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 QUÉBEC, THE ATTORNEY GENRAL OF BRITISH COLUMBIA

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PART I - STATEMENT OF FACTS

1. The Intervener accepts the Statement of Facts provided in the Respondent's Factum.

PART II – POINTS IN ISSUE

2. The Intervener submits that:

(a) the Federal Court of Appeal correctly decided to reject the Appellant's arguments that the Aboriginal right, as defined by the Trial Judge and modified by the Federal Court of Appeal, was incompatible with the sovereignty of the Crown;

10 (b) the Federal Court of Appeal correctly concluded that the Aboriginal right as defined by the Trial Judge and modified by the Federal Court of Appeal has not been extinguished.

PART III - ARGUMENTS

(A) Introduction

3. As the Intervener made clear in his Memorandum of Fact and Law before the Federal Court of Appeal, Grand Chief Michael Mitchell was the sole Plaintiff before the Trial Division of the Federal Court of Canada and, as such, the conclusions of the Trial Judge, the Federal Court of Appeal and of this Honourable Court will be limited to the rights of Grand Chief Michael Mitchell, as a Mohawk of Akwesasne.

4. Furthermore, the Aboriginal right of a Mohawk person or persons from the Mohawk communities of Kahnawake, Kanesatake, Tyendinaga, Grand River and Wahta were not part of the conclusions rendered by the Trial Judge or the Federal Court of Appeal and are not in issue before this Honourable Court.

5. The Appellant's arguments revolve around the possibility of other Mohawk individuals from Akwesasne or other First Nations claiming the same right (para. 36). This concern of the Appellant about the Aboriginal right of the Respondent is purely of a financial nature. The possibility for other Aboriginal individuals or groups to claim a similar right should not be impeded or threatened solely by monetary rationalizations and should be analyzed according to the recognized legal principles developed by the Canadian judicial system. Moreover, since the Aboriginal right concerned is limited to the Respondent, as a Mohawk of Akwesasne, the financial ramifications are not at issue.

6. It is submitted that the Aboriginal right in issue is the right for a Mohawk of Akwesasne to bring goods from New York State into Ontario or Quebec for personal use or consumption, for collective use or consumption by the members of the community of Akwesasne, or for non-commercial scale trade with First Nations communities in Ontario or Quebec. The Appellant's concerns regarding the transformation of such an Aboriginal right into commercial ventures by First Nations is merely hypothetical, as would be the ensuing competitive inequities for Canadian businesses (para. 40). The Intervener submits that although the judiciary

may provide a framework for interpretation of the right, an Aboriginal right cannot be extinguished or unduly limited by a hypothetical situation.

(B) The Aboriginal right of the Respondent is not incompatible with the sovereignty of the Crown

7. At paragraph 30 of the Appellant's Factum, it is argued that the practice asserted by the Respondent is "a denial of the authority of the Crown to control the borders and is therefore inconsistent with sovereignty". The Appellant refers to *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, at page 539, where Lamer, C.J. stated that the purpose of section 35(1) of the *Constitution Act, 1982*, was to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown".

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8. At paragraph 33 of the Appellant's Factum, it is further argued that the Aboriginal practice of "free movement back and forth across the international boundary" is not consistent with one of the essential features of sovereignty. However, the Respondent clearly recognizes, at paragraph 22 of his Factum, that the Aboriginal right in this case "is not absolute and is subject to reasonable limitations", such as search and declaration procedures at Canada customs. Therefore, the practice cannot simply be qualified as one of "free movement back and forth across the international boundary".

20 9. The arguments of the Appellant are clearly to the effect that the Crown, because of its sovereign status, only needs to accommodate Aboriginal rights insofar as they do not inconvenience the Crown.

10. Such an approach is incorrect for two reasons. First, it fails to take into consideration the unique status of First Nations in North America. Secondly, it disregards the proper principles of interpretation to be used in construing Aboriginal rights.

1. Unique Status of First Nations in North America

11. It is respectfully submitted that the Aboriginal right in question does not contravene the sovereignty of the Crown, as this right is derived from the unique status of First Nations in Canada and has been recognized and interpreted by the Canadian judiciary.

12. There is authority for the argument that First Nations within North America have always been recognized as Nations and have always enjoyed a unique constitutional status.

13. In Rotman, Leonard Ian, Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada, University of Toronto Press, Toronto, 1996, at page 289, Professor L. Rotman states:

> If the aboriginal peoples were not sovereign nations during the formative years of Crown-Native relations, there would not have been any treaties, compacts, alliances or agreements between the parties, at least not in the manner and form that they actually took.

