mitchell *v*. m.n.r.

Minister of National Revenue *Appellant*

v.

Grand Chief Michael Mitchell also known as Kanentakeron *Respondent*

and

The Attorney General of Quebec,
the Attorney General for New Brunswick,
the Attorney General of Manitoba,
the Attorney General of British Columbia,
the Mohawk Council of Kahnawake,
the Assembly of First Nations and
the Union of New Brunswick Indians *Interveners*

Indexed as: Mitchell *v.* M.N.R.

Neutral citation: 2001 SCC 33.

File No.: 27066.

2000: June 16; 2001: May 24.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Binnie, Arbour and LeBel JJ.

on appeal from the federal court of appeal

Constitutional law – Aboriginal rights – Right to bring goods across St. Lawrence River for purposes of trade – Whether Mohawks of Akwesasne have right to bring goods into Canada from U.S. for trading purposes without paying customs duties -- Whether claimed right incompatible with Canadian sovereignty – Constitution Act, 1982, s. 35(1).

Evidence -- Aboriginal rights – Evidence to be adduced to establish aboriginal right – Assessment of evidence in aboriginal claims.

The respondent is a Mohawk of Akwesasne and a descendant of the Mohawk nation, one of the polities of the Iroquois Confederacy prior to the arrival of Europeans. In 1988, the respondent crossed the international border bearing goods purchased in the United States. He declared the goods to Canadian customs agents but asserted that aboriginal and treaty rights exempted him from paying duty. He was permitted to continue into Canada but advised he would be charged duty. The goods except some motor oil were presented to the Mohawk community of Tyendinaga as gifts. The oil was taken to a store in Akwesasne for resale to members of that community. The respondent was served with a claim for unpaid duty and sought declaratory relief. The Federal Court, Trial Division held that the respondent had an aboriginal right to cross the border freely without having to pay customs duties on goods destined for personal and community use as well as for noncommercial scale trade with other First Nations. The Federal Court of Appeal affirmed an aboriginal right to bring goods into Canada duty-free, subject to limitations based on the evidence of the traditional range of Mohawk trading.

Held: The appeal should be allowed. The claimed aboriginal right has not been established. The respondent must pay duty on the goods imported into Canada.

Per **McLachlin C.J.** and Gonthier, Iacobucci, Arbour and LeBel JJ.: Under English colonial law, the pre-existing laws and interests of aboriginal societies were absorbed into the common law as rights upon the Crown's assertion of sovereignty unless these rights were surrendered, extinguished or inconsistent with Crown sovereignty. The enactment of s. 35(1) of the *Constitution Act, 1982* accorded constitutional status to existing aboriginal and treaty rights, including the aboriginal rights recognized at common law. However, the government retained the jurisdiction to limit aboriginal rights for justifiable reasons in the pursuit of substantial and compelling public objectives. The test to establish an aboriginal right focuses on the integral, defining features of the relevant aboriginal society before the Crown's assertion of sovereignty. A claimant must prove that a modern practice, custom or tradition has a reasonable degree of continuity with a practice, tradition or custom that was in existence prior to contact with the Europeans. The practice, tradition or custom must have been integral to the distinctive culture of the aboriginal people in the sense that it distinguished or characterized their traditional culture and lay at the core of the aboriginal people's identity.

The initial step is to ascertain the true nature of the claimed right, without assessing its merits or artificially broadening or narrowing the right. This requires examining (1) the nature of the action which the applicant is claiming was done pursuant to an aboriginal right; (2) the nature of the governmental legislation or action alleged to infringe the right, i.e. the conflict between the claim and the limitation; and (3) the ancestral traditions and practices relied upon to establish the right. An application of these factors in this case suggests that the claimed right is properly characterized as the right to bring goods across the Canada-United States boundary at the St. Lawrence River for purposes of trade. The claim is for a right to trade *simpliciter* and necessarily entails a mobility right because the right to bring goods across the St. Lawrence River for purposes of trade involves travel. The right should not be qualified as a right to bring goods without paying duty or taxes because such a limitation should be considered at the infringement stage. Technically, the right should be characterized as a right

to bring goods across the St. Lawrence River as opposed to the international border, a construction of newcomers. However, in modern terms, the river and the border are equivalent.

Aboriginal rights claims give rise to inherent evidentiary difficulties. However, the rights protected under s. 35(1) should not be rendered illusory by imposing an impossible burden of proof. The rules of evidence must therefore be applied flexibly, in a manner commensurate with the inherent difficulties posed by aboriginal claims. Since claimants must demonstrate features of pre-contact society in the absence of written records, oral histories may offer otherwise unavailable evidence of ancestral practices and aboriginal perspectives. Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge. In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts. Here, the parties presented evidence from historians and archeologists. The aboriginal perspective was supplied by oral histories of elders such as the respondent. The respondent's testimony, confirmed by archaeological and historical evidence, was useful and the trial judge did not err in finding the respondent's evidence to be credible and reliable.

There are no precise rules or absolute principles governing the interpretation or weighing of evidence in support of aboriginal claims. The laws of evidence must ensure that the aboriginal perspective is given due weight but consciousness of the special nature of aboriginal claims does not negate general principles governing evidence. Claims must still be established on persuasive evidence demonstrating validity on a balance of probabilities. In the present case, the evidence indicates that the Mohawks travelled north on occasion and trade was a distinguishing feature of their society. The evidence does not show, however, an ancestral practice of trading north of the St. Lawrence River. Mohawk trade at the time of

contact fell predominantly along an east-west axis. The relevant evidence supporting the claim consists of a single ceremonial knife, treaties that make no reference to pre-existing trade, and the mere fact of Mohawk involvement in the fur trade. While appellate courts grant considerable deference to findings of fact made by trial judges, the finding of a cross-border trading right in this case represents, in view of the paucity of the evidence, a "clear and palpable error". Evidentiary principles must be sensitively applied to aboriginal claims but they cannot be strained beyond reason.

In any event, even if deference were granted to the trial judge's finding of pre-contact trade relations between the Mohawks and First Nations north of the St. Lawrence River, the evidence does not establish this northerly trade as a defining feature of the Mohawk culture. The claimed right implicates an international boundary and, consequently, geographical considerations are clearly relevant to the determination of whether the trading in this case is integral to the Mohawks' culture. Even if the trial judge's generous interpretation of the evidence were accepted, it discloses negligible transportation and trade of goods by the Mohawks north of the St. Lawrence River prior to contact. This trade was not vital to the Mohawks' collective identity. It follows that no aboriginal right to bring goods across the border for the purposes of trade has been established.

Since the respondent has not proven his claim to an aboriginal right, there is no need to comment on the extent, if any, to which colonial laws of sovereign succession are relevant to the definition of aboriginal rights under s. 35(1) of the *Constitution Act, 1982*.

Per Major and **Binnie** JJ.: It is agreed that even if Mohawks did occasionally trade goods across the St. Lawrence River with First Nations to the north prior to contact, this practice was neither a defining feature of their culture nor vital to their collective identity. There are, however, additional considerations for allowing the appeal. In this case, an issue arises

about the sovereignty implications of the international trading and mobility right claimed by the respondent as a citizen of the Iroquois Confederacy.

Akwesasne lies at the jurisdictional epicentre of the St. Lawrence River and straddles the Canada-United States border, as well as provincial and state borders. This crisscrossing of borders through the Mohawk community goes beyond mere inconvenience and constitutes a significant burden on everyday living. The Mohawk people seek to diminish the border disruption in their lives, reunite a divided community, and find economic advantage in the international boundary. That economic value of their claim is created by non-aboriginal society is not fatal to its existence. A frozen rights theory is incompatible with s. 35(1) and aboriginal rights are capable of growth and evolution.

An aboriginal right must be derived from pre-contact activity that was an element of a practice, custom or tradition integral to the aboriginal community's distinctive culture. Traditional Mohawk homelands were in the Mohawk Valley (N.Y. State) but the Mohawks historically travelled as far north as the St. Lawrence River valley. In that era, the Mohawks were, and acted as, a fully autonomous people within the Iroquois Confederacy. Territorial boundaries changed as a militarily powerful Iroquois Confederacy spread to and along the St. Lawrence River displacing other aboriginal inhabitants. While none of the boundaries between First Nation Territories in pre-contact times corresponded with the present international boundary at Akwesasne, such boundaries existed and, under traditional practices and customs, they were respected by the Mohawks in times of peace.

Counsel for the respondent does not dispute Canadian sovereignty. He seeks Mohawk autonomy within the broader framework of Canadian sovereignty. The respondent's claim is not just about physical movement of people or goods in and about Akwesasne. It is about the Mohawks' aspiration to live as if the international boundary did not exist.

Whereas historically the Crown may have been portrayed as an entity across the seas with which aboriginal people could scarcely be expected to identify, this was no longer the case in 1982 when the s. 35(1) reconciliation process was established. The Constitution was patriated and all aspects of our sovereignty became firmly located within our borders. If the principle of "merged sovereignty" articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians *together* form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing aboriginal and treaty rights must be reconciled. The constitutional objective is reconciliation not mutual isolation. What is significant is that the Royal Commission itself sees aboriginal peoples as full participants with non-aboriginal peoples in a shared Canadian sovereignty. Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are part of it.

The respondent's claim presents two defining elements. He asserts a trading and mobility right across the international boundary and he attaches this right to his current citizenship not of Canada but of the Haudenosaunee (Iroquois) Confederacy with its capital in Onondaga, New York State.

A treaty right is an affirmative promise by the Crown which will be interpreted generously and enforced in a way that upholds the honour of the Crown. In the case of aboriginal rights, there is no historical event comparable to the treaty-making process in which the Crown negotiated the right or obligation sought to be enforced. The respondent's claim is rooted in practices which he says long preceded the Mohawks' first contact with Europeans in 1609.

British colonial law presumed that the Crown intended to respect aboriginal rights that were neither unconscionable nor incompatible with the Crown's sovereignty. Courts have extended this recognition to practices, customs or traditions integral to the aboriginal community's distinctive culture. While care must be taken not to carry forward doctrines of British colonial law into interpretations of s. 35(1) without careful reflection, s. 35(1) was not a wholesale repudiation of the common law. The notion of incompatibility with Crown sovereignty was a defining characteristic of sovereign succession and therefore a limitation on the scope of aboriginal rights. For example, important as they may have been to the Mohawk identity as a people, it could not be said that pre-contact warrior activities gave rise under successor regimes to a *legal right* under s. 35(1) to engage in military adventures on Canadian territory. This concept of sovereign incompatibility continues to be an element in the s. 35(1) analysis, albeit a limitation that will be sparingly applied. For the most part, the protection of practices, traditions and customs that are distinctive to aboriginal cultures in Canada does not raise legitimate sovereignty issues at the definitional stage.

With the creation of the international boundary in 1783, Akwesasne became the point at which British (and later Canadian) sovereignty came face to face with the sovereignty of the U.S. Control over the mobility of persons and goods across a border has always been a fundamental attribute and incident of sovereignty. States are expected to exercise their authority over borders in the public interest. The duty cannot be abdicated to the vagaries of an earlier regime whose sovereignty has been eclipsed. Therefore, the international trading/mobility right claimed by the respondent is incompatible with the historical attributes of Canadian sovereignty. Since the claimed aboriginal right did not survive the transition to non-Mohawk sovereignty, there was nothing in existence in 1982 to which s. 35(1) protection of *existing* aboriginal rights could attach.

This conclusion is not at odds with the purpose of s. 35(1) to bring about a reconciliation of the interests of aboriginal peoples with Canadian sovereignty. Aboriginal people are part of Canadian sovereignty and the accommodation of their rights is not a zero-sum relationship between minority rights and citizenship. Affirmation of the sovereign interest of Canadians as a whole, including aboriginal peoples, should not in this case be seen as a loss of legitimate constitutional space for aboriginal peoples. To extend constitutional protection to the respondent's claim would overshoot the purpose of s. 35(1). In terms of sovereign incompatibility, the respondent's claim relates to national interests that all of us have in common rather than to distinctive interests that for some purposes differentiate an aboriginal community. Reconciliation of these interests in this particular case favours an affirmation of our collective sovereignty. This conclusion neither forecloses nor endorses any position on the compatibility or incompatibility of internal self-governing institutions of First Nations with Crown sovereignty, either past or present.

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Applied: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; **explained:** *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; **distinguished:** *Watt v. Liebelt*, [1999] 2 F.C. 455; **referred to:** *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Adams*, [1996] 3 S.C.R. 101; *United States v. Garrow*, 88 F.2d 318 (1938); *R. v. Côté*, [1996] 3 S.C.R. 139; *Attorney General for Canada v. Cain*, [1906] A.C. 542; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *R. v. Pamajewon*, [1996] 2 S.C.R. 821; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751; *R. v. Dick*, [1985] 2 S.C.R. 309; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, aff'g in part [1993] 5 W.W.R. 97; *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571; *Campbell v. British Columbia (Attorney General)* (2000), 79 B.C.L.R. (3d) 122; *Corbiere v. Canada*, [1999] 2 S.C.R. 203; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Marshall*, [1999] 3 S.C.R. 533; *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045; *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399; *Oyekan v. Adele*, [1957] 2 All E.R. 785; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Mabo v. Queensland* (1992), 175 C.L.R. 1; *Wik Peoples v. Queensland* (1996), 187 C.L.R. 1; *R. v. Eninew* (1984), 12 C.C.C. (3d) 365; *R. v. Hare* (1985), 20 C.C.C. (3d) 1; *R. v. Simmons*, [1988] 2 S.C.R. 495; *R. v. Jacques*, [1996] 3 S.C.R. 1075, *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *United States v. Ramsey*, 431 U.S. 606 (1977); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Ekiu v. United States*, 142 U.S. 651 (1892); *Fong Yu Ting v. United*

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APPEAL from a judgment of the Federal Court of Appeal, [1999] 1 F.C. 375, 167 D.L.R. (4th) 702, 233 N.R. 129, [1999] 1 C.N.L.R. 112, [1998] F.C.J. No. 1513 (QL), affirming in part a judgment of the Trial Division, [1997] 4 C.N.L.R. 103, 134 F.T.R. 1, [1997] F.C.J. No. 882 (QL). Appeal allowed.

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THE CHIEF JUSTICE --

I. Introduction

1 This case raises the issue of whether the Mohawk Canadians of Akwesasne have the right to bring goods into Canada from the United States for collective use and trade with other First Nations without paying customs duties. Grand Chief Michael Mitchell claims that his people have an aboriginal right that ousts Canadian customs law. The government replies that no such right exists, first because the evidence does not support it and second because such a right would be fundamentally contrary to Canadian sovereignty. At the heart of the case lies the question of the evidence that must be adduced to establish an aboriginal right.

