Court File No. 27066

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF CANADA)

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 KANANTAKERON,

Respondent,
(Plaintiff).

FACTUM OF THE INTERVENOR

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STATEMENT OF FACTS

1. The Assembly of First Nations (hereinafter referred to as the "AFN") adopts the Statement of Facts presented by the respondents.

PART II

POINTS IN ISSUE

1. The Constitutional Question is stated in the Appellant's factums.

PART III

ARGUMENT

A. INTRODUCTION

1. The respondent Mitchell is not claiming any right that is incompatible with Canadian sovereignty.

2. The Appellant, in its factum, essentially presents the following chain of arguments:

   A. An aboriginal right of personal mobility across a Canadian boundary cannot possibly exist. Such a right would necessarily be incompatible with Canadian sovereignty;

   B. As a matter of logic and law, no aboriginal right to bring certain goods into Canada duty free could possibly exist unless there is first recognized an aboriginal right of personal mobility;

   C. It follows from (1) and (2) that no aboriginal right to bring goods into Canada duty free can possibly exist;

   D. In any event, no aboriginal right to bring goods into Canada duty free can exist because even on its own, such a right would be incompatible with Canadian sovereignty.

3. The AFN submits that the argument proposed by the Appellant is incorrect. Specifically:

A. An aboriginal right of personal mobility across a Canadian boundary cannot possibly exist. Such a right would necessarily be incompatible with Canadian sovereignty.

There is no theoretical bar to the existence of a personal mobility right on the part of an aboriginal person. It is entirely conceivable, as recognized in the reasons of Mr. Justice Strayer in Watt v. Leibelt [1999] 2 F.C. 455 (C.A.) that aboriginal persons might have the aboriginal right to cross the United States -Canada border where it runs through lands traditionally traversed by a First Nation.

> *The respondent contends that the existence of a sovereign state is inconsistent with any fetters on the power of that state to control which non-citizens may remain in the country. 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 in inherent in a sovereign state. For example the Canadian Charter of Rights and Freedoms prohibits any actions by any agencies of government which might otherwise be within the authority of a sovereign state such as the power to control the content of the press or the power to carry out unlimited searches and seizures within its territory. In the same vein, section 35 of the Constitution Act, 1982 now guarantees existing Aboriginal rights not previously extinguished, and this carries the corollary that no agency of the state can, after 1982, extinguish those rights. 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.*

(Watt v. Leibelt, supra at p. 468, Respondent's Book of Authorities, Tab 25)

This right, like aboriginal and treaty rights generally, according to this Honourable Court, would be subject to regulation.

B. As a matter of logic and law, no aboriginal right to bring certain goods into Canada duty free could possibly exist unless there is first recognized an aboriginal right of personal mobility.

An aboriginal right to bring certain goods into Canada duty free might depend in some situations on whether the person has the lawful right to cross the border. The right could exist under the constitution of Canada, including section 6 of the Constitution Act, 1982 - mobility rights (Tab 6) or under the statutory or common laws of Canada. It is not at all unusual for a constitutional right to be exercisable only when certain other conditions exist in law and fact. The idea that a sovereign cannot grant or recognize a right, subject to regulation, to cross its

border has no basis in theory or actual practice. Canada has entered into international agreements such as the Jay Treaty (Appellant's Book of Authorities, Tab 60) of old or the North American Free Trade Agreement (hereinafter referred to as "NAFTA") (Tab 7) of modern times, which involve commitments to allow persons to enter the country for various purposes.[1] Similarly, Canada has chosen to entrench in its constitution section 35, of the Constitution Act, 1982 (Tab 6) which affirms a variety of aboriginal and treaty rights that could include some rights of personal mobility. These section 35 rights, according to this Court, are subject to regulation under the R. v. Badger [1996] 1 S.C.R. 771 (Tab 1) and R. v. Sparrow [1990] 1 S.C.R. 1075 (Respondent's Book of Authorities, Tab 20) principles.