14. L'Heureux-Dubé, J., dissenting in *Van der Peet*, supra, at page 575, quotes Chief Justice Marshall of the United States Supreme Court in *Worcester* v. *Georgia*, (1832) 31 U.S. (6 Pet.) 515:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.

L'Heureux-Dubé, J., noted that the above passage was quoted with approval by Hall, J., in *Calder* v. *Attorney General of British Columbia*, [1973] S.C.R. 313, at page 383.

15. At page 576 of *Van der Peet*, supra, L'Heureux-Dubé, J., quotes Judson, J., in *Calder*, supra, who, for the majority in the result, wrote at page 328:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. [Emphasis added in the S.C.R.]

16. In Brian Slattery's "Aboriginal Sovereignty and Imperial Claims", 29 Osgoode Hall L.J. 681, the author, at page 688, argues that:

> "On purely historical grounds, it seems very doubtful that European imperial powers consistently regarded Aboriginal America as vacant territory."

17. In *R.* v. *Côté*, [1996] 3 S.C.R. 139, at page 172, Lamer, C.J., states that:

> "... in its diplomatic relations, the French Crown maintained that aboriginal peoples were sovereign nations rather than mere subjects of the monarch."

18. It is respectfully submitted that the source of the Respondent's Aboriginal rights, including the right at issue before this Honourable Court, is rooted in the unique constitutional status of the Mohawk Nation and that these rights are not subservient to, but are balanced with, the interests of the Crown.

19. It is appropriate and consistent with both the broad and liberal canons of interpretation to be applied to Aboriginal rights and with the premise that First Nations are sovereign to interpret the Aboriginal right at issue in a way that respects the principles embodied in the Two Row Wampum Treaty.

20. In his testimony at trial, Grand Chief Mitchell described how the Mohawk Nation's relationship with European Nations was embodied in the Two Row Wampum Treaty. The Two Row Wampum Treaty, including the Silver Covenant Chain, represents the fundamental understanding that the Europeans who came to North America and the people of the Aboriginal Nations they encountered, would respect one another's laws, languages, customs and institutions with neither party interfering in the other's affairs. The defining feature of the Two Row Wampum Treaty was

that both societies were considered to be equals. The Silver Covenant Chain was the mechanism by which Aboriginal and European peoples were to achieve acceptable accords on issues of mutual interest. **(Expert Report of Robert W. Venables, Appellant's Record, Vol. II, pp. 237-238; Examination in Chief of Grand Chief Michael Mitchell, Appendix II, pp. 191- 194)**

2. Interpretation Principles of Aboriginal Rights

21. Since the decision in *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29, the Courts have held on numerous occasions that the content and scope of Aboriginal rights protected under section 35(1) of the *Constitution Act, 1982*, must be given a generous, large and liberal interpretation.

22. L'Heureux-Dubé, J., concurring in *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, at page 803, summarizes what she phrases as the "traditional and fundamental" interpretative canons relating to Aboriginal rights and to section 35(1) of the *Constitution Act, 1982*:

> Section 35(1) must be given a generous, large and liberal interpretation and uncertainties, ambiguities or doubts should be resolved in favour of the natives. Further, aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown *vis-à-vis* aboriginal people. Finally, but most significantly, aboriginal rights protected under s. 35(1) have to be viewed in the context of the specific history and culture of the native society and with regard to native perspective on the meaning of the rights asserted.

23. Dickson, C.J., in *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, at page 1108, in considering *Guerin* v. *R.*, [1984] 2 S.C.R. 335 and *R.* v. *Taylor and Williams*, (1981) 34 O.R. (2d) 360 (Ont. C.A.) stated:

> That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

(C) The Trial Judge and the Federal Court of Appeal correctly concluded that the Aboriginal right of the Respondent had not been extinguished

1. Criteria For Extinguishment

24. As stated by the Appellant and the Respondent in their Factums (para. 59 of the Appellant's Factum and para. 71 of the Respondent's Factum), the intention to extinguish an Aboriginal right must be "clear and plain". This requirement was enounced in *Sparrow*, supra, at page 1099. Dickson, C.J., referring to Justice Hall's decision in *Calder*, supra, at page 404, states:

> But Hall J. in that case stated (at p. 404) that "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be 'clear and plain' ". (Emphasis added.) The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.
> [Emphasis added in the S.C.R.]