2 Chief Mitchell is a Mohawk of Akwesasne, a Mohawk community located just west of Montreal, and a descendant of the Mohawk nation, one of the polities comprising the Iroquois Confederacy prior to the arrival of Europeans. On March 22, 1988, Chief Mitchell crossed the international border from the United States into Canada, arriving at the Cornwall customs office. He brought with him some blankets, bibles, motor oil, food, clothing, and a washing machine, all of which had been purchased in the United States. He declared the goods to the Canadian customs agents but asserted that he had aboriginal and treaty rights which exempted him from paying duty on the goods. After some discussion, the customs agents notified Chief Mitchell that he would be charged $142.88 in duty, and they permitted him to

continue into Canada. Chief Mitchell, along with other Mohawks of Akwesasne, presented everything but the motor oil to the Mohawk community of Tyendinaga. The gifts were intended to symbolize the renewal of the historic trading relationship between the two communities. The oil was taken to a store in Akwesasne territory for resale to members of that community. In September of 1989, Chief Mitchell was served with a Notice of Ascertained Forfeiture claiming $361.64 for unpaid duty, taxes and penalties.

3 I conclude that the aboriginal right claimed has not been established. The sparse and tenuous evidence advanced in this case to prove the existence of pre-contact Mohawk trading north of the Canada-United States boundary simply cannot support the claimed right. Even if deference is paid to the trial judge on this finding, any such trade was clearly incidental, and not integral, to the Mohawk culture. As a result, Chief Mitchell must pay duty on the goods he imported to Canada.

II. Enactments

4 *Constitution Act, 1982*

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Customs Act, R.S.C. 1985, c. 1 (2nd Supp.)

17. (1) Imported goods are charged with duties thereon from the time of importation thereof until such time as the duties are paid or the charge is otherwise removed.

(2) Subject to this Act, the rates of duties on imported goods shall be the rates applicable to the goods at the time they are accounted for under subsection 32(1), (2) or (5).

(3) Whenever the importer of goods that have been released or any person authorized pursuant to paragraph 32(6)(*a*) to account for goods becomes liable under this Act to pay duties thereon, the owner of the goods at the time of release becomes jointly and severally liable, with the importer or person authorized, the pay the duties.

31. Subject to section 19, no goods shall be removed from a customs office, sufferance warehouse, bonded warehouse or duty free shop by any person other than an officer in the performance of his duties under this or any other Act of Parliament unless the goods have been released by an officer.

153. No person shall

...

(*c*) wilfully, in any manner, evade or attempt to evade compliance with any provision of this Act or evade or attempt to evade the payment of duties under this Act.

159. Every person commits an offence who smuggles or attempts to smuggle into Canada, whether clandestinely or not, any goods subject to duties, or any goods the importation of which is prohibited, controlled or regulated by or pursuant to this or any other Act of Parliament.

III. Decisions

5 At trial ((1997), 134 F.T.R. 1), McKeown J. declared that Chief Mitchell possesses an existing aboriginal but not a treaty right "to pass and repass freely across what is now the Canada-United States boundary including the right to bring goods from the United States into Canada for personal and community use without having to pay customs duties on those goods.... The aboriginal right includes the right to bring these goods from the United States into Canada for noncommercial scale trade with other First Nations" (p. 75). He found that the ancestors of the Akwesasne Mohawks lived in present-day New York State, with the Adirondack mountains representing the northern boundary of their territory. They travelled north into what is now Canada and crossed what is now the Canada-United States boundary, carrying with them goods for personal and community use. Further, he concluded that the area around Akwesasne was used by the Mohawks prior to the arrival of Europeans for the purposes of travel, diplomacy and trade. This history, he concluded, established an aboriginal right to bring goods across the present border free of duty, and to trade these goods with other First Nations.

6 McKeown J. accepted that the Mohawks, like other aboriginal societies of North America, were accustomed to the concept of boundaries and paying for the privilege of crossing arbitrary lines established by other peoples. However, he concluded that this did not negate a modern right to cross such boundaries duty-free because it merely constituted regulation of the underlying aboriginal right to bring goods across boundaries freely. The *Customs Act* did not extinguish this right because it too was merely regulatory.

7 The Federal Court of Appeal ([1999] 1 F.C. 375), *per* Sexton J.A., Isaac C.J. concurring, affirmed McKeown J.'s finding of an aboriginal right to bring goods into Canada duty-free, subject to limitations based on the evidence of the traditional range of Mohawk trading: the goods must have been purchased in New York State; the goods must be brought to a border crossing between New York and either Ontario or Quebec; and if destined for trade, such trade must be only with other aboriginal communities in those two provinces. Létourneau J.A. would have further narrowed the right by excluding a separate right of free passage across the border, requiring Mohawks seeking to exercise the right to report at the Cornwall customs office, and excluding a right to bring goods into Canada for trade purposes without the payment of customs duties.

IV. Issues

8 The issue on appeal is whether Chief Mitchell has an aboriginal right which precludes the imposition of duty under the *Customs Act* on certain imported goods. The issue can be addressed in the following manner:

A. *What is the Nature of Aboriginal Rights*?

B. *What is the Aboriginal Right Claimed?*

C. *Has the Claimed Aboriginal Right Been Established?*

(1) Evidentiary Concerns – Proving Aboriginal Rights

(a) Admissibility of Evidence in Aboriginal Right Claims

(b) The Interpretation of Evidence in Aboriginal Right Claims

(2) Does the Evidence Show an Ancestral Mohawk Practice of Trading North of the St. Lawrence River?

(3) Does the Evidence Establish that the Alleged Practice of Trading Across the St. Lawrence River Was Integral to Mohawk Culture and Continuous to the Present Day?

D. *Is the Claimed Right Barred from Recognition as Inconsistent with Crown Sovereignty?*

Because I conclude that Chief Mitchell has not established an aboriginal right, I need not address questions of extinguishment, infringement and justification.

V. Analysis

A. *What is the Nature of Aboriginal Rights?*

9 Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures. The part of North America we now call Canada was first settled by the French and the British who, from the first days of exploration, claimed sovereignty over the land on behalf of their nations. English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation: see, e.g., the *Royal Proclamation, 1763*, R.S.C. 1985, App. II, No. 1, and *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1103. At the same time, however, the

Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown: *Sparrow*, *supra*. With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as "fiduciary" in *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

10 Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them: see B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727. Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada: see *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, and *Mabo v. Queensland* (1992), 175 C.L.R. 1, at p. 57 (*per* Brennan J.), pp. 81-82 (*per* Deane and Gaudron JJ.), and pp. 182-83 (*per* Toohey J.).

11 The common law status of aboriginal rights rendered them vulnerable to unilateral extinguishment, and thus they were "dependent upon the good will of the Sovereign": see *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), at p. 54. This situation changed in 1982, when Canada's constitution was amended to entrench existing aboriginal and treaty rights: *Constitution Act, 1982*, s. 35(1). The enactment of s. 35(1) elevated existing common law aboriginal rights to constitutional status (although, it is important to note, the protection offered by s. 35(1) also extends beyond the aboriginal rights recognized at common law: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 136). Henceforward, aboriginal rights falling within the constitutional protection of s. 35 could not be unilaterally abrogated by the government. However, the government retained the

jurisdiction to limit aboriginal rights for justifiable reasons, in the pursuit of substantial and compelling public objectives: see *R. v. Gladstone*, [1996] 2 S.C.R. 723, and *Delgamuukw, supra*.

12 In the seminal cases of *R. v. Van der Peet*, [1996] 2 S.C.R. 507, and *Delgamuukw, supra*, this Court affirmed the foregoing principles and set out the test for establishing an aboriginal right. Since s. 35(1) is aimed at reconciling the prior occupation of North America by aboriginal societies with the Crown's assertion of sovereignty, the test for establishing an aboriginal right focuses on identifying the integral, defining features of those societies. Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact. The practice, custom or tradition must have been "integral to the distinctive culture" of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (*Van der Peet*, *supra*, at paras. 54-59 (emphasis in original)). This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society's cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society in question.

13 Once an aboriginal right is established, the issue is whether the act which gave rise to the case at bar is an expression of that right. Aboriginal rights are not frozen in their pre-contact form: ancestral rights may find modern expression. The question is whether the impugned act represents the modern exercise of an ancestral practice, custom or tradition.

B. *What is the Aboriginal Right Claimed?*

14 Before we can address the question of whether an aboriginal right has been established, we must first characterize the right claimed. The event giving rise to litigation merely represents an alleged exercise of an underlying right; it does not, in itself, tell us the scope of the right claimed. Therefore it is necessary to determine the nature of the claimed right. At this initial stage of characterization, the focus is on ascertaining the true nature of the claim, not assessing the merits of this claim or the evidence offered in its support.

15 In *Van der Peet*, *supra*, at p. 53, the majority of this Court provided three factors that should guide a court's characterization of a claimed aboriginal right: (1) the nature of the action which the applicant is claiming was done pursuant to an aboriginal right; (2) the nature of the governmental legislation or action alleged to infringe the right, i.e. the conflict between the claim and the limitation; and (3) the ancestral traditions and practices relied upon to establish the right. The right claimed must be characterized in context and not distorted to fit the desired result. It must be neither artificially broadened nor narrowed. An overly narrow characterization risks the dismissal of valid claims and an overly broad characterization risks distorting the right by neglecting the specific culture and history of the claimant's society: see *R. v. Pamajewon*, [1996] 2 S.C.R. 821.

16 Chief Mitchell characterizes his claim as the right to enter Canada from the United States with personal and community goods, without paying customs or duties, and the right to trade these goods with other First Nations. On the strength of this claimed right, he crossed the Canada-United States boundary with personal and community goods, the action giving rise to the case at bar. Although the motor oil was the only item transported by Chief Mitchell that was destined for resale, it can only be concluded that Chief Mitchell's actions - and his case - focused in fact on trade. The claimants asserted that "trade and commerce [is] central to their soul". Witness after witness was asked to describe historical Mohawk trading practices. Furthermore, when Chief Mitchell exercised his alleged right, all of the goods brought into

Canada were trade-related: they were intended as gifts to seal a trade agreement with Tyendinaga and to signify renewed trading relations, in accordance with customary practice. Therefore the first factor, the action claimed as an exercise of an aboriginal right, suggests that the heart of the claim is the right to bring goods across the Canada-United States border for purposes of trade.

17 The second factor, the nature of the conflict between the claimed right and the relevant legislation, while more neutral, does not displace this conclusion. The law in conflict with the alleged right is the *Customs Act*. It applies both to personal goods and goods for trade.

18 The third factor to be considered in characterizing the claim is the relevant traditions and practices of the aboriginal people in question. The ancestral aboriginal practices upon which the claimant relies provide a strong indication of the nature and scope of the right claimed. In this case, the claimants emphasize their ancestral trading practices; indeed these practices and the alleged limitations on them raised by the appellant, lie at the heart of the case. As noted, the claimants assert that historically "trade and commerce [is] central to their soul". One of the claimant's expert witnesses testified that trade "came as easily to the Iroquois as living and breathing". The government, while not denying that the Mohawks traditionally traded, asserts that such trade did not extend north into what is now Canada and that, in any event, the Mohawks traditionally accepted the custom of paying tributes and duties to cross boundaries established by other polities.

19 I conclude that the *Van der Peet* factors of the impugned action, the governmental action or legislation with which it conflicts, and the ancestral practice relied on, all suggest the claim here is properly characterized as the right to bring goods across the Canada-United States boundary at the St. Lawrence River for purposes of trade.

20 It may be tempting for a claimant or a court to tailor the right claimed to the contours of the specific act at issue. In this case, for example, Chief Mitchell seeks to limit the scope of his claimed trading rights by designating specified trading partners. Originally, he claimed the right to trade with other First Nations in Canada. After the Federal Court of Appeal decision, he further limited his claim to trade with First Nations in Quebec and Ontario. These self-imposed limitations may represent part of Chief Mitchell's commendable strategy of negotiating with the government and minimizing the potential effects on its border control. However, narrowing the claim cannot narrow the aboriginal practice relied upon, which is what defines the right. The essence of the alleged Mohawk tradition was not to bring goods across the St. Lawrence River to trade with designated communities, but rather to simply bring goods to trade. As a matter of necessity, pre-contact trading partners were confined to other First Nations, but this historical fact is incidental to the claim – the right to cross the St. Lawrence River with goods for personal use and trade. For example, in *Gladstone*, *supra*, the majority of this Court found an aboriginal right to engage in the commercial trade of herring spawn, but did not then proceed to restrict the Heiltsuk to their pre-contact First Nations trading partners. Moreover, it is difficult to imagine how limitations on trading partners would operate in practice. If Chief Mitchell trades goods to First Nations in Ontario and Quebec, there is nothing to prevent them from trading the goods with anyone else in Canada, aboriginal or not. Thus, the limitations placed on the trading right by Chief Mitchell and the courts below artificially narrow the claimed right and would, at any rate, prove illusory in practice.

21 The trial judge characterized the right claimed as including a right to engage in "small, noncommercial scale trade" (p. 12). He does not make it clear what inferences arise from this characterization, but one possible inference might be that evidence of minimal pre-contact trade would suffice to establish the right. I note without comment the practical difficulties inherent in defining "small, noncommercial scale trade" and the obvious fact that many

small acts of trade may add up to more major trade. For purposes of this appeal, it suffices to note that Chief Mitchell did not seek at trial to limit his claim to small-scale or noncommercial trade. While he did not claim a right to trade goods brought across the border in the commercial mainstream, he did assert a right to trade with other First Nations, without qualifying the scale of such trade. He then called evidence emphasizing the centrality of trade to the ancestral Mohawk way of life. Moreover, his express purpose in transporting the goods across the border was the revival of trading relations with a neighbouring community. In these circumstances, it seems inappropriate to place much weight on the limitation proposed by the Federal Court, and the claimed right is best characterized as a right to trade *simpliciter*.

22 In another attempt at limitation, Chief Mitchell denies that his claim entails the right to pass freely over the border, i.e., mobility rights. Perhaps recognizing that mobility has become a contentious issue in recent cases (e.g., *Watt v. Liebelt*, [1999] 2 F.C. 455 (C.A.); *R. v. Campbell* (2000), 6 Imm. L.R. (3d) 1), he answers that his claim is contingent on his existing right to enter Canada pursuant to the *Canadian Charter of Right and Freedoms* and the *Immigration Act*, R.S.C. 1985, c. I-2. He does not seek a right to enter Canada because he does not require such a right. Again, however, narrowing the claim cannot narrow the aboriginal practice that defines the claimed right. An aboriginal right, once established, generally encompasses other rights necessary to its meaningful exercise. In *R. v. Côté*, [1996] 3 S.C.R. 139, for example, it was held that the right to fish for food in a specified territory necessarily encompassed a right of physical access to that territory. The evidence in the present case showed that trade involved travel. It follows that any finding of a trading right would also confirm a mobility right.