C. It follows from (1) and (2) that no aboriginal right to bring goods into Canada duty free can possibly exist.

Proposition (3) depends on the correctness of both proposition (1) and (2). As propositions (1) and (2) are each wrong, proposition (3) is wrong;

D. In any event, no aboriginal right to bring goods into Canada duty free can exist because even on its own, such a right would be incompatible with Canadian sovereignty.

There is no incompatibility between Canadian sovereignty and the right recognized in this case by the Courts below. It is a right that is expressly confined by the judgements below to the importation of goods on a non-commercial scale, for use by Mitchell or a member of his community and subject to the search and declaration procedures under the declaration. It does not extend to the import of goods whose importation would be illegal. The right, like other section 35 rights, is implicitly subject to regulation under the Sparrow, supra and Badger, supra tests.

4. The AFN will address each proposition raised by the Appellant in the event that this Honourable Court finds it necessary or appropriate to resolve or comment on them. It is the submission of the AFN, however, that only proposition (4) is squarely raised by this appeal. The respondent Mitchell states that he has no intention of arguing, in this particular appeal, for the existence of an aboriginal right of personal mobility. It is, with respect, Mitchell's right to do so. An aboriginal claimant is not obliged, at any stage, to argue for a wider determination than the claimant itself considers necessary on the particular facts of the case. In the second R. v. Marshall [1999] 3 S.C.R. 533 at p.550 paragraph 23 (rehearing case) (Tab 2) this Honourable Court emphasized that section 35 cases should be decided on a case-by-case basis, on their particular facts. The federal government does not in general have any unilateral right to widen the scope of a claim, including at the appellate stage.

5. The Appellant suggests - its proposition (2) - that it is logically and legally impossible to confine a claim to the scope that Mitchell himself wishes to argue. The AFN would respectfully disagree.

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1 The Jay Treaty, Article 3, Appellant's Book of Authorities, Tab 60; North American Free Trade Agreement, Chapter Sixteen (Temporary Entry For Business Purposes).

6. A constitutional or constitutionally protected right is often one that can only be asserted if other conditions exist in law. For example:

> The general constitutional right to mobility, in section 6 of the Constitution Act, 1982 (Tab 2) is contingent on their being a citizen or permanent resident of Canada. It by no means follows that a person has a right to be recognized by Canada as a citizen or permanent resident;
>
> Whether a person has a right to freely associate, under section 2 of the Constitution Act, 1982 may depend on whether that purpose is a lawful one. That determination may depend on a variety of other laws;
>
> Whether a person has a right under the Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930) to hunt, fish or trap may depend in a particular case on whether the right is being exercised on "unoccupied Crown lands" or lands to which an Indian has a "right of access" – Badger, supra. If these latter conditions are met, the right to hunt, fish or trap exists. It is not necessarily the case that an Indian has the right to insist that Crown lands be unoccupied or that there be a right of access to the land.

7. Courts may in some cases refuse to accept arbitrary measures that deny to a person the prior condition that is necessary to exercise a constitutionally protected right. For example:

> Even though the right of free expression is protected by the Charter, a person may sometimes be unable to exercise those rights at a particular time or place due to the property rights of others. This Honourable Court has made it clear, however, that a government cannot, under its rights as proprietor, arbitrarily deny the right of individuals to distribute political pamphlets in a government owned airport - Committee for the Commonwealth of Canada v. Canada, [1991] 1 SCR 139. (Tab 3)
>
> An Indian has the right under the Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930) to hunt, fish and trap on unoccupied lands or on other lands to which an Indian "has a right of access". This Honourable Court has found that governments cannot arbitrarily deny a right of access to Crown lands and thereby frustrate unduly the core right to hunt, fish and trap - R. v. Sutherland, [1980] 2 S.C.R. 451. (Tab 4)
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> There would be serious issues to be explored if the government of Canada suddenly denied the right of Mitchell and others like him to cross back and forth between Canada and the United States, if the government of Canada had no purpose other than to frustrate the aboriginal right to bring in goods duty and tax free. But this hypothetical situation is not raised by the facts of this case.

8. On the facts of this case, the government of Canada has not questioned that Mitchell had the personal right to cross the border from the United States into Canada. The only matter squarely raised by the facts of this case is whether Mitchell had the right to bring in certain goods duty and tax-free.