25. The Intervener respectfully submits that the correct test for evaluating whether or not an Aboriginal right has been extinguished is that set out by L'Heureux-Dubé, J. in *R. v. N.T.C. Smokehouse Limited*, [1996] 2 S.C.R. 672 at page 712, which statement she quotes again in her decision in *R. v. Gladstone*, supra, at page 809. L'Heureux-Dubé, J. states :

> I am prepared to accept that the extinguishment of aboriginal rights can be accomplished through a series of legislative acts. However, *Sparrow* specifically stands for the proposition that the intention to extinguish must nonetheless be clear and plain. This is diametrically opposed to the position that extinguishment may be achieved by merely regulating an activity or that legislation necessarily inconsistent with the continued enjoyment of an aboriginal right can be deemed to extinguish it. Clear and plain means that the government must address the aboriginal activities in question and explicitly extinguish them by making them no longer permissible.
> [Emphasis added in the S.C.R.]

26. Dickson, C.J., in *Simon* v. *The Queen*, [1985] 2 S.C.R. 387, at page 406, quotes Douglas, J., from the United States Supreme Court in *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941): "extinguishment cannot be lightly implied".

27. In *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, Lamer, C.J., in analyzing *Sparrow*, supra, stated at page 1120:

> ... the Court drew a distinction between laws which extinguished aboriginal rights, and those which merely regulated them. Although the latter types of laws may have been "necessarily inconsistent" with the continued exercise of aboriginal rights, they could not extinguish those rights.

2. The Aboriginal right of the Respondent was not extinguished by customs laws

28. The *Customs Act* cannot be construed as having the intention to extinguish the Aboriginal right in question. The mere existence of complete legislation and regulations governing duty and taxes on goods being brought into Canada does not *de facto* extinguish the Respondent's Aboriginal right, even if such right was to become completely unexercisable.

29. The Appellant argues at paragraph 63 of his Factum that since no special provision has been made for the aboriginal peoples in customs laws for 175 years, this is "clearly indicative of an intention that, in this field, the aboriginal peoples should be governed by the same law as everyone else", and therefore that an Aboriginal right, such as the one claimed by the Respondent, would have been extinguished.

30. The mere fact that regulatory provisions have not been amended or changed and that these provisions do not refer to an Aboriginal right does not *per se* extinguish such right. This argument was clearly stated by McLachlin J., as she then was, in *Gladstone*, supra, at pages 817-818:

I cannot conclude that these regulations extinguished the aboriginal right of the Heiltsuk people to use herring spawn on kelp as a source of sustenance. The regulations do not manifest the "clear and plain" intention required to extinguish an aboriginal right. The most likely purpose of these regulatory measures was to conserve the young of the resource in order to foster the growth of the fisheries. A measure aimed at conservation of a resource is not inconsistent with a recognition of an aboriginal right to make use of that resource. Indeed, there is no evidence that these regulations were intended to relate to the aboriginal right at all.

(D) CONCLUSION

31. This Honourable Court should dismiss the present appeal and should ensure that constitutional protection is given to Aboriginal societies. As it was phrased in *Sparrow*, supra, at page 1110:

> Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples.

32. The Supreme Court of Canada has since then set out new ground rules which require the judiciary to consider aboriginal perspectives and to place weight on these perspectives (see, *inter alia*, *Van der Peet*, supra, and *Delgamuukw*, supra).

33. It is respectfully submitted that such Aboriginal perspectives were considered by the Trial Judge and the Federal Court of Appeal in recognizing the Respondent's Aboriginal right. It is submitted that this recognition should be reinforced by this Honourable Court.

34. The unique history of Aboriginal Nations in Canada must be a primary consideration in determining the extent of an Aboriginal right. Given the historical evidence put forward before the Trial Judge and the Federal Court of Appeal, the Courts correctly concluded that the Aboriginal right of the Respondent was an integral and distinctive part of the culture of the Mohawk Nation, and more specifically of the Mohawk community of Akwesasne.

35. Furthermore, considering that there is no specific intention on the part of the Crown to extinguish the Aboriginal right in question, implicitly or explicitly, it is submitted that this Honourable Court should affirm the judgment of the Federal Court of Appeal and dismiss this appeal.

PART IV - ORDER SOUGHT

The Intervener submits that this Appeal should be dismissed and that the judgment of the Federal Court of Appeal, dated November 2, 1998, regarding the Respondent's Aboriginal Rights, should be affirmed.