23 The Attorney General of Manitoba raises two additional points about the characterization of the right. First, he argues that the claim should not be characterized in the negative. The original claim was to bring goods across the border "without having to pay any

duty or taxes whatsoever to any Canadian government or authority". Manitoba argues that the right should be characterized simply as a right to bring goods, without qualification. I agree. As in the fishing and hunting cases, once an existing right is established, any restriction on that right through the imposition of duties or taxes should be considered at the infringement stage: see, e.g., *R. v. Adams*, [1996] 3 S.C.R. 101; *Côté, supra*; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *Gladstone, supra*; see also *R. v. Badger*, [1996] 1 S.C.R. 771. The right claimed in those cases was not the right "to fish (or hunt) without restriction". Similarly, here the right is not "to bring trade goods without having to pay duty"; properly defined, the right claimed is to bring trade goods *simpliciter*.

24 Manitoba also argues that the right should not be construed as a right to cross the border. Technically this argument is correct, as the border is a construction of newcomers. Aboriginal rights are based on aboriginal practices, customs and traditions, not those of newcomers. This objection can be dealt with simply: the right claimed should be to bring goods across the St. Lawrence River (which always existed) rather than across the border. In modern terms, the two are equivalent.

25 Properly characterized, then, the right claimed in this case is the right to bring goods across the St. Lawrence River for the purposes of trade.

C. *Has the Claimed Aboriginal Right Been Established?*

26 *Van der Peet* set out the test for establishing an aboriginal right protected under s. 35(1). Briefly stated, the claimant is required to prove: (1) the existence of the ancestral practice, custom or tradition advanced as supporting the claimed right; (2) that this practice, custom or tradition was "integral" to his or her pre-contact society in the sense it marked it as

distinctive; and (3) reasonable continuity between the pre-contact practice and the contemporary claim. I will consider each of these elements in turn. First, however, it is necessary to consider the evidence upon which claims may be proved, and the approach courts should adopt in interpreting such evidence.

(1) Evidentiary Concerns – Proving Aboriginal Rights

27 Aboriginal right claims give rise to unique and inherent evidentiary difficulties. Claimants are called upon to demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records. Recognizing these difficulties, this Court has cautioned that the rights protected under s. 35(1) should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection (*Simon v. The Queen*, [1985] 2. S.C.R. 387, at p. 408). Thus in *Van der Peet*, *supra*, the majority of this Court stated that "a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in" (para. 68).

28 This guideline applies both to the admissibility of evidence and weighing of aboriginal oral history (*Van der Peet*, *supra*; *Delgamuukw*, *supra*, at para. 82).

(a) *Admissibility of Evidence in Aboriginal Right Claims*

29 Courts render decisions on the basis of evidence. This fundamental principle applies to aboriginal claims as much as to any other claim. *Van der Peet* and *Delgamuukw* affirm the continued applicability of the rules of evidence, while cautioning that these rules must be applied flexibly, in a manner commensurate with the inherent difficulties posed by such claims and the

promise of reconciliation embodied in s. 35(1). This flexible application of the rules of evidence permits, for example, the admissibility of evidence of post-contact activities to prove continuity with pre-contact practices, customs and traditions (*Van der Peet*, *supra*, at para. 62) and the meaningful consideration of various forms of oral history (*Delgamuukw*, *supra*).

30 The flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not "cast in stone, nor are they enacted in a vacuum" (*R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 487). Rather, they are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way. Underlying the diverse rules on the admissibility of evidence are three simple ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.

31 In *Delgamuukw*, mindful of these principles, the majority of this Court held that the rules of evidence must be adapted to accommodate oral histories, but did not mandate the blanket admissibility of such evidence or the weight it should be accorded by the trier of fact; rather, it emphasized that admissibility must be determined on a case-by-case basis (para. 87). Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge.

32 Aboriginal oral histories may meet the test of usefulness on two grounds. First, they may offer evidence of ancestral practices and their significance that would not otherwise be available. No other means of obtaining the same evidence may exist, given the absence of

contemporaneous records. Second, oral histories may provide the aboriginal perspective on the right claimed. Without such evidence, it might be impossible to gain a true picture of the aboriginal practice relied on or its significance to the society in question. Determining what practices existed, and distinguishing central, defining features of a culture from traits that are marginal or peripheral, is no easy task at a remove of 400 years. Cultural identity is a subjective matter and not easily discerned: see R. L. Barsh and J. Y. Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997), 42 *McGill L.J.* 993, at p. 1000, and J. Woodward, *Native Law* (loose-leaf), at p. 137. Also see *Sparrow*, *supra*, at p. 404; *Delgamuukw*, *supra*, at paras. 82-87, and J. Borrows, "The Trickster: Integral to a Distinctive Culture" (1997), 8 *Constitutional Forum* 27.

33 The second factor that must be considered in determining the admissibility of evidence in aboriginal cases is reliability: does the witness represent a reasonably reliable source of the particular people's history? The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness's ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.

34 In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions. Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective. Thus, *Delgamuukw* cautions against facilely rejecting oral histories simply because they do not convey "historical" truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted.

35 In this case, the parties presented evidence from historians and archaeologists. The aboriginal perspective was supplied by oral histories of elders such as Grand Chief Mitchell. Grand Chief Mitchell's testimony, confirmed by archaeological and historical evidence, was especially useful because he was trained from an early age in the history of his community. The trial judge found his evidence credible and relied on it. He did not err in doing so and we may do the same.

(b) *The Interpretation of Evidence in Aboriginal Right Claims*

36 The second facet of the *Van der Peet* approach to evidence, and the more contentious issue in the present case, relates to the interpretation and weighing of evidence in support of aboriginal claims once it has cleared the threshold for admission. For the most part, the rules of evidence are concerned with issues of admissibility and the means by which facts may be proved. As J. Sopinka and S.N. Lederman observe, "[t]he value to be given to such facts does not ... lend itself as readily to precise rules. Accordingly, there are no absolute principles which govern the assessment of evidence by the trial judge" (*The Law of Evidence in Civil Cases* (1974), at p. 524). This Court has not attempted to set out "precise rules" or "absolute principles" governing the interpretation or weighing of evidence in aboriginal claims. This reticence is appropriate, as this process is generally the domain of the trial judge, who is best situated to assess the evidence as it is presented, and is consequently accorded significant latitude in this regard. Moreover, weighing evidence is an exercise inherently specific to the case at hand.

37 Nonetheless, the present case requires us to clarify the general principles laid down in *Van der Peet* and *Delgamuukw* regarding the assessment of evidence in aboriginal right claims. The requirement that courts interpret and weigh the evidence with a consciousness of the special nature of aboriginal claims is critical to the meaningful protection of s. 35(1) rights.

As Lamer C.J. observed in *Delgamuukw*, the admission of oral histories represents a hollow recognition of the aboriginal perspective where this evidence is then systematically and consistently undervalued or deprived of all independent weight (para. 98). Thus, it is imperative that the laws of evidence operate to ensure that the aboriginal perspective is "given due weight by the courts" (para. 84).

38 Again, however, it must be emphasized that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law, which, as they relate to the valuing of evidence, are often synonymous with the "general principles of common sense" (Sopinka and Lederman, *supra*, at p. 524). As Lamer C.J. emphasized in *Delgamuukw*, *supra*, at para. 82:

> [A]boriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain "the Canadian legal and constitutional structure" [*Van der Peet* at para. 49]. Both the principles laid down in *Van der Peet* – first, that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit – must be understood against this background. [Emphasis added.]

39 There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse" (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14). In particular, the *Van der Peet* approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity

on the balance of probabilities. Placing "due weight" on the aboriginal perspective, or ensuring its supporting evidence an "equal footing" with more familiar forms of evidence, means precisely what these phrases suggest: equal and due treatment. While the evidence presented by aboriginal claimants should not be undervalued "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case" (*Van der Peet*, *supra*, at para. 68), neither should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated.

40 With these principles in mind, I turn now to the consideration of whether the evidence offered in the present case in fact supports an aboriginal right to bring goods across the St. Lawrence River for the purposes of trade.

(2) Does the Evidence Show an Ancestral Mohawk Practice of Trading North of the St. Lawrence River?

41 While the ancestral home of the Mohawks lay in the Mohawk Valley of present-day New York State, the evidence establishes that, before the arrival of Europeans, they travelled north on occasion across the St. Lawrence River. We may assume they travelled with goods to sustain themselves. There was also ample evidence before McKeown J. to support his finding that trade was a central, distinguishing feature of the Iroquois in general and the Mohawks in particular. This evidence indicates the Mohawks were well situated for trade, and engaged in small-scale exchange with other First Nations. A critical question in this case, however, is whether these trading practices and northerly travel coincided prior to the arrival of Europeans; that is, does the evidence establish an ancestral Mohawk practice of transporting goods across the St. Lawrence River for the purposes of trade? Only if this ancestral practice is established does it become necessary to determine whether it is an integral feature of Mohawk culture with continuity to the present day.

42 With respect, the trial judge's affirmative response to this question finds virtually no support in the evidentiary record. Indeed, McKeown J. concedes as much (at p. 44):

> There is little direct evidence that the Mohawks, prior to the arrival of the Europeans, brought goods from their homeland and traded with other First Nations on the Canadian side of the boundary . . .

Nonetheless, he goes on to state:

> [H]owever, I am satisfied that Mohawk society is distinctive, that trade was an integral part of Mohawk tradition and that the Mohawks travelled freely across the border to expand trading territory and to obtain goods for the purposes of trade, . . . I find that the plaintiff and the Mohawks of Akwesasne have established an aboriginal right to pass and repass freely what is now the Canada-United States boundary with goods for personal and community use and for trade with other first nations.

These statements are contradictory on two levels. First, the findings in the second statement do not lead logically to its conclusion: Mohawks travel across the border in attempts to expand trading territory through "commercially motivated warfare" (as it was called at trial (p. 33)) or to obtain goods for trade elsewhere simply does not address the question of whether goods were brought across the border <u>for purposes of trade with First Nations to the north</u>. On this question, McKeown J. was quite correct to state there exists "little direct evidence". This leads to the second contradiction: the inconsistency between this concession of little direct evidence and the finding of an aboriginal right. This is not to suggest that an aboriginal claim can never be established on the basis of minimal evidence, direct or otherwise, provided it is sufficiently compelling and supports the conclusions reached. In this case, however, the "little direct evidence" relied upon by the trial judge is, at best, tenuous and scant, and is perhaps better characterized as an absence of even minimally cogent evidence. This conclusion seems inescapable after a review of the evidence upon which McKeown J. relied in support of his holding. In particular, McKeown J. relied upon archaeological evidence; the testimony of Chief

Mitchell and Dr. Venables, a cultural historian; and post-contact Mohawk involvement in treaty-making and the fur trade.

43 The archaeological evidence consisted of two works, submitted by expert witnesses, purportedly documenting an historical north-south trade in copper and ceremonial knives, respectively. Sexton J.A., writing for the majority of the Federal Court of Appeal in upholding the trial judge's finding of a cross-border trading right, placed significant emphasis on the former. He concluded at para. 50 that D.K. Richter's book, *The Ordeal of the Longhouse: The Peoples of the Iroquois League in the Era of European Colonization* (1992), 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.

44 This is, with respect, an overly generous interpretation of both the book and the trial judgment. The book merely states that plates of worked copper originating in the Great Lakes region were particularly prized as gifts by the members of the Five Nations Confederacy (Richter, *supra*, at p. 28). It indicates that this copper originated to the north of the Mohawk Valley, not that the Mohawks obtained this copper through direct trading with their northern neighbours. Indeed, Richter's book confirms that long-distance Mohawk trade, at least at the time of contact, fell along an east-west axis. The Mohawks traded with the Wenros and Neutrals to the west (in the Niagra Region, south of the Great Lakes) and the Mohicans in the east, but not with their enemies in the disputed territory to the north. Richter contends that warfare between the Five Nations and their northern neighbours precluded the possibility of trade (at pp. 28-29):

> The lack of any need for large-scale trade helps explain not just the isolationism of Five Nations villages from each other and outsiders but their wars with such sixteenth-century neighbours as the Hurons, the Susquehnannocks, the Algonquins, and the St. Lawrence Iroquoians. Because relationships among people rested on the alliances of spiritual power that came from reciprocity, a *lack* of reciprocity, as epitomized by the absence of trading relationships, could easily lead to a presumption of hostility. Just as a shaman or an other-than-human person could be expected to wreak havoc when denied respect reciprocity, so too could people of another village with whom no exchange relationships existed. [Underlining added; italics in original.]

45 Richter then proceeds to note that the opposite dynamic prevailed where trading occurred between nations: reciprocal trade facilitated and signified peaceful relations between communities. In a passage not quoted by McKeown J., Richter concludes that the copper plates, originating in the Great Lakes region and prized by the Confederacy for their spiritual power, were obtained indirectly along the east-west trade axis, not directly from the north as implied by the trial judge and asserted by the Court of Appeal (at p. 29):

> [A]mong the few neighboring peoples with whom all of the autonomous villages of the Five Nations seem to have been regularly at peace during the period when Europeans first arrived on the Turtle's Back were the Neutrals and the Wenros to the west and the Mahicans and River Indians to the east. Each sat astride routes to the sources of exotic commodities associated with spiritual power that were not available in the homelands of the Five Nations: Great Lakes copper and other minerals linked with spiritual power came from beyond the country of the Neutrals and Wenros, and shell beads arrived from the coast of Long Island Sound presumably by way of the Mahicans and River Indians. [Emphasis added.]

46 Consequently, while Richter's book may support the pre-contact existence of north-south trade routes, it refutes the direct involvement of the Mohawks in this trade. This is a significant fact, given the reliance by the trial judge on this evidence in concluding the aboriginal right was established, and in rejecting the testimony of the appellant's expert witness, Dr. von Gernet, to the effect that he had "yet to find a single archeological site anywhere in Ontario dating to the prehistoric, the protohistoric or the early historical period which has in any way ever been associated with the Mohawks" (p. 30).

47 The second item of archaeological evidence relates to an alleged trade in chalcedony ceremonial knives, raised by the claimant's expert witness, Dr. Venables, on the basis of W. A. Ritchie's *The Archeology of New York State* (rev. ed. 1980) Again, Ritchie describes the Iroquois trade networks as falling "chiefly westward toward the Upper Great Lakes, where also the strongest cultural ties are found" (p. 196 (emphasis added)). The only evidence of northerly trade is found in a single "smoky chalcedony ceremonial (?) knife," from which Ritchie postulates a potential trade route "evidently to the north in Quebec" (p. 196) established somewhere between 3000 B.C. and 300 B.C. This evidence, standing alone, can hardly be called compelling.