B. SOVEREIGNTY

9. The Appellant argues that it would be inherently incompatible with Canadian sovereign for any aboriginal person to have an aboriginal right of personal mobility. The conflict, according to the Appellant, exists regardless of the historical facts established.

10. The control of the international border is no doubt a matter of high importance to Canadian authorities. A First Nation might at the same time find that the right of its people to move across the border is also of high importance and constitutes a section 35 right.

11. The factual burden of proving that right to the satisfaction of a Canadian court has been placed on the First Nation. In this case, Mitchell established the existence of the right of his First Nation through historical evidence. The trial judge has ruled, his judgment is entitled to deference in the absence of palpable error, and the Court of Appeal has essentially affirmed his findings.

12. Once the existence of an aboriginal or treaty right is proved, the correct way to address the competing interests here, according to this Honourable Court, is for federal and provincial authorities to observe the framework established in the Sparrow, supra at pp.1101 - 1111 and Badger, supra at pp. 813 - 822 cases. There must be appropriate consultation or consent before federal and provincial authorities limit the rights of First Nations; no limitation should go beyond what is necessary to achieve an important federal objective; compensation should be paid in appropriate cases.

13. A number of aboriginal and treaty rights have already been recognized by this Honourable Court even though these rights limit the right of federal or provincial authorities on a variety of matters of high importance. Border control is of great importance to Canadian sovereignty. So are other matters. Control over land use within the country is on no lesser plane of importance, but that has not stopped this Honourable Court from affirming aboriginal and treaty rights to the use of land - Delgamuuwk v. British Columbia, [1997] 3 S.C.R. 1010 (Respondent's Book of Authorities, Tab 3). Control over the hunting of wildlife is no doubt a matter of great economic and environmental importance, but this Honourable Court has recognized aboriginal and treaty rights to hunt, fish and trap in a wide variety of circumstances.

14. At this juncture this Honourable Court has chosen the Sparrow, supra and Badger, supra framework of reconciliation. It is expressed as a comprehensive and flexible framework. Each case is to be examined on its own facts. The policy interests of the federal and provincial government, and the precision of the means used to achieve them, can be carefully considered and weighed against the interests of the First Nations involved.

15. The approach urged by the Appellant threatens to create a complicated, abstract and confusing barrier to the recognition and accommodation of aboriginal and treaty rights. Courts are invited to recognize a platonic notion of what the essential attributes are of federal or provincial sovereignty, and then dismiss a section 35 claim, without even looking at all the factual and policy issues involved. Some kinds of claims are to be declared as anathema, even though they might have a solid ground in tradition and even though in contemporary practice these claims could be recognized and respected without undermining any fundamental federal or provincial interests.

16. It is true that in defining the initial scope of aboriginal or treaty rights, and even before getting to the Sparrow, supra and Badger, supra tests, that a Court might find some inherent limitations on the right. Aboriginal and treaty rights are interpreted in light of a whole range of historical experiences and understandings. In some cases, this Honourable Court has affirmed, for example, that an aboriginal or treaty right was understood as being confined to economic activities on a non-commercial scale. But the initial definition of an aboriginal and treaty right should be done on a case-by-case basis, not by invoking peremptory notions of "sovereignty" that place the recognition of a right as beyond the pale.

17. The government of Canada, like many modern governments, has entered into and implemented international agreements, like the NAFTA that recognize the right of various non-citizens or non-residents of Canada to enter the country for various purposes. In the European Union, many states have accepted the principle that there should be the elimination of border controls between European Union countries.[2] Rights of personal mobility are recognized increasingly under international arrangements.

18. In the modern world, sovereign authorities negotiate all kinds of limitations on their sovereignty, including those with respect to personal mobility across boundaries, in the belief that doing so promotes important economic, social and cultural objectives. No one contends that agreements like NAFTA or their implementing legislation are somehow in flat contradiction to Canadian sovereignty.

