall,* [1999] 4 C.N.L.R., 161, para. 37, Tab 17

(F) Conclusion

120. This Court concluded in *Reference re: Secession of Québec*, *supra,* para. 82, Tab 22:

> ...The "promise" of s. 35, as it was termed in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments.

121. At trial the Respondent testified:

> I see the Mohawk Nation as a proud nation. My citizenship in the Mohawk Nation, the Haudenosaunee, no one can ever take away. I am proud to have been an Ogahoumi [sic, Onkwehonwe]. I am proud to be living in this country, Canada, that our ancestors made alliances and stood with Great Britain through many wars, through tough times. Our elders still today will speak highly of the Crown, how we are allies, how we helped each other, how we helped them at the beginning of time.
>
> Mitchell, Transcript, at 190, *Respondent's Record*, at 11

122. In determining his actions on March 22, 1988, and in pleading and arguing his case, the Respondent has reinforced and given shape to what this Court has referred to as the necessary reconciliation of the Crown's sovereignty with distinctive pre-existing Aboriginal societies.

123. In dismissing this Appeal, this Court would ensure that Canada reciprocates by acknowledging that its supreme law now honours the pre-existence and continuance of Aboriginal societies and delivers constitutional protection. As the Respondent testified: "We need the court to go back and say there is in existence an aboriginal right, there is in existence an historic right".

> Mitchell, Transcript, at 292, *Respondent's Record,* at 40

PART IV — ORDER SOUGHT

124. The Respondent submits that the appeal should be dismissed and the judgment of the majority of the Federal Court of Appeal should be affirmed.

All of which is respectfully submitted this 9th day of April, 2000

Peter W. Hutchins

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Micha J. Menczer

Paul Williams

Counsel for the Respondent

PART V — AUTHORITIES

Factum pages

CASES

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