48 The trial judge preferred the evidence of Dr. Venables and Chief Mitchell where it conflicted with that of Dr. von Gernet. He properly admitted the testimony of Chief Mitchell relaying the oral history of his people, correctly stating, in accordance with *Van der Peet*, that the weight he accorded "to oral history and to documentary evidence does not depend on the form in which the evidence was presented to the court" (p. 25). However, Chief Mitchell did not discuss Mohawk trading activity north of the St. Lawrence River. Referring to Akwesasne, he simply stated that "[a]ccording to our traditions it had always been one of our areas where we did all our planting, we did our fishing and we did our hunting". Dr. Venables testimony was equally limited. He referred to extensive trade between the Mohawks and their Iroquois confederates to the west, but did not identify any direct evidence of trade to the north. Dr. Venables cited the works by Richter and Ritchie but, as discussed above, the latter offers only the most tenuous support for northerly trade and the former, if anything, refutes the existence of such trade during the time preceding contact. Dr. Venables also referred to the *Historical Atlas of Canada*, but the trial judge found at p. 29 that this text "does not demonstrate cross-border trade by the Mohawks".

49 Finally, the trial judge relied on post-contact Mohawk activity as proof of continuity with pre-contact practices, an adaptation of the rules of evidence approved in *Van der Peet*. He found it "particularly noteworthy that the early treaties entered into by the Mohawks and other Iroquois were largely concerned with trade" (p. 43). None of these early treaties, however, support a reasonable inference of pre-contact cross-river trade. For example, the trial judge relied on a 1645 treaty between the Hurons, French and Mohawks. The Mohawks had defeated the Hurons (allies of the French) and now sought to restrict their trade and travel through the peace treaty, to their own benefit. Dr. Venables interpreted the Mohawk negotiator's speech at the treaty conference as demonstrating the integrity of trade to Mohawk culture. The Mohawk negotiator did not actually refer to pre-existing trade, nor did Dr. Venables claim he had. The Mohawks had warred against the Hurons and Algonquins for years. While the treaty might suggest the existence of trade during the uneasy year of peace before it was broken, it offers no evidence of pre-contact trade across the St. Lawrence River.

50 The trial judge also relied on evidence of Mohawk participation in the Montreal-Albany fur trade as suggesting pre-contact trade along a northerly route. He rejected the assertion that this fur trade activity arose solely in response to the arrival of Europeans, reasoning that "it seems highly unlikely that the Mohawks would start trading immediately upon the arrival of Europeans if they had not been involved in some prior trade" (p. 39). In his view, "a north-south trade existed prior to the European presence and after the arrival of the Europeans, the trade was expanded to include furs" (p. 37). While this inference may indeed be drawn from the evidence, it is drawn in the absence of any other evidence – oral or documentary, aboriginal or settler, direct or otherwise – substantiating the existence of this pre-contact trade route. It cannot carry much force.

51 As discussed in the previous section, claims must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities. Sparse, doubtful and

equivocal evidence cannot serve as the foundation for a successful claim. With respect, this is exactly what has occurred in the present case. The contradiction between McKeown J.'s statement that little direct evidence supports a cross-river trading right and his conclusion that such a right exists suggests the application of a very relaxed standard of proof (or, perhaps more accurately, an unreasonably generous weighing of tenuous evidence). The *Van der Peet* approach, while mandating the equal and due treatment of evidence supporting aboriginal claims, does not bolster or enhance the cogency of this evidence. The relevant evidence in this case – a single knife, treaties that make no reference to pre-existing trade, and the mere fact of Mohawk involvement in the fur trade – can only support the conclusion reached by the trial judge if strained beyond the weight they can reasonably hold. Such a result is not contemplated by *Van der Peet* or s. 35(1). While appellate courts grant considerable deference to findings of fact made by trial judges, I am satisfied that the findings in the present case represent a "clear and palpable error" warranting the substitution of a different result (*Delgamuukw, supra*, at paras. 78-80). I conclude that the claimant has not established an ancestral practice of transporting goods across the St. Lawrence River for the purposes of trade.

52 This holding should not be read as imposing upon aboriginal claimants the "next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community" (*Van der Peet*, *supra*, at para. 62). McKeown J. correctly observed that indisputable evidence is not required to establish an aboriginal right (p. 20). Neither must the claim be established on the basis of direct evidence of pre-contact practices, customs and traditions, which is inevitably scarce. Either requirement would "preclude in practice any successful claim for the existence" of an aboriginal right (*Van der Peet*, *supra*, at para. 62). My conclusion, rather, is premised on the distinction between sensitively applying evidentiary principles and straining these principles beyond reason. In *Adams, supra*, this Court recognized a Mohawk right to fish on the St. Lawrence River, but this was on the basis of evidence that "clearly demonstrated" (para. 46 (emphasis added)) that

fishing for subsistence in the area constituted a significant aspect of Mohawk life at the time of contact. Similarly, the recognition in *Gladstone* of an aboriginal right to engage in the commercial trade of herring spawn was founded firmly on an indisputable historical and anthropological record that "readily bears this out" (para. 26), complemented by written documentation by European observers of such inter-tribal trade at the time of contact (para. 26-27). This Court concluded that the claimant had "provided clear evidence from which it can be inferred that, prior to contact, Heiltsuk society was, in significant part, based on such trade" (para. 28). Here, no such "clear evidence" of a trading practice north of St. Lawrence River exists and no comparable inference can be drawn.

53 In view of the paucity of evidence of Mohawk trade north of St. Lawrence River, I need not consider the argument that, even if it were established, any Mohawk trading right should be characterized as inherently subject to border controls, tolls and duties imposed by other peoples, as recognized by ancestral aboriginal custom.

(3) Does the Evidence Establish that the Alleged Practice of Trading Across the St. Lawrence River Was Integral to Mohawk Culture and Continuous to the Present Day?

54 Even if deference were granted to the trial judge's finding of pre-contact trade relations between the Mohawks and First Nations north of the St. Lawrence River, the evidence does not establish this northerly trade as a defining feature of the Mohawk culture. As discussed earlier, the *Van der Peet* test identifies as aboriginal rights only those activities that represent "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right" (para. 46 (emphasis added)). It is therefore incumbent upon Chief Mitchell in this case to demonstrate not only that personal and community goods were transported across the St. Lawrence River for trade purposes prior to contact, but also that this practice is integral to the Mohawk people.

55 The importance of trade – in and of itself – to Mohawk culture is not determinative of the issue. It is necessary on the facts of this case to demonstrate the integrality of this practice to the Mohawk in the specific geographical region in which it is alleged to have been exercised (i.e., north of the St. Lawrence River), rather than in the abstract. This Court has frequently considered the geographical reach of a claimed right in assessing its centrality to the aboriginal culture claiming it. For example, in recognizing a constitutionally protected Mohawk fishing right in *Adams, supra*, the majority of this Court framed the *Van der Peet* test as follows (at para. 34):

> The appellant argues that the Mohawks have an aboriginal right to fish in Lake St. Francis. In order to succeed in this argument the appellant must demonstrate that, pursuant to the test laid out by this Court in *Van der Peet*, fishing in Lake St. Francis was "an element of a practice, custom or tradition integral to the distinctive culture" of the Mohawks. [Emphasis added.]

The majority, in assessing the integrality of this practice to the Mohawks in *Adams*, consistently tied the claimed right to the specific area at issue – the region of Lake St. Francis (see paras. 37 and 45). *Côté, supra*, similarly emphasized that it is the exercise of the claimed right in a specific geographical area that must be integral (paras. 41-78). In that case, the Court stated that "[a]n aboriginal practice, custom or tradition entitled to protection as an aboriginal right will frequently be limited to a specific territory or location, depending on the actual pattern of exercise of such an activity prior to contact" (para. 39).

56 Thus, geographical considerations are clearly relevant to the determination of whether an activity is integral in at least some cases, most notably where the activity is intrinsically linked to specific tracts of land. However, as Lamer C.J. observed in *Delgamuukw*, "aboriginal rights ... fall along a spectrum with respect to their degree of connection with the land" (para. 138). In this regard, I note that the relevance of geography is much clearer in hunting and fishing cases such as *Adams* and *Côté*, which involve activities inherently tied to the land, than it is in relation to more free-ranging rights, such as a general right

to trade, which fall on the opposite end of the spectrum. General trading rights lack an inherent connection to a specific tract of land. Thus, geography was not a relevant factor in the aboriginal rights trilogy of *Van der Peet*, *supra*, *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *Gladstone*, *supra*, all cases involving claimed rights of exchange or trade. The claimants in these cases were only required to demonstrate the integrality of the claimed trading practice in general, rather than in relation to a specific region. Moreover, in *Gladstone*, where the Heiltsuk successfully established an aboriginal right to engage in the commercial trade of herring spawn on kelp, the Court did not confine the scope of this trade to its historical reach. Such a restriction would unduly cement the right in its pre-contact form and frustrate its modern exercise, contrary to the principles set out in *Van der Peet*. Consequently, trading rights will seldom attract geographical restrictions.

57 In the present case, however, the right to trade is only one aspect, and perhaps a peripheral one, of the broader claim advanced by Chief Mitchell: the right to convey goods across an international boundary for the purposes of trade. For this reason, Chief Mitchell's claim cannot simply be equated with the claims in the aboriginal rights trilogy as involving a broad "right to trade". This distinction is manifest in the contrasting manners in which the claimed rights are framed in these cases, pursuant to the *Van der Peet* factors.

58 In the present case, unlike past trading cases, all three *Van der Peet* touchstones resonate with considerations of geography. The action giving rise to the case is Chief Mitchell arriving at the Cornwall International Bridge and claiming a right to cross this international boundary with goods for trade. Absent a border, this case would not be before the Court. Similarly, the government restriction alleged to infringe the right arises from provisions of the *Customs Act* regulating the importation of goods. Unlike the provisions implicated in the aboriginal rights trilogy, the *Customs Act* is fundamentally concerned with the geographical origins and destinations of goods. The ancestral practice relied upon in support of the right,

while argued broadly, also involved allegations of an historical trade route north across the St. Lawrence River. Chief Mitchell's characterization of his claim, while not determinative, reflects the undeniable geographical element of the claim: he asserts the right to enter Canada from the United States with personal and community goods, without paying customs and other duties, for trade with First Nations.

59 Ultimately, the characterization of the claimed right in this case, as in *Adams* and *Côté*, imports a necessary geographical element, and its integrality to the Mohawk culture should be assessed on this basis. By contrast, geographical considerations were irrelevant to the framing of the claimed trading right in the aboriginal rights trilogy, and were therefore equally irrelevant to whether the claimed trade constituted a defining feature of the cultures in question and the scope of the right if successfully established. In this manner, the *Van der Peet* approach to characterizing the claimed right will generally determine when – and to what extent – geographical considerations are relevant to the claim.

60 The claimed right in the present case implicates an international boundary and, consequently, imports a geographical element into the inquiry. Instead of asking whether the right to trade – in the abstract – is integral to the Mohawk people, this Court must ask whether the right to trade across the St. Lawrence River is integral to the Mohawks. The evidence establishes that it is not. Even if the trial judge's generous interpretation of the evidence were accepted, it discloses negligible transportation and trade of goods by the Mohawks north of the St. Lawrence River prior to contact. If the Mohawks did transport trade goods across the St. Lawrence River for trade, such occasions were few and far between. Certainly it cannot be said that the Mohawk culture would have been "fundamentally altered" (para. 59) without this trade, in the language of *Van der Peet*. It was not vital to the Mohawks' collective identity. It was not something that "truly made the society what it was" (*Van der Peet*, *supra*, at para. 55). Participation in northerly trade was therefore not a practice integral to the distinctive

culture of the Mohawk people. It follows that no aboriginal right to bring goods across the border for the purposes of trade has been established.

D. *Is the Claimed Right Barred from Recognition as Inconsistent with Crown Sovereignty?*

61 The conclusion that the right claimed is not established on the evidence suffices to dispose of this appeal. I add a note, however, on the government's contention that s. 35(1) of the *Constitution Act, 1982* extends constitutional protection only to those aboriginal practices, customs and traditions that are compatible with the historical and modern exercise of Crown sovereignty. Pursuant to this argument, any Mohawk practice of cross-border trade, even if established on the evidence, would be barred from recognition under s. 35(1) as incompatible with the Crown's sovereign interest in regulating its borders.

62 This argument finds its source in the doctrine of continuity, which governed the absorption of aboriginal laws and customs into the new legal regime upon the assertion of Crown sovereignty over the region. As discussed above, this incorporation of local laws and customs into the common law was subject to an exception for those interests that were inconsistent with the sovereignty of the new regime: see Slattery, *supra*, at p. 738; see also *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.), *per* Lambert J.A., at paras. 1021-24; *Mabo*, *supra*, *per* Brennan J., at p. 61; *Inasa v. Oshodi*, [1934] A.C. 99 (P.C.); and *R. v. Jacobs*, [1999] 3 C.N.L.R. 239 (B.C.S.C.).

63 This Court has not expressly invoked the doctrine of "sovereign incompatibility" in defining the rights protected under s. 35(1). In the *Van der Peet* trilogy, this Court identified the aboriginal rights protected under s. 35(1) as those practices, customs and traditions integral to the distinctive cultures of aboriginal societies: *Van der Peet*, *supra*, at para. 46. Subsequent cases affirmed this approach to identifying aboriginal rights falling within the aegis of s. 35(1)

(*Pamajewon*, *supra*, at paras. 23-25; *Adams*, *supra*, at para. 33; *Côté*, *supra*, at para. 54; see also: Woodward, *supra*, at p. 75) and have affirmed the doctrines of extinguishment, infringement and justification as the appropriate framework for resolving conflicts between aboriginal rights and competing claims, including claims based on Crown sovereignty.

64 The Crown now contends that "sovereign incompatibility" is an implicit element of the *Van der Peet* test for identifying protected aboriginal rights, or at least a necessary addition. In view of my conclusion that Chief Mitchell has not established that the Mohawks traditionally transported goods for trade across the present Canada-U.S. border, and hence has not proven his claim to an aboriginal right, I need not consider the merits of this submission. Rather, I would prefer to refrain from comment on the extent, if any, to which colonial laws of sovereign succession are relevant to the definition of aboriginal rights under s. 35(1) until such time as it is necessary for the Court to resolve this issue.

VI. Conclusion

65 I would allow the appeal. Chief Mitchell must pay the duty claimed by the government. I note that the government has undertaken to pay Chief Mitchell's costs.

BINNIE J. –

66 I have read the reasons of the Chief Justice and I concur in the result and with her conclusion that even if Mohawks did occasionally trade goods across the St. Lawrence River with First Nations to the north, this practice was not on the evidence a "defining feature of the Mohawk culture" (para. 54) or "vital to the Mohawk's collective identity" (para. 60) in pre-contact times. There are, however, some additional considerations that have led me to conclude that the appeal must be allowed.