19. The Constitution Act, 1982 in section 6 (mobility rights) already recognizes a sweeping right of citizens and permanent residents of Canada to enter and leave Canada. That right is subject to regulation in accordance with the terms of section 1 of the Constitution Act, 1982. There would be nothing strange, heretical or destructive in principle about the existence of a comparable aboriginal right. It would be a right to cross the border, at least in certain areas, and would be subject to regulation, presently, under the section 35 equivalent of section 1 of the Charter, which is the Sparrow, supra and Badger, supra test.

20. This Honourable Court is respectfully invited to consider the practical damage that could be caused by creating a new doctrine of "inherently incompatible with sovereignty". This Court has repeatedly recognized the desirability of having aboriginal and wider interests recognized through negotiations. It is a notorious matter that negotiations over land claims and other matters involving aboriginal and treaty rights can be difficult and take decades to complete. The interjection of a new notion of "inherently incompatible with sovereignty" into these difficult negotiations would cause all kinds of new barriers to agreement. This vague new doctrine would exacerbate disputes over the scope of existing rights. Critics of negotiated accommodations with First Nations would seize on

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2 Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders and the Convention Applying the Agreement, January 19, 1991, Belg.-Fr.-F.R.G.-Lux.-Neth., reprinted in 30 I.L.M. 68, 69, 73, 84 [in four parts] [(Schengen Agreement concluded June 14, 1985; Schengen Convention concluded June 19, 1990). SEE Julian J.E. Schutte, Schengen: Its Meaning for the Free Movement of Persons in Europe, 28 Common Mkt. L. Rev. 549, 559 (1991) (referring to the Schengen Information System ("SIS") as the "most spectacular novelty" of the Schengen Convention). (Tab 11)

this new doctrine as a basis for denying the recognition of rights to self-government in many areas, including education or taxation.

21. It would be particularly regrettable for this Honourable Court to introduce a new doctrine of "inherently incompatible with sovereignty" in a case like the present. Mitchell, at this stage is not insisting on the recognition of some wider aboriginal right to personally cross the international boundary. At issue is a right: that while lawfully crossing into Canada, Mitchell has the aboriginal right to not pay duties and taxes on goods that are not connected to commercial-scale trade, and which are not subject to an import ban on the basis of health or safety concerns. The doctrine, which the Appellant seeks to have created in this case, would not only be mischievous in its effects, but gratuitous.

22. Contrary to the Appellant's first proposition identified in paragraph 2 herein, an aboriginal right to personal mobility would not be neither unthinkable. nor inherently incompatible with the sovereignty of the federal government. On the facts of this case, and on the position taken by the Appellant, there is no need to determine, however, whether such a right exists here.

23. Contrary to the Appellants's second proposition identified in paragraph 2 herein, an aboriginal right to bring in goods duty and tax free could exist upon lawful personal entry into Canada, even if there is no aboriginal or treaty right of personal entry. On the facts of this case, a right to bring in goods duty free has been demonstrated to the satisfaction of the trial judge and has been confirmed by the Court of Appeal.

24. The Appellant's third proposition depends on the validity of both the first and second propositions. It remains, therefore, to dispose of the Appellant's fourth proposition: that a right to bring in goods duty free is incompatible with Canadian sovereignty.

25. The AFN respectfully submits there is no incompatibility between the right with respect to the aboriginal right to duty-free import of goods recognized by the Courts below and the concept of Canadian sovereignty. Such a right, as defined by the Courts below, does not extend to goods whose importation would be unlawful or have health, safety or similar public welfare concerns. It does not, in this case, extend to imports on a commercial scale. Narrow as the right is to begin with, it is also presently subject, according to a whole series of cases decided by this Honourable Court, to federal regulations that satisfy the Sparrow, supra / Badger, supra tests.

26. Given the definition of the right to begin with, and the fact that it is subject to regulation, it is impossible to see how the recognition of such a right could jeopardize unduly the ability of the federal government to address any legitimate health, safety or public welfare concerns.

27. The Appellant did not at trial enter any evidence to substantiate that a right of duty-free import should be denied, in general or with respect to any particular goods, under the Sparrow, supra / Badger, supra tests. The appropriate time and place to argue in defence of limitations on the right recognized by the Courts below would be at a trial Court, where the federal government would present the evidence justifying a particular measure and the First Nation concerned would have the opportunity to respond and present contrary evidence.