ALL OF WHICH is respectfully submitted this 8th day of May, 2000.

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ESTIMATE OF TIME FOR ORAL ARGUMENT

Pursuant to the Order of Justice Gonthier dated January 25, 2000, Counsel for the Intervener estimates that the time required for his oral argument on the Appeal is fifteen (15) minutes.

PART V - TABLE OF AUTHORITIES

APPENDIX I – CONSTITUTIONAL QUESTION

By order of McLachlin C.J.C. dated January 21, 2000, the following constitutional question was stated:

(1) Are sections 17, 31, 153(*c*) and 159 of the *Customs Act*, S.C. 1986, c. 1, constitutionally inapplicable to a Mohawk of Akwesasne, resident in Canada, by reason of an Aboriginal right within the meaning of s. 35(1) of the *Constitution Act*, 1982, when he or she enters Ontario or Quebec from New York State with goods from the State of New York for personal use or consumption, or for the collective use or consumption by the members of the community of Akwesasne, or for non-commercial scale trade with First Nations communities in Ontario and Quebec?

APPENDIX II – EXAMINATION IN CHIEF OF GRAND CHIEF MICHAEL MITCHELL (pp.191-194)

one that I carry which is another wampum belt, but it will identify what I am trying to tell you. When the white man and the Ougahoumi first met and the settlers came, in this case it was the Dutch that first came, in 1664 there was a treaty conference in what is now called Albany. AT that time they said we must have a protocol, an arrangement as to how we will co-exist. This is what this belt is known.

At that time they said, "Our King, who is your father," our people said no, we have one father, Sonkwaiatison. We will be brothers. So, when they signed an agreement as to the way we are going to co-exist, the Haudenosaunee make this wampum belt. They said that there will be two rows, three white wampum shall separate us, peace, friendship and brotherhood. This represents the spirit of what we call the river of life. On this side will be a ship and on this side will be a canoe. Inside our canoe will be what we are as a people, my language, my culture, my government, my laws and in your ship where you came from, where you could not practice that we will let you practice it here. You can practice your religion, you can practice the way you want to have your

government, the way you want to create your laws, but we will co-exist.

In earlier times in North America, when the Europeans could not exist in this country because they did not know or well acquainted with the medicines, what food to eat, what tools to use, they were guided through this and assisted by this treaty and they were helped by the Haudenosaunee. These things were sacred when they were given and they are sacred with us now.

It is also said that we are to respect one another. I guess sometimes it becomes a little hard for it is embodied in these principles that we will always know who we are. Our birthright, our nationhood and in our own teachings.

When we leave our communities it is the custom and the manner that you are always told you are something else. You are always told that you do not have this right. So when I became a leader in the Longhouse as a faithkeeper and I listened to the many deliberations between Washington and the Six Nations, between Albany and the Six Nations, between other nations and the Six Nations, we had a certain belief. We had certain

principles. In spite of all the non-recognition by Canada and the United States and the jurisdictions and authority, the ceremonies always went on. Our life went on. The outside influences many times caused our people to have internal strife, but these things would repair it when we would continue on because when we go back to our traditional beliefs they are well again and that has been taken away.

So, I can tell you I am an Ogahoumi. I am a Mohawk. I believe myself to be. If you want to speak to me in Mohawk I will answer you in Mohawk. If you want to speak to me in Oneida I will answer you in Oneida. But the things that I have learned represent the hope of many younger Mohawks.

I have to deal because of it -- the point I am making is that as a young person who acquired this little knowledge, there was always strife between the Christian side of our community and the traditional side. There was always strife between the traditional side and the elective side. So, when they said we need to have maybe some of our younger people go across because we need to heal ourselves, we need to acknowledge

one another, it was the time that I became an elected leader with the traditional background.

The things you are going to be bringing out of what happened as an elected leader later on that I want to say to this Court is an expression of what we had to deal with and what occurred later on. But what we stand on all the way through is something that will stay with us forever.

Q. Just to clarify for the transcript, the belt that you have been describing does it have a more common name?

A. Kaswentha or the two-row wampum.

Q. My final question, was that the basis of your relationship with the British and other Europeans that came to North America?

A. The first British contact that went through the same protocol, reaffirm the principles in the two row, committed themselves to that and right to this day this is what we try to abide by.

MR. MENCZER: Thank you, Chief Mitchell.

My lord, I suggest this is an