67 It has been almost 30 years since this Court emphatically rejected the argument that the mere assertion of sovereignty by the European powers in North America was necessarily incompatible with the survival and continuation of aboriginal rights: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. Because not *all* customs and traditions of aboriginal First Nations are incompatible with Canadian sovereignty, however, does not mean that *none* of them can be in such conflict. The Chief Justice refrains from addressing the sovereignty issue (para. 64) but she holds, correctly in my view, that "any finding of a trading right would also confirm a mobility right" (para. 22, emphasis added). The scope of the trading/mobility right also bothered the Federal Court of Appeal: [1997] 1 F.C. 375. Létourneau J.A. (for the entire court on this aspect) commented at para. 18 of his opinion:

> The respondent claims his international mobility right as a citizen of the Mohawk nation. I would be inclined to agree with counsel for the appellant that an aboriginal right to enter a sovereign state that is not based on citizenship of that state cannot be reconciled with that state's right to self-preservation by effecting an appropriate control of its borders. [Emphasis added.]

68 The Federal Court of Appeal circumnavigated this problem by characterizing the respondent's claim as a claim for a tax exemption, but as the Chief Justice demonstrates (para. 23), any such claim can only be conceptualized as a restriction on mobility. The aboriginal claim to a trading right must relate back to a pre-contact practice, custom or tradition. Mobility existed in pre-contact times. Customs duties at the present international border *within* Mohawk territory came along almost 180 years later.

69 Having rejected the approach of the Federal Court of Appeal to narrow the claimed aboriginal right to tax exemptions, however, we are left with that court's legitimate concern about the sovereignty implications of the international trading/mobility right claimed by the respondent, as pointed out by Létourneau J.A., "as a citizen of the Mohawk nation"

(para. 18). Much of the debate during the 35-day trial implicated this issue, as did much of the argument on appeal to this Court, and I therefore think it desirable to address at least some aspects of the sovereignty controversy.

70 Counsel for the respondent does not challenge the reality of Canadian sovereignty, but he seeks for the Mohawk people of the Iroquois Confederacy the maximum degree of legal autonomy to which he believes they are entitled because of their long history at Akwesasne and elsewhere in eastern North America. This asserted autonomy, to be sure, does not presently flow from the ancient Iroquois legal order that is said to have created it, but from the *Constitution Act, 1982*. Section 35(1), adopted by the elected representatives of Canadians, recognizes and affirms existing aboriginal and treaty rights. If the respondent's claimed aboriginal right is to prevail, it does so not because of its own inherent strength, but because the *Constitution Act, 1982* brings about that result.

71 The aspect of Mohawk autonomy at issue in this case is reflected in the declaration granted by the Trial Division of the Federal Court ((1997), 134 F.T.R. 1), at p. 4:

> ... that the plaintiff as a Mohawk of Akwesasne resident in Canada has an existing aboriginal right which is constitutionally protected by ss. 35 and 52 of the *Constitution Act, 1982* to pass and repass freely across what is now the Canada - United States boundary including the right to bring goods into Canada for personal and community use, including for trade with other First Nations, without having to pay any duty or taxes whatsoever to any Canadian Government or authority.... [Emphasis added.]

This is essentially a description of a trading/mobility right of people and their goods across the international boundary subject only to such restrictions as can be justified by the government under the principles laid down in *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

72 The Crown's argument on the appeal is that such a claim goes beyond the sort of economic or cultural activity or land-based interest that the courts have previously recognized under s. 35(1) in such cases as *R. v. Van der Peet*, [1996] 2 S.C.R. 507, *R. v. Gladstone*, [1996] 2 S.C.R. 723, *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *R. v. Adams*, [1996] 3 S.C.R. 101.

73 In terms of traditional aboriginal law, the issue, as I see it, is whether trading/mobility activities asserted by the respondent not as a Canadian citizen but as an heir of the Mohawk regime that existed prior to the arrival of the Europeans, created a *legal right* to cross international boundaries under succeeding sovereigns. This aspect of the debate, to be clear, is not at the level of *fact* about the effectiveness of border controls in the 18th century. (Nor is it about the compatibility of internal aboriginal self-government with Canadian sovereignty.) The issue is at the level of *law* about the alleged incompatibility between European (now Canadian) sovereignty and mobility rights across non-aboriginal borders said by the trial judge to have been acquired by the Mohawks of Akwesasne by reason of their conduct prior to 1609.

74 In terms of post-1982 aboriginal law, consideration should be given to whether the international trading/mobility right asserted by the respondent would advance the objective of reconciliation of aboriginal peoples with Canadian sovereignty which, as established by the *Van der Peet* trilogy, is the purpose that lies at the heart of s. 35(1).

75 The dispute therefore raises issues of considerable importance. I propose to deal with the relevant points in the following order:

(1) the strategic location of the Mohawk reserve at Akwesasne on the international boundary between Canada and the United States;

(2) the respondent's border challenge on March 22, 1988;

(3) the Mohawk strategy to turn the border burden into an economic benefit;

(4) the basis of the respondent's aboriginal rights claims;

(5) the sovereignty objection;

(6) the effect of non-assertion of aspects of the respondent's potential claim;

(7) the real substance of the Mohawk position;

(8) the *legal* basis of the respondent's claim, including relevant distinctions between aboriginal and treaty rights;

(9) the limitation of "sovereign incompatibility";

(10) the alleged incompatibility between the aboriginal right as disclosed by the evidence and Canadian sovereignty;

(11) implications for internal aboriginal self-government.

76 The importance of the Crown's argument is that even if the respondent's claim could be said to be distinctive and integral to Mohawk culture, it would still not give rise to an aboriginal right. The Crown says it fails the basic requirement of compatibility with the sovereignty of the legal regimes that came afterwards. The question also arises, as noted, whether acceptance of it would advance or undermine the s. 35(1) objective of reconciliation.

1. Strategic Location of Akwesasne

77 Akwesasne ("the place where the partridge dwells or drums") consists of a string of islands about 130 kilometres long that stretches from east of Prescott, Ontario to near Valleyfield, Quebec. It is home to 12 to 13 thousand people, approximately two-thirds of whom live in Canada. It lies at the jurisdictional epicentre of the St. Lawrence River. Not only do the islands straddle the Ontario-Quebec border in Canada, but they are bisected by the international boundary that divides the St. Lawrence River. While the respondent conceives of Akwesasne as part of the Mohawk homelands, which itself constitutes one of the elements of the Iroquois Confederacy ("Haudenosaunee" or "People of the Longhouse") that formerly extended over large tracts of eastern Canada and northern New York State, the territory of Akwesasne is also parcelled out among five different governments in Canada, Quebec, Ontario, the United States and New York State. Mohawk institutions are similarly divided territorially among the Mohawk Council of Akwesasne, the St. Regis Tribal Council and the Mohawk Nation Council of Chiefs. The resulting boundary problems complicate the everyday existence of the Mohawks. As the respondent stated in his evidence:

> We did not ask that this International Boundary line separate our community in half. We certainly didn't ask for the New York State border to be placed in our territory. We certainly didn't ask that our other half be separated by Quebec and Ontario.
>
> It is a reality that we find ourselves in. We admit very easily that it is a very difficult and unique situation to be in....
>
> We wish to change that and by exercising our aboriginal rights we have to modernize a lot of what we mean by what our rights are and how we execute them.

78 Akwesasne people routinely pass back and forth across the international boundary several times a day. Supplies from the mainland encounter customs problems. In 1991, the

Canadian government sought to reduce the tax burden on residents by the *Akwesasne Residents Remission Order*, SOR/91-412, under the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.).

79 I accept that this crisscrossing of borders through the Mohawk community goes beyond mere inconvenience and does constitute a significant burden on everyday living. It is, of course, a burden to border communities everywhere. Jurisdictional patchworks, and their ability to complicate one's existence, are not special to aboriginal communities. Elsewhere in Quebec, there are similar difficulties. In Estcourt, the international boundary runs through the living-room of the Béchard family. In Stanhope, Quebec, the billiard room of the Dundee Line Hotel is neatly bifurcated by the boundary with New York State: National Film Board, *Between Friends/Entre Amis* (1976), at pp. 213, 246-47.

80 Having said that, the purpose of s. 35(1) of the *Constitution Act, 1982* is to reconcile "the pre-existence of aboriginal societies with the sovereignty of the Crown" (*Van der Peet*, *supra*, at para. 31). In this respect, the respondent argued with some passion in the witness box that the jurisdictional divisions carry deeper meaning for the Mohawks of Akwesasne because they represent the intrusion of non-aboriginal governing institutions in the everyday life of Akwesasne and their relations with other members of the Haudenosaunee (Iroquois Confederacy). The border complexities are a constant reminder to the Mohawks of their frustration and inability to control the destiny of their own communities.

81 There is some international support for special recognition of the plight of indigenous peoples in this respect. The *Draft United Nations declaration on the rights of indigenous peoples*, adopted by the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities by its resolution 1994/45, August 26, 1994, provides in Article 35 that:

> Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders.

82 Similarly, *Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*, adopted by the General Conference of the International Labour Organisation, June 27, 1989, provides in Article 32:

> Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

83 Comparable language is found in the *Draft of the Inter-American Declaration on the Rights of Indigenous Peoples*, approved by the Inter-American Commission on Human Rights on September 18, 1995, although it also provides specifically in Article 24 that:

> Nothing in this instrument shall be construed as granting any rights to ignore boundaries between States.

84 Canada has taken various concrete steps to try to minimize the disruption of Akwesasne created by the international boundary. These measures, according to the respondent, fall well short of recognizing Mohawk entitlement.

2. <u>The Respondent's Border Challenge</u>

85 With much publicity and notice to the Canadian government, the respondent accompanied by Mohawk supporters performed a symbolic border crossing on March 22, 1988. He brought with him into Canada one washing machine, 20 Bibles, 10 blankets, used clothing, one case of lubricating motor oil, 10 loaves of bread, two pounds of butter, four gallons

of whole milk, six bags of cookies and 12 cans of soup. The box of motor oil remained on the Akwesasne reserve. Everything else went to another Mohawk community in Canada, Tyendinaga, west of Kingston, Ontario, in the Bay of Quinte area.

86 The respondent submitted to the usual border procedures but refused to pay duty. Customs officers let him enter Canada with the goods but a year later, on September 15, 1989, he was served with a Notice of Ascertained Forfeiture of the goods under the *Customs Act* and a claim of $361.64. Having unsuccessfully challenged the decision under s. 131 of the *Customs Act*, the respondent commenced the present declaratory action.

87 The respondent contended that the Mohawks of Akwesasne are entitled to purchase goods on the U.S. side of the boundary and move those goods into Canada without payment of customs dues or other levies, including GST, for personal consumption, commercial trade at Akwesasne, or for trade with other First Nations in Canada. (A claim by Akwesasne Mohawks from St. Regis to carry goods duty free into the United States was rejected in *United States v. Garrow*, 88 F.2d 318 (C.C.P.A. 1938).)

88 With respect to commercial trade at Akwesasne, the respondent's evidence was that the case of motor oil brought across the border without payment of duty was placed for resale in Jock's Store, a general store located on the Canadian side of Akwesasne, but open to natives and passing non-native motorists alike. Non-aboriginal purchasers, likely minimal in number, may therefore obtain the benefit of duty-free prices.

89 With respect to trade off the reserve, the respondent said that the bulk of the symbolic importation was delivered to the Tyendinaga Band which had apparently contributed money to finance the purchases in the first place. Further, the respondent described ongoing negotiation of “an extensive trade and commerce agreement” between Akwesasne and the

Ojibway/Cree First Nations with whom the respondent says there was a historic trading relationship. The respondent says the importation was at a "non-commercial level", i.e., a small-scale transaction typical of a barter economy. The issue of larger "commercial scale" trade is to be addressed, it seems, by another court on another occasion.

3. The Mohawk Strategy to Turn the Border Burden into an Economic Benefit

90 Understandably, the respondent and the other Mohawk people are looking for opportunities not only to diminish the border disruption in their lives, but to reunite a community divided by boundaries that are not of Mohawk making, and to turn the solution of these complexities to their collective economic advantage.

91 There was likely little economic profit in moving goods from one side of the Akwesasne community to the other prior to creation of the international boundary in 1783, apart from meeting the needs of everyday living. There is real profit now only because the international boundary runs through it. The policies of the Canadian government have attributed a financial significance to what is otherwise an arbitrary line drawn on a map.

92 It is obvious that the "collective advantage" for the Mohawk community of duty-free imports into Canada would not be derived from a continuation of the aboriginal way of life, but is a direct artifact of the financial and tariff arrangements of the non-aboriginal Canadian government. While the respondent argued that the Court need not concern itself in the appeal with other cross-border First Nation communities in Canada, the logic of the Mohawk position would apply equally to any First Nation with a proven history of trade whose homeland in Canada straddles the international boundary.

93 The respondent, it should be noted, dissociates the present claim from the smuggling problems at Akwesasne which he points out have brought much grief to his community:

> Our people in Akwesasne have shown that they are against smuggling; they have co-operated with police, and our own Mohawk police have made a number of drug busts. Cigarettes are perhaps the least of our worries. Drugs, liquor, and automatic weapons, all of which are harmful to our people, have been brought into the territory in great quantities. Our people in our community have said that this is wrong under our laws, whether a border exists or not. Their view is that those native people who abuse our right to transport such property within our territory free of taxes and duties are opportunists. They are risking injury to the rights of all our people for their own immediate profit. Neither the community nor the Iroquois Confederacy supports smuggling.
>
> (Exhibit D-13. Grand Chief Michael Mitchell, "An Unbroken Assertion of Sovereignty", in B. Richardson, ed., *Drumbeat: Anger and Renewal in Indian Country* (1980), 105, at p. 130)

94 The Attorney General for New Brunswick argues that the claimed aboriginal right really amounts to no more than an aboriginal cross-border link to facilitate trade in non-aboriginal goods between non-aboriginal communities. There was, on the evidence, nothing to prevent the Tyendinaga Mohawks from re-selling the goods to non-natives. This concern was not alleviated by counsel for the Assembly of First Nations who argued that mobility rights and free movement of goods must be considered separately, because goods could pass the boundary with or without people. The use of Purolator and Federal Express to send goods back and forth across the border is rather remote from the original concept of permitting the Mohawks to "live as their forefathers had done for centuries" (Judson J. in *Calder*, *supra*, at p. 328).