28. The federal government may indeed lose some revenues from duty-free import. There is nothing incompatible with Canadian sovereignty, however, about recognizing tax exemptions, including the duty-free import of certain goods by certain individuals or groups. From the point of view of Canadian domestic law, it is an option that is open to Canada in its sovereignty.

> *The respondent contends that the existence of a sovereign state is inconsistent with any fetters on the power of that state to control which non-citizens may remain in the country. 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 in inherent in a sovereign state. For example the Canadian Charter of Rights and Freedoms prohibits any actions by any agencies of government which might otherwise be within the authority of a sovereign state such as the power to control the content of the press or the power to carry out unlimited searches and seizures within its territory. In the same vein, section 35 of the Constitution Act, 1982 now guarantees existing Aboriginal rights not previously extinguished, and this carries the corollary that no agency of the state can, after 1982, extinguish those rights. 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.*
>
> *Watt v. Leibelt, supra at p. 468*

When Canada adopted section 35, Canada affirmed in its highest domestic law aboriginal and treaty rights, including those that provide for various exemptions from taxation or other levies.

29. The Appellant submits that it might be appropriate for a First Nation to have the authority to tax its own people with respect to the import of goods. That is no reason to deny the right of a First Nation to immunity from import duties and taxes vis-a-vis the government of Canada. As R. v. Marshall, [1999] 3 S.C.R. 456 (Tab 5) and other cases suggest, the aboriginal right at issue here belongs to the collectivity. Many aboriginal and treaty rights can be invoked by individual members of the community as long as those rights persist. The collectivity, however, may have the right to waive, vary or eliminate these rights. A collectivity might choose to waive the right of its members to import goods duty free where doing so is necessary in the interests of the revenue-raising measures by the community.

C. EXTINGUISHMENT

30. The AFN submits that in construing any enactments in question, quite apart from any question of subsequent executive practice, this Honourable Court should keep in mind the following considerations:

Extinguishment must be expressed in clear and unmistakable terms;

The aboriginal right at issue here is a collective right and is of a sui generis nature. General enactments that refer in a general way to such matters as whether a person can be exempt from duties cannot be construed as a clear and unmistakable intention to extinguish rights of a unique character belonging to a whole community;

Even though an instrument like the Jay Treaty may not be implemented by domestic legislation, it is binding on Canada in international law. There is a general principle of statutory construction that where possible, statutes should be construed as not being incompatible with international treaty commitments made by the Crown. The aboriginal right at issue in this case is promised by the Jay Treaty as well as by the Crown's duty to honour aboriginal rights. Indeed, senior federal officials in fact cited the Jay Treaty in directing that duties not be exacted from aboriginal peoples.[3] A Court should, wherever possible, avoid interpreting a statute so as to render the Crown in breach of both its commitments to other states as well as to a vulnerable people within Canada with whom the Crown has a fiduciary relationship. Where it is possible to do so, it should be found that the Crown intended to act in a manner consistent with its honour.

31. In R. v. Francis [1956] S.C.R. 618 (Respondent's Book of Authorities, Tab 15) this Honourable Court found, in effect, that Canada's internal law was in default of its obligations under the Jay Treaty. In the Francis case, however, no consideration was given to the possibility that there might be an aboriginal right at stake. In this case, the respondent Mitchell has proved that there is. That done, this Honourable Court has a solid basis on which to reach a conclusion that reconciles Canada's commitments to both the United States and to First Nations with the state of Canada's internal law.

32. As noted in paragraph 53 of the judgment of Letourneau J., [Case on Appeal - Appellant's Record page 880], the executive branch of the federal government for half a century acted in a manner that was consistent with the view that aboriginal persons like Mitchell did not have to pay duties on the import of personal goods. The assessment of whether a right has been extinguished should not confine itself to the examination of the statute in isolation. The interaction between First Nations and the Crown has been largely taking place at the level of executive government on both sides. The Royal Proclamation of 1763 was an act of the executive, not of a legislature. The executive level of government for the Crown entered into the historic treaties with First Nations, just as the executive level generally enters into international treaties of other kinds. First Nations' citizens who expect the Crown to act in an Honourable manner, consistent with its fiduciary relationship, have a right to base their understandings and expectations on the whole ensemble of Crown conduct, not only that connected with the drafting and enactment of statutes.