95 The modernization and increased economic value of a claim is not necessarily fatal to its existence. Drivers of economic value are different today than they were in the past. A "frozen rights" theory has been rejected by the courts as incompatible with the purpose of s. 35(1): *Sparrow*, *supra*, at p. 1093. Aboriginal rights are capable of growth and evolution:

"s. 35(1) is a solemn commitment that must be given meaningful content" (*Sparrow*, *supra*, at p. 1108).

4. The Basis of the Respondent's Aboriginal Rights Claim

96 An aboriginal right must be derived from pre-contact activity that was an element of a practice, custom or tradition integral to the aboriginal community's distinctive culture. The first step in resolving such a claim includes an assessment of the precise nature of the claim being made, "taking into account such factors as the nature of the action said to have been taken pursuant to an aboriginal right, the government regulation argued to infringe the right, and the tradition, custom or practice relied upon to establish the right" (*Van der Peet*, *supra*, at para. 53, and *N.T.C. Smokehouse Ltd.*, *supra*, at para. 16).

97 The Chief Justice addresses the factual evidence relevant to this analysis in her reasons. For my purposes, however, it is necessary to enlarge upon some of the matters that touch on the issue of sovereignty. The trial judge has provided a meticulous and comprehensive history of the events relevant to the appeal.

98 While the traditional Mohawk homelands were in the Mohawk Valley (near Albany, New York State), the Mohawk people ranged throughout a territory that reached north to the valley of the St. Lawrence River. The Chief Justice points out that "[W]e may assume they travelled with goods to sustain themselves" (para. 41), but points to the scarcity of the evidence that what they carried included goods earmarked for north-south trade (para. 51). It is, however, accepted that the Mohawks travelled to the St. Lawrence River valley. The trial judge found that Akwesasne itself was probably not established as a permanent settlement until "some time between 1747 and 1755" (p. 14) apparently in conjunction with a Jesuit mission. This was about 140 years after the Mohawk's first contact with the Europeans, which the trial

judge, at p. 16, held was 1609. The first contact, according to the trial judge, was a battle between the French and the Mohawks on Lake Champlain. No claim to aboriginal title is suggested by the respondent in these proceedings, and it is clear that specific aboriginal rights can exist independently of claims to aboriginal title (*Van der Peet*, *supra*, at para. 74).

(i) *Prior to Contact*

99 Prior to European contact, the upper St. Lawrence River Valley was "a battleground" (*Adams*, *supra*, at p. 126) between the Mohawks coming up from the south and the Hurons and Algonquin-speaking peoples who had earlier established themselves in the area. The trial judge quoted at p. 21 the evidence of Dr. Alexander von Gernet, called by the Crown, who acknowledged that:

> What I can say is that in the course of their raiding expeditions along the St. Lawrence while they were engaged in warfare with their northern enemies, they would almost certainly have had occasion to travel along this route, presumably stop, victualize their armies, provide their armies with food. [Emphasis added by trial judge.]

To which the trial judge added, at p. 35:

> [W]hile one might be obliged to fish in order to victualize an army, it is difficult to see how an army would engage in trade with their enemies while in pursuit of them.

and further pointed out at p. 44:

> Whatever goods they obtained either by raiding or by hunting and fishing could be freely brought back across the [then non-existent] border.

100 Territorial boundaries between the warring First Nations ebbed and flowed. The trial judge stated at pp. 21-22 his general conclusion from the historical evidence as follows:

> Regardless of the conflicting characterization of the Mohawks' use and control of the territory in the St. Lawrence Valley, in my view, the Mohawks whose homelands were in the Mohawk Valley prior to the arrival of the Europeans, regularly exploited the area in the St. Lawrence Valley which is now part of Canadian territory. It is not clear from the evidence whether the Mohawks consistently used the area as a hunting and fishing territory or whether the area was mainly a battle and raiding ground with other First Nations. However, it is clear that the territory around the St. Lawrence River, in what is now Canada, was regularly travelled by the Mohawks.

101 The trial judge's assessment of the nature of the Mohawk's progress through the territory in pre-contact times was based in part on the evidence of the respondent's expert, Professor Charles Johnston. The trial judge reproduced the following extract from Professor Johnston's evidence (at p. 27):

> Well, let's put it this way, trading and making war came as easily to the Iroquois as living and breathing. When they weren't making war, they were usually engaged in trading.... War, of course, stemmed out of trade and trade came out of war.

102 It is this evidence of pre-contact activity that defines the basis of an aboriginal right. The picture that emerges is one of a militarily powerful confederacy that spread to and along the St. Lawrence River Valley displacing the earlier aboriginal inhabitants by force of arms. They traded with their friends to the east and west of the Mohawk Valley, as the Chief Justice acknowledges. They fought with their enemies to the north. The trial judge cautioned at p. 35 against "concentrat[ing] too much on raiding activities". The point, nevertheless, is that in the pre-contact era, the Mohawks were (and acted as) a fully autonomous people within the Iroquois Confederacy. The principle object of this litigation is to reassert that autonomy in relation to the present international border between Canada and the United States to the greatest extent permitted by law.

103 While none of the boundaries between First Nation Territories in pre-contact times corresponded with the present international boundary at Akwesasne, such boundaries existed, and the trial judge found that under traditional practices and customs, they were respected by the Mohawks in times of peace.

(ii) *Evidence of Post-Contact Activity*

104 While evidence of post-contact activity cannot enlarge the factual basis of the aboriginal right claim, it is said to be relevant in this case because of the alleged incompatibility of the respondent's claim with the later assertion of non-Mohawk sovereignty.

105 Professor Charles Johnston emphasized that the arrival of the Europeans created further turmoil (at p. 27):

> The French arrested the Dutch first and then the English established their control in the Hudson and Mohawk valleys and the French do the same thing on the St. Lawrence. So you have these competing systems. The point is the Mohawks are right in the middle.

106 The evidence showed that post-contact Mohawks from the Mohawk Valley began migrating north to establish permanent communities on the St. Lawrence River. The trial judge noted, "[t]hey massed an invasion force in the late 1640s and early 1650s which led to the dispersion of the aboriginal peoples of Ontario" (p. 35).

107 The Hurons and Algonquins allied themselves with the French, and most of the Iroquois with the English. The Mohawks in the St. Lawrence River Valley had divided loyalties. The communities closest to Montreal, at least, came to be allies of the French. The trial judge noted that some Mohawks "moved north because they believed that an alliance with the French

was preferable to neutrality or an alliance with the English" (p. 22). While colonial law under the French regime treated aboriginal rights differently than the British regime, our Court has affirmed that "the intervention of French sovereignty [did not] negate the potential existence of aboriginal rights within the former boundaries of New France under s. 35(1)": (*R. v. Côté*, [1996] 3 S.C.R. 139, at para. 51). The fighting between the French and the English and their respective First Nation allies continued until the fall of New France in 1759-60.

108 The legal effect of the resulting Treaty of Paris 1763 was described by the Judicial Committee of the Privy Council in *Attorney General for Canada v. Cain*, [1906] A.C. 542, at pp. 545-46:

> In 1763 Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any time been held or acquired by the Crown of France, were ceded to Great Britain: *St. Catherine's Milling and Lumber Co. v. Reg.* (1888), 14 App. Cas. 46, at p. 53. Upon that event the Crown of England became possessed of all legislative and executive powers within the country so ceded to it, and, save so far as it has since parted with these powers by legislation, royal proclamation, or voluntary grant, it is still possessed of them. One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: Vattel, Law of Nations, book 1, s. 231; book 2, s. 125.

109 The "aliens" in the *Cain* case were citizens of the United States. For our purposes, it must be kept in mind that the respondent does not assert here mobility rights granted by France, Britain or Canada. He is, of course, entitled to full rights as a Canadian citizen. But in this particular case, he is not asserting those rights. He is asserting mobility rights as a "citizen of Haudenosaunee" that are derived from Mohawk mobility that pre-dated all of those regimes.

110 Within two decades after the fall of New France, the American Revolution swept northwards. Troops of General George Washington on manoeuvres in New York State

"destroyed the cornfields, burnt the Longhouses and basically wiped out as many of the Iroquois families that [*sic*] still existed", thereby reinforcing the northern migration of some of the Mohawks to British territory. The boundary that cuts through Akwesasne did not come into existence until the conclusion of the American War of Independence by a subsequent Treaty of Paris in 1783.

5. The Sovereignty Objection

111 The unusual aspect of this case is that not only the value but the very *purpose* of the claimed trading/mobility right depends on a boundary that is itself an expression of non-aboriginal sovereignties on the North American continent.

112 The respondent is understandably proud of the Mohawk heritage. The Iroquois Confederacy is thought to have been formed around 1450. The evidence accepted by the trial judge at p. 26 was that at their height

> the Mohawks had achieved for themselves the most remarkable civil organization in the New World excepting only Mexico and Peru.

The respondent's 17th century ancestors were no doubt unaware that some of the Kings in distant Europe were laying claim to sovereignty over Mohawk territory. As Marshall C.J. of the United States Supreme Court observed in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), at p. 543:

> It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied....

113 Nevertheless, this is what happened. From the aboriginal perspective, moreover, those early claims to European "dominion" grew to reality in the decades that followed. Counsel for the respondent does not dispute Canadian sovereignty. He seeks Mohawk autonomy within the broader framework of Canadian sovereignty.

114 The common law concept of aboriginal rights is built around the doctrine of sovereign succession in British colonial law. The framers of the *Constitution Act, 1982* undoubtedly expected the courts to have regard in their interpretation of s. 35(1) to the common law concept. This point was made by McLachlin J. (as she then was) (dissenting in the result) in *Van der Peet*, *supra*, at paras. 227 and 262:

> The issue of what constitutes an aboriginal right must, in my view, be answered by looking at what the law has historically accepted as fundamental aboriginal rights.
>
> ...
>
> Given the complexity and sensitivity of the issue of defining hitherto undefined aboriginal rights, the pragmatic approach typically adopted by the common law – reasoning from the experience of decided cases and recognized rights – has much to recommend it. [Emphasis added.]

115 I agree. The *Constitution Act, 1982* ushered in a new chapter but it did not start a new book. Within the framework of s. 35(1) regard is to be had to the common law ("what the law has historically accepted") to enable a court to determine what constitutes an aboriginal right.

116 The respondent positions his claim as follows. He makes a point of travelling back and forth across the international border producing his Haudenosaunee passport issued at the capital of the Mohawk Confederacy at Onandaga, New York State. As he explained in testimony:

> [The passport] is also to me an expression of recognition, not only by my own Iroquois Confederacy and our nation's capital, Onondaga, that I carry my own passport, but it is also a recognition of Canada and the United States of who my citizenship lies with.

This evidence with respect to the Haudenosaunee passport was said by respondent's counsel to go "to the issue of the basis of the rights that the [respondent] is claiming in this case".

117 In assessing aboriginal claims, courts are required to take into account "the perspective of the aboriginal people themselves" (*Sparrow*, *supra*, at p. 1112; *Van der Peet*, *supra*, at para. 49). From the respondent's perspective, the aboriginal right flows from Mohawk sovereignty. In Exhibit D-13 he writes, at p. 107:

> Akwesasne is a Mohawk community that has existed from time immemorial, with its own laws and government, and we have consistently been determined to maintain the sovereignty of our Nation.

To which he adds at p. 135:

> I think of myself as a community leader, but my national leaders are the leaders of the Mohawk Nation. I am a citizen of Haudenosaunee; and if anyone says I am also a Canadian citizen, the most I can agree is that we have certain benefits in Canada, by treaty, the same benefits as we have in the United States.

118 Fundamentally, the respondent views his aboriginal rights as a shield against non-aboriginal laws, including what he sees as the imposition of a border that "wasn't meant for [the] Kanienkehaka or the Mohawk Nation or any of the Six Nations". He thus testified at trial:

> Even though my grandfather didn't speak any English he was able to explain to me, as other elders have, that the promises made by the English to the Haudenosaunee that they would continue to recognize our nation as free and independent peoples. At one meeting they would recite it, what exactly were those words and the gist that we had to understand it.

> So, when our people in Akwesasne today say this border was not intended for us, they have an understanding in historical terms of the interpretation of those promises. In our language and the way it is passed down, the line of what is now known as the International Border belongs to somebody else. It wasn't meant for Kanienkehaka or the Mohawk Nation or any of the Six Nations. We understand that much.

119 In this testimony the respondent refers to "promises made by the English to the Haudenosaunee", but his claim to base a trading/mobility right and tax exemptions on an existing treaty right was rejected by the trial judge and has not been appealed to this Court. His contention here is that whether or not the British made a treaty promise to that effect, the Mohawks were in fact free under the Mohawk legal regime "to pass and repass ... across what is now the Canada-United States boundary" with goods for trade and this freedom should now receive s. 35 protection. The claim to trade and mobility across international boundaries as a citizen of Haudenosaunee engages the sovereignty issue.

6. Non-Assertion of Aspects of the Respondent's Claim

120 The Trial Division declaration, as stated, recognized an aboriginal right "to pass and repass freely across what is now the Canada-United States boundary including the right to bring goods into Canada for personal and community use, including for trade with other First Nations, without having to pay any duty or taxes whatsoever to any Canadian Government or authority" (p. 4, emphasis added). The word "including" was subsequently deleted in an effort to shrink the scope of the aboriginal right asserted in *this* particular proceeding and thereby to present a smaller target to the appellant's objection. The Federal Court of Appeal added site-specific limitations to the claimed right. In the end, the declaration issued by the Federal Court of Appeal read as follows (at para. 56):

> [T]he 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.

121 In his opening address at trial, counsel for the respondent also made it clear that no claim is made in *this* action to import prohibited or controlled goods:

> So that it will be perfectly clear from the outset of the trial, my lord, Plaintiff states immediately and unequivocally that he is not here pleading (and that this case is not about) any right to bring across the Canada/U.S. border any form of firearm or any form of restricted or prohibited drug, alcohol, plants or the like. Nor do the facts in this case raise the issue of importation into Canada of commercial goods for the primary purpose of competing in the commercial mainstream in Canada. Plaintiff is not, my lord, seeking any judicial determination of that issue in this case. [Emphasis added.]

122 When asked by the trial judge whether the claim included "commercial trade" (as defined, e.g., in *Gladstone*, *supra*, at para. 57), he said not "at this time".

123 The respondent takes the position that aboriginal peoples do not have to claim the full extent of their entitlement. He reiterated that the purpose of s. 35 was to bring about a reconciliation between Canadian society and its aboriginal communities (*Van der Peet*, *supra*), and characterized the respondent's willingness to exclude from his claim a right to bring across the border prohibited goods (e.g., firearms and illegal drugs) and controlled goods (e.g., alcohol, though not tobacco) as a reasonable concession in pursuit of such a reconciliation. However, in considering whether the evidence gives rise to the claimed right, it is necessary to look at *all* of the evidence to determine whether, in its totality, it establishes not only a pre-contact practice that was *capable* of being carried forward under the new European-based legal orders but a practice that is compatible with Canadian sovereignty.

124 The analysis of the courts below in support of the respondent's position, if accepted, would suggest that in future cases other Mohawks would argue with some force that the historical practice of the free movement of people and goods having been established in this case, any other restrictions on the movement of goods, people and perhaps capital would have to be justified under the *Sparrow* doctrine.

7. The Substance of the Claim Disclosed by the Evidence

125 For the reasons already mentioned, the respondent's claim, despite the concessions made in argument, is not just about physical movement of people or goods in and about Akwesasne. It is about pushing the envelope of Mohawk autonomy within the Canadian Constitution. It is about the Mohawks' aspiration to live as if the international boundary did not exist. Whatever financial benefit accrues from the ability to move goods across the border without payment of duty is clearly incidental to this larger vision.

126 It is true that in *R. v. Pamajewon*, [1996] 2 S.C.R. 821, the Court warned, at para. 27, against casting the Court's aboriginal rights inquiry "at a level of excessive generality". Yet when the claim, as here, can only properly be construed as an international trading and mobility right, it has to be addressed at that level.

127 In the constitutional framework envisaged by the respondent, the claimed aboriginal right is simply a manifestation of the more fundamental relationship between the aboriginal and non-aboriginal people. In the Mohawk tradition this relationship is memorialized by the "two-row" wampum, referred to by the respondent in Exhibit D-13, at pp. 109-110, and in his trial evidence (trans., vol. 2, at pp. 191-92), and described in the Haudenosaunee presentation to the Parliamentary Special Committee on Indian Self-Government in 1984 as follows:

> When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect.
>
> These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.
>
> (*Indian Self-Government in Canada: Report of the Special Committee* (1984), back cover)

128 Thus, in the "two-row" wampum there are two parallel paths. In one path travels the aboriginal canoe. In the other path travels the European ship. The two vessels co-exist but they never touch. Each is the sovereign of its own destiny.

129 The modern embodiment of the "two-row" wampum concept, modified to reflect some of the realities of a modern state, is the idea of a "merged" or "shared" sovereignty. "Merged sovereignty" asserts that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became merger partners. The final *Report of the Royal Commission on Aboriginal Peoples*, vol. 2 (*Restructuring the Relationship* (1996)), at p. 24, says that "Aboriginal governments give the constitution [of Canada] its deepest and most resilient roots in the Canadian soil." This updated concept of Crown sovereignty is of importance. Whereas historically the Crown may have been portrayed as an entity across the seas with which aboriginal people could scarcely be expected to identify, this was no longer the case in 1982 when the s. 35(1) reconciliation process was established. The Constitution was patriated and all aspects of our sovereignty became firmly located within our borders. If the principle of "merged sovereignty" articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians

together form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing aboriginal and treaty rights must be reconciled.

130 The final *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, goes on to describe "shared" sovereignty at pp. 240-41 as follows:

> Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government.

On this view, to return to the nautical metaphor of the "two-row" wampum, "merged" sovereignty is envisaged as a single vessel (or ship of state) composed of the historic elements of wood, iron and canvas. The vessel's components pull together as a harmonious whole, but the wood remains wood, the iron remains iron and the canvas remains canvas. Non-aboriginal leaders, including Sir Wilfrid Laurier, have used similar metaphors. It represents, in a phrase, partnership without assimilation.

131 The s. 35(1) issue arising out of all this is signalled in the style of cause. The respondent sued as "GRAND CHIEF MICHAEL MITCHELL also known as KANENTAKERON". He lives with a foot simultaneously in two cultural communities, each with its own framework of legal rights and responsibilities. As Kanentakeron he describes learning from his grandfather the spiritual practices of the People of the Longhouse, whose roots in North America go back perhaps 10,000 years. Yet the name Michael Mitchell announces that he is also part of modern Canada who watches television from time to time and went to

high school in Cornwall. As much as anyone else in this country, he is a part of our collective sovereignty. He writes in Exhibit D-13, at p. 135:

> If anyone thinks that Mohawks are anti-Canadian or American, then we kindly remind you that First Nations in North America, in ratio to other nationalities, sent more soldiers to the First and Second World Wars. Since we usually wound up on the front lines, many of our people didn't make it home.

132 The dual aspect reflected in the style of cause of the respondent's action also finds its parallel in the Court's treatment of the rights of aboriginal peoples. What is "integral to the aboriginal community's distinctive culture" (*Van der Peet*, at para. 53) is constitutionally protected. In *other* respects however, the respondent and other aboriginal people live and contribute as part of our national diversity. So too in the Court's definition of aboriginal rights. They find their source in an earlier age, but they have not been frozen in time. They are, as has been said, rights not relics. They are projected into modern Canada where they are exercised as group rights in the 21st century by modern Canadians who wish to preserve and protect their aboriginal identity.

133 In the earlier years of the century the federal government occasionally argued that Parliament's jurisdiction under s. 91(24) of the *Constitution Act, 1867* ("Indians, and Lands reserved for the Indians") was plenary. Indians were said to be federal people whose lives were wholly subject to federal "regulation". This was rejected by the courts, which ruled that while an aboriginal person could be characterized as an Indian for some purposes including language, culture and the exercise of traditional rights, he or she does not cease thereby to be a resident of a province or territory. For other purposes he or she must be recognized and treated as an ordinary member of Canadian society. In a decision handed down soon after the coming into force of the *Constitution Act, 1982*, *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, a tax case, Dickson J. (as he then was) wrote at p. 36, "Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities of other Canadian citizens". See also *Natural Parents v. Superintendent of Child Welfare*,

[1976] 2 S.C.R. 751, *per* Laskin C.J. at p. 763, and *R. v. Dick*, [1985] 2 S.C.R. 309, *per* Beetz J., at p. 326. In *Gladstone* (at para. 73) and again in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (at para. 165), Lamer C.J. repeats that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign" (emphasis added). The constitutional objective is reconciliation not mutual isolation.

134 The Royal Commission does not explain precisely how "shared sovereignty" is expected to work in practice, although it recognized as a critical issue how "60 to 80 historically based nations in Canada at present, comprising a thousand or so local Aboriginal communities" would "interact with the jurisdictions of the federal and provincial governments" in cases of operational conflict (final report, vol. 2, *supra*, at pp. 166 and 216). It also recognized the challenge aboriginal self-government poses to the orthodox view that constitutional powers in Canada are wholly and exhaustively distributed between the federal and provincial governments: see, e.g., *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571 (P.C.), at p. 581; P. W. Hogg and M. E. Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995), 74 *Can. Bar Rev*. 187, at p. 192; this issue is presently before the courts in British Columbia in *Campbell v. British Columbia (Attorney General)* (2000), 79 B.C.L.R. (3d) 122 (S.C.). There are significant economic and funding issues. Some aboriginal people who live off reserves, particularly in urban areas, have serious concerns about how self-government would affect them, as discussed in part in *Corbiere v. Canada*, [1999] 2 S.C.R. 203. With these difficulties in mind perhaps, the Royal Commission considered it to be "essential that any steps toward self-government be initiated by the aboriginal group in question and "respond to needs identified by the members" (*Partners in Confederation: Peoples, Self-Government and the Constitution* (1993), at p. 41). It rejected the 'one size fits all' approach to First Nations' self-governing institutions in favour of a negotiated treaty model. The objective, succinctly put, is to create

sufficient "constitutional space for aboriginal peoples to be aboriginal": D. Greschner, "Aboriginal Women, The Constitution and Criminal Justice" (1992), *U.B.C. L. Rev. (Sp. Ed.)* 338, at p. 342. See also J. Borrows, "Uncertain Citizens: Aboriginal Peoples and the Supreme Court" (2001), 80 *Can. Bar Rev. (Sp. Ed.)* 15, at p. 34. The Royal Commission Final Report, vol. 2, states at p. 214 that:

> Section 35 does not warrant a claim to unlimited governmental powers or to complete sovereignty, such as independent states are commonly thought to possess. As with the federal and provincial governments, Aboriginal governments operate within a sphere of sovereignty defined by the constitution. In short, the Aboriginal right of self-government in section 35(1) involves circumscribed rather than unlimited powers.

135 It is unnecessary, for present purposes, to come to any conclusion about these assertions. What is significant is that the Royal Commission itself sees aboriginal peoples as full participants with non-aboriginal peoples in a shared Canadian sovereignty. Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are part of it.

136 With this background I return to the point that the respondent does not base his mobility rights in this test case as a Canadian citizen. His counsel acknowledges that s. 35(1) itself does not purport to create rights. It affirms only *existing* rights. The respondent's international trading and mobility right is put forward in his evidence as a right incidental to his status as a citizen of Haudenosaunee, with its capital at Onondaga, near Syracuse, New York State. He explained in his testimony:

> Q. You made particular reference, Chief Mitchell, to going to Onondaga. What is the significance of Onondaga?
>
> A. In the Iroquois world as we understand it Onondaga is the capital of the Confederacy, much like Ottawa is the capital of Canada, Washington is the capital of the United States, Onondaga is the capital of the Haudenosaunee, of the Six Nations.

...

> Q. Chief Mitchell, do you consider yourself a citizen of the Confederacy?
>
> A. I am a citizen of the Haudenosaunee, the Iroquois Confederacy....
>
> Each of the member nations of the Haudenosaunee if they wish to apply for a passport they go to Onondaga. The passport that we use to travel, we use our own Iroquois Confederacy passport.

137 The respondent's claim thus presents two defining elements. He asserts a trading and mobility right across the international boundary and he attaches this right to his current citizenship not of Canada but of the Haudenosaunee Confederacy with its capital in Onondaga, New York State.

8. The Legal Basis of the Respondent's Claim

138 The respondent initially asserted both a treaty right and an aboriginal right but the conceptual distinction between these two sources of entitlement is important. A treaty right is an affirmative promise by the Crown which will be interpreted generously and enforced in a way that upholds the honour of the Crown: *R. v. Taylor* (1981), 62 C.C.C. (2d) 227; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Marshall*, [1999] 3 S.C.R. 456.

139 The trial court acknowledged that if duty-free provisions had been incorporated into a treaty with the Mohawks, the promise would be enforceable as a s. 35 treaty right. A treaty right is itself an expression of Crown sovereignty.

140 In the case of aboriginal rights, there is no historical event comparable to the treaty-making process in which the Crown negotiated the right or obligation sought to be enforced. The respondent's claim is rooted in practices which he says long preceded the Mohawks' first contact with Europeans in 1609.

141 I return to the comment of McLachlin J., dissenting in the result, in *Van der Peet* at para. 227 that "the issue of what constitutes an aboriginal right must, in my view, be answered by looking at what the law has historically accepted as fundamental aboriginal rights". There was a presumption under British colonial law that the Crown intended to respect the pre-existing customs of the inhabitants that were not deemed to be unconscionable (e.g., W. Blackstone in *Commentaries on the Laws of England* (4th ed. 1770), Book I, at p. 106, gave the example, now discredited, of "infidel" laws) or incompatible with the new sovereignty: *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045 (K.B.), at pp. 1047-48; *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.), at paras. 1021-24. Professor B. Slattery formulated the traditional principle as follows:

> When the Crown gained sovereignty over an American territory, colonial law dictated that the local customs of the native peoples would presumptively continue in force and be recognizable in the courts, except insofar as they were unconscionable or incompatible with the Crown's assertion of sovereignty. [Emphasis added.]
>
> ("Understanding Aboriginal Rights" (1987), 66 *Can. Bar. Rev.* 727, at p. 738)

142 In a more recent paper published as "Making Sense of Aboriginal and Treaty Rights" (2000), 79 *Can. Bar. Rev. (Sp. Ed.)* 196, Professor Slattery, at p. 201, largely reiterates his earlier proposition although he now substitutes the phrase "Crown suzerainty" for "Crown sovereignty". The substitution signals a shift in emphasis from sovereignty over individuals to sovereignty over "autonomous" groups, which is perhaps related to arguments in support of aboriginal self-government.

143 Since *Calder, supra*, the courts have extended recognition beyond pre-existing "rights" to practices, customs or traditions integral to the aboriginal community's distinctive culture (*Van der Peet, supra*, at para. 53). The aboriginal rights question, as McLachlin J. put

it, dissenting in the result, in *Van der Peet*, at para. 248, is traditionally "[w]hat laws and customs held sway before superimposition of European laws and customs[?]"

144 Reference has already been made to the fact that one of several sources of the concept of aboriginal rights, now significantly modified by the more generous principles of constitutional interpretation, is traditional British colonial law. Many of the cases decided by the Judicial Committee of the Privy Council were concerned with rights of property created under a former regime. In *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399, at p. 407, it was confirmed that "A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners" (emphasis added). More recently, Lord Denning, speaking for the Privy Council in *Oyekan v. Adele*, [1957] 2 All E.R. 785, at p. 788, said: "In inquiring ... what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected" (emphasis added). As with the modern law of aboriginal rights, the law of sovereign succession was intended to reconcile the interests of the local inhabitants across the empire to a change in sovereignty.

145 The concept of a *presumption* was endorsed by Hall J. in *Calder*, *supra*, at p. 402:

> The appellants rely on the presumption that the British Crown intended to respect native rights; therefore, when the Nishqa people came under British sovereignty ... they were entitled to assert, as a legal right, their Indian title. [Emphasis added.]

146 It was subsequently affirmed that aboriginal rights could exist independently of "Indian title" (*Van der Peet*, *supra*, at para. 74; *Adams*, *supra*, at para. 26). Further, in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, Dickson J. emphasized the "legal" character of the resulting aboriginal right: "in *Calder* ... this Court recognized aboriginal title as a legal right

derived from the Indians' historic occupation and possession of their tribal lands" (p. 376, emphasis added), and then went on to state the proposition that the Indians were "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion" (p. 378, emphasis added; emphasis in original deleted).

147 The High Court of Australia has reached a similar conclusion with respect to the legal regime governing Australian aboriginal people: *Mabo v. Queensland* (1992), 175 C.L.R. 1, *per* Brennan J., for the majority, at pp. 55-57, and Toohey J., at p. 184. See also *Wik Peoples v. Queensland* (1996), 187 C.L.R. 1.

148 I am far from suggesting that the key to s. 35(1) reconciliation is to be found in the legal archives of the British Empire. The root of the respondent's argument nevertheless is that the Mohawks of Akwesasne acquired under the legal regimes of 18th century North America, a positive legal right as a group to continue to come and go across any subsequent international border dividing their traditional homelands with whatever goods they wished, just as they had in pre-contact times. In other words, Mohawk autonomy in this respect was continued but not as a mere custom or practice. It emerged in the new European-based constitutional order as a *legal* trading and mobility *right*. By s. 35(1) of the *Constitution Act, 1982*, it became a constitutionally protected right. That is the respondent's argument.

9. The Limitation of "Sovereign Incompatibility"

149 Care must be taken not to carry forward doctrines of British colonial law into the interpretation of s. 35(1) without careful reflection. In *R. v. Eninew* (1984), 12 C.C.C. (3d) 365 (Sask. C.A.) and *R. v. Hare* (1985), 20 C.C.C. (3d) 1 (Ont. C.A.), for example, it was held by two provincial courts of appeal that s. 35(1) "recognized and affirmed" (and thus set in constitutional concrete) the traditional frailties of common law aboriginal rights, including their

vulnerability to unilateral extinguishment by governments. This was rejected in *Sparrow*, *supra*, where the Court construed s. 35(1) as affirming the promise of a new commitment by Canadians to resolve some of the ancient grievances that have exacerbated relations between aboriginal and non-aboriginal communities.

150 Yet the language of s. 35(1) cannot be construed as a wholesale repudiation of the common law. The subject matter of the constitutional provision is "existing" aboriginal and treaty rights and they are said to be "recognized and affirmed" not wholly cut loose from either their legal or historical origins. One of the defining characteristics of sovereign succession and therefore a limitation on the scope of aboriginal rights, as already discussed, was the notion of incompatibility with the new sovereignty. Such incompatibility seems to have been accepted, for example, as a limitation on the powers of aboriginal self-government in the 1993 working report of the Royal Commission on Aboriginal Peoples, *Partners in Confederation: Peoples, Self-Government and the Constitution*, *supra*, at p. 23:

> ... Aboriginal nations did not lose their inherent rights when they entered into a confederal relationship with the Crown. Rather, they retained their ancient constitutions so far as these were not inconsistent with the new relationship. [Emphasis added.]

151 Prior to *Calder*, *supra*, "sovereign incompatibility" was given excessive scope. The assertion of sovereign authority was confused with doctrines of feudal title to deny aboriginal peoples any interest at all in their traditional lands or even in activities related to the use of those lands. To acknowledge that the doctrine of sovereign incompatibility was sometimes given excessive scope in the past is not to deny that it has any scope at all, but it is a doctrine that must be applied with caution.

152 I take an illustration from the evidence in this case. The trial judge showed that pre-contact the Mohawks, as a military force, moved under their own command through what

is now parts of southern Ontario and southern Quebec. The evidence, taken as a whole, suggests that military values were "a defining feature of Mohawk [or Iroquois] culture", to use my colleague's expression at para. 54. Indeed, the Mohawk warrior tradition has its adherents to this day. As previously noted, the trial judge at p. 35 thought the Mohawks' military activities in the St. Lawrence River Valley probably got in the way of their trading activities:

> [I]t is difficult to see how an army would engage in trade with their enemies while in pursuit of them.

153 However, important as they may have been to the Mohawk identity as a people, it could not be said, in my view, that pre-contact warrior activities gave rise under successor regimes to a *legal right* under s. 35(1) to engage in military adventures on Canadian territory. Canadian sovereign authority has, as one of its inherent characteristics, a monopoly on the *lawful* use of military force within its territory. I do not accept that the Mohawks *could* acquire under s. 35(1) a legal right to deploy a military force in what is now Canada, as and when they choose to do so, even if the warrior tradition was to be considered a defining feature of pre-contact Mohawk society. Section 35(1) should not be interpreted to throw on the Crown the burden of demonstrating subsequent extinguishment by "clear and plain" measures (*Gladstone*, *supra*, at para. 31) of a "right" to organize a private army, or a requirement to justify such a limitation after 1982 under the *Sparrow* standard. This example, remote as it is from the particular claim advanced in this case, usefully illustrates the principled limitation flowing from sovereign incompatibility in the s. 35(1) analysis.

154 In my opinion, sovereign incompatibility continues to be an element in the s. 35(1) analysis, albeit a limitation that will be sparingly applied. For the most part, the protection of practices, traditions and customs that are distinctive to aboriginal cultures in Canada does not raise legitimate sovereignty issues at the definitional stage.

10. The Alleged Incompatibility Between the Aboriginal Right Disclosed by the Evidence and Canadian Sovereignty

155 I proceed to the next step keeping in mind that the respondent's claim must respond not only to the historical requirements that have traditionally preoccupied aboriginal law but also to the reconciliation objective that lies at the heart of the purposive interpretation of s. 35(1).

156 The assertion of British sovereignty to the Akwesasne area was certainly no later than the Treaty of Paris 1763. Boundaries at that time were considered to be of high importance:

> The Treaty of Paris produced the greatest rearrangement of boundaries in North America that had hitherto occurred. It is for this reason that the war that immediately preceded it is sometimes called the "War of the Boundary Lines".
>
> (L. Nicholson, *The Boundaries of the Canadian Confederation* (1979), at p. 19)

157 Prior to the American Revolution, as evidenced by the geographic scope of the *Royal Proclamation, 1763* (reproduced in R.S.C. 1985, App. II, No. 1), the claim of British sovereignty continued south to Florida and westwards beyond the Great Lakes (*Calder*, *supra*, at pp. 322-23). Movement from the Mohawk Valley to Akwesasne lay wholly within the British claim and did not cross an international boundary. The present international boundary, as earlier mentioned, was not settled until after the American Revolution under the subsequent Treaty of Paris 1783.

158 The question is whether the asserted legal right to the autonomous exercise of international trade and mobility was compatible with the new European (now Canadian) sovereignty and the reciprocal loss (or impairment) of Mohawk sovereignty.

159 In the resolution of this legal issue, as stated, we are addressing *legal* incompatibility as opposed to *factual* incompatibility. The latter emerged more slowly as assertions of sovereignty gave way to colonisation and progressive occupation of land. From the outset, however, frontiers were a fundamental expression or demarcation of sovereignty amongst First Nations as well as in the European conception (Nicholson, *supra*, at pp. 8-9), and indeed amongst and between Britain's North American colonies (J. Story, *Commentaries on the Constitution of the United States* (4th ed. 1873), vol. II, at pp. 463-64). Akwesasne is the point at which, since 1783, British (and later Canadian) sovereignty came face to face with the sovereignty of the United States.

160 Control over the mobility of persons and goods into one country is, and always has been, a fundamental attribute of sovereignty.

> It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries. For the general welfare of the nation the state is expected to perform this role. [Emphasis added.]
>
> (*R. v. Simmons*, [1988] 2 S.C.R. 495, *per* Dickson C.J., at p. 528)

See also *R. v. Jacques*, [1996] 3 S.C.R. 1075, *per* Gonthier J., at paras. 15 and 18; *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), at p. 279; and *United States v. Ramsey*, 431 U.S. 606 (1977). In other words, not only does authority over the border exist as an incident of sovereignty, the state is expected to exercise it in the public interest. The duty cannot be abdicated to the vagaries of an earlier regime whose sovereignty has been eclipsed (*Cain*, *supra*, at pp. 545-46).

161 The legal situation is further complicated by the fact, previously mentioned, that the respondent attributes his international trading and mobility right not to his status as a Canadian citizen but as a citizen of the Haudenosaunee (Iroquois Confederacy) based at Onondaga, New

York. Border conditions in the modern era are vastly different from those in the 18th century. Nevertheless, as stated, borders existed among nations, including First Nations. They were expressions of sovereign autonomy and then, as now, compelled observance.

162 The courts of the United States, being in this case the country of export, also view border controls as incidental to territorial sovereignty. In *Chue Chan Ping v. United States*, 130 U.S. 581 (1889), it was said by Field J., for the United States Supreme Court, at pp. 603-4:

> Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.

In *Ekiu v. United States*, 142 U.S. 651 (1892), at p. 659, the United States Supreme Court stated:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.

To the same effect is the holding of Gray J., for the court, in *Fong Yu Ting v. United States*, 149 U.S. 698 (1893), at p. 707.

163 Similar views were expressed by scholars writing before the Canada-United States border was ever established. E. de Vattel, whose treatise *The Law of Nations* was first published in 1758, said this:

> The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state. There is nothing

> in all this that does not flow from the rights of domain and sovereignty: every one is obliged to pay respect to the prohibition; and whoever dares to violate it, incurs the penalty decreed to render it effectual.
>
> (*The Law of Nations* (Chitty ed. 1834), book II at pp. 169-70)

To the same effect is Blackstone, *supra*, at p. 259:

> Upon exactly the same reason stands the prerogative of granting safe-conducts, without which by the law of nations no member of one society has a right to intrude into another.

In my view, therefore, the international trading/mobility right claimed by the respondent as a citizen of the Haudenosaunee (Iroquois) Confederacy is incompatible with the historical attributes of Canadian sovereignty.

164 The question that then arises is whether this conclusion is at odds with the purpose of s. 35(1), i.e. the reconciliation of the interests of aboriginal peoples with Crown sovereignty? In addressing this question it must be remembered that aboriginal people are themselves part of Canadian sovereignty as discussed above. I agree with Borrows, *supra*, at p. 40, that accommodation of aboriginal rights should *not* be seen as "a zero sum relationship between minority rights and citizenship; as if every gain in the direction of accommodating diversity comes at the expense of promoting citizenship", (quoting W. Kymlicka and W. Norman, eds., *A Citizenship in Diverse Societies* (2000), at p. 39). On the other hand, the reverse is also true. Affirmation of the sovereign interest of Canadians as a whole, including aboriginal peoples, should not necessarily be seen as a loss of sufficient "constitutional space for Aboriginal peoples to be Aboriginal" (Greschner, *supra*, at p. 342). A finding of distinctiveness is a judgment that to fulfill the purpose of s. 35, a measure of constitutional space is required to accommodate particular activities (traditions, customs or practices) rooted in the aboriginal peoples' prior occupation of the land. In this case, a finding against "distinctiveness" is a conclusion that the

respondent's claim does not relate to a "defining feature" that makes Mohawk "culture what it is" (*Van der Peet*, at paras. 59 and 71); it is a conclusion that to extend constitutional protection to the respondent's claim finds no support in the pre-1982 jurisprudence and would overshoot the purpose of s. 35(1). In terms of sovereign incompatibility, it is a conclusion that the respondent's claim relates to national interests that all of us have in common rather than to distinctive interests that for some purposes differentiate an aboriginal community. In my view, reconciliation of these interests in this particular case favours an affirmation of our collective sovereignty.

11. Implications for Internal Aboriginal Self-Government

165 In reaching that conclusion, however, I do not wish to be taken as either foreclosing or endorsing any position on the compatibility or incompatibility of *internal* self-governing institutions of First Nations with Crown sovereignty, either past or present. I point out in this connection that the sovereign incompatibility principle has not prevented the United States (albeit with its very different constitutional framework) from continuing to recognize forms of *internal* aboriginal self-government which it considers to be expressions of residual aboriginal sovereignty. The concept of a "domestic dependent nation" was introduced by Marshall C.J. in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), at p. 17, as follows:

> ... it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.

166 More recently, in *United States v. Wheeler*, 435 U.S. 313 (1978), the United States Supreme Court, *per* Stewart J., described the applicable U.S. doctrine at pp. 322, 323 and 326:

> The powers of Indian tribes are, in general, "*inherent powers of a limited sovereignty which has never been extinguished*." ...
>
> Indian tribes are, of course, no longer "possessed of the full attributes of sovereignty." *United States* v. *Kagama*, *supra*, at 381. Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.
>
> ...
>
> In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.
>
> ...
>
> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy.... They cannot enter into direct commercial or governmental relations with foreign nations.... And, as we have recently held, they cannot try nonmembers in tribal courts....
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. [Underlining added.]

167 The U.S. doctrine of domestic dependant nation differs in material respects from the proposals of our Royal Commission on Aboriginal Peoples. The concepts of merged sovereignty and shared sovereignty, which are said to be essential to the achievement of reconciliation as well as to the maintenance of diversity, are not reflected in the American jurisprudence. Under U.S. law the powers of a tribal government (whatever its theoretical sovereignty) can be overridden by an ordinary law of Congress. Further, there is nothing that I am aware of in the U.S. doctrine that extends the concept of self-government to claims to an independent self-sustaining economic base, as contemplated by the Royal Commission on Aboriginal Peoples (final report, vol. 2, *supra*, at p. 2). In any event, whatever be the differences and similarities, an international trading and mobility right, which necessarily involves "external relations", would appear *not* to be included in the attributes of a U.S.-style "domestic dependant nation".

168 As to the position of Mohawks in Canada seeking to trade into the United States, see *United States v. Garrow*, *supra*, which involved "a full-blooded Indian woman of the Canadian St. Regis Tribe of Iroquois Indians" (p. 318) who resided in Canada near the international boundary line. She entered the United States at the village of Hogansburg, New York, carrying 24 baskets for sale in the United States. She was charged duty under the Tariff Act of 1930. She launched a protest, claiming that as she was an aboriginal person she could bring the baskets into the United States free of duty under Article III of the Jay Treaty. Her claim was rejected, the court stating at p. 324:

> There being neither any treaty exemption of appellee's goods from duty, nor any statutory exemption thereof, it follows that they are dutiable, as claimed by the collector.

See also *Akins v. United States*, 551 F.2d 1222 (C.C.P.A. 1977).

169 I refer to the U.S. law only to alleviate any concern that addressing aspects of the sovereignty issue in the context of a claim to an international trading and mobility right would prejudice one way or the other a resolution of the much larger and more complex claim of First Nations in Canada to *internal* self-governing institutions. The United States has lived with internal tribal self-government within the framework of external relations determined wholly by the United States government without doctrinal difficulties since *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), was decided almost 170 years ago.

170 In this connection, the respondent also referred us to *Watt v. Liebelt*, [1999] 2 F.C. 455, where the Federal Court of Appeal considered the mobility right of an aboriginal person whose traditional territory also straddles the Canada-U.S. border. The claimant, who

was neither a Canadian citizen nor a person registered under the *Indian Act*, claimed a right to come into or remain in Canada. In considering this question, the court commented at para. 15:

> 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 inherent as a sovereign state.... [S]ection 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.

171 The question under consideration here is rather different from the question discussed in that passage. It is not about post-1982 extinguishment. It is about the *prior* question of whether the claimed international trading and mobility right could, as a matter of law, have arisen in the first place.

172 It was, of course, an expression of sovereignty in 1982 to recognize existing aboriginal rights under s. 35(1) of the *Constitution Act, 1982*. However, if the claimed aboriginal right did not survive the transition to non-Mohawk sovereignty, there was nothing in existence in 1982 to which s. 35(1) protection of *existing* aboriginal rights could attach. It would have been, of course, quite within the sovereign's power to confer specific border privileges by treaty, but the respondent's claim to a treaty right was dismissed.

173 In my respectful view the claimed aboriginal right never came into existence and it