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3 Letourneau J.A., COA page 881, quotes the following letter from the Deputy Minister of Citizenship to the Deputy Minister of Customs and Excise in which the Deputy Minister of Justice is quoted as saying: "With reference to the importation of goods into Canada from the United States free of duty, I am of the opinion that it will depend on the particular facts of each case as it arises. In view of Article III (of the Jay Treaty)...Indians passing or repassing with their own proper goods and effects of whatever nature...need pay no duty." Consequently, it will depend in each instance whether the article in question is the Indian's own proper goods and effects. When the goods are in bales...or other large packages, unusual among Indians…they would be liable for duty.

33. The administrative practice of not exacting import duties from aboriginal peoples, which continued for half a century, is at least sufficient to establish that the Crown did not exhibit to the Canadian public or the First Nations community concerned, a clear and plain intention to extinguish any aboriginal right to bring in personal goods duty free. Administrative practice is often a valuable source of information on the optimal interpretation of a statute or treaty, see: Driedger on the Construction of States, 3rd ed, pp. 471-472 (Tab 10); Vienna Convention on the Law of Treaties, Article 31(3)(b), United Nations Doc. A/CONF 39/27 (Tab 8). Here, at the very least, the administrative practice negates the ability of the federal government to establish it evinced a clear and plain intention to extinguish the aboriginal right at issue.

34. The Appellant says that even if the aboriginal right still persisted by the middle of the century, it was extinguished by an Act to Amend the Income Tax Act and the Income War Tax Act, S.C. 1949, ch. 25, s. 49 (Appellant's Book of Authorities, Tab 43). Nowhere on the face of that statute is there any reference to the special, collective, right that a First Nation might have. It is obvious that statute cannot be taken as absolute in its scope. If so, it would eliminate exemptions from taxation that exist as a matter of diplomatic or sovereign immunity under international law, and it would be contrary to section 125 of the Constitution Act, 1867 (Tab 9), which establishes inter-jurisdictional immunity from taxation.

D. CONCLUSION

35. The AFN submits that this Honourable Court should decline the invitation of the federal government to create a new doctrine of "inherent incompatibility" with sovereignty. To do so would unnecessarily create confusion and uncertainty at best. At worst, this new doctrine is liable to be a powerful rhetorical weapon in the hands of special interests or governments who are determined to block negotiations directed towards a balanced and just reconciliation of First Nations' interests and those of others.

36. This Honourable Court has already established a flexible framework, the Sparrow, supra and Badger, supra test, for protecting the interests of federal or provincial governments which this Court considers essential.

37. The respondent in this case had, and discharged, the burden of demonstrating the existence of an aboriginal right. The Appellant has failed to enter a case that shows that some particular limitation is necessary on the right defined by the Courts below. It may, after consultation with the First Nation involved, at some later day attempt to create some limitation on the right which it considers necessary and just. At that point, it will be up to the Courts to decide with the benefit of evidence and argument on both sides, whether that particular limitation passes muster under the Badger, supra and Sparrow, supra test or otherwise.

38. The Appellant should not to be permitted to forego the processes of dialogue and justification required by the Badger, supra and Sparrow, supra tests by invoking the doctrine that some kinds of aboriginal rights are simply beyond the pale of constitutionality.

PART IV

REMEDY SOUGHT

39. The AFN submits that the appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

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Martin S. Minuk

Bryan Schwartz

PART V

TABLE OFAUTHORITIES

Texts

1. *Driedger on the Construction of States, 3rd ed, pp. 471-472*

Journal Article

1. *Julian J.E. Schutte, Schengen: Its Meaning for the Free Movement of Persons in Europe (1991) 28 Common Mkt. L.Rev. 549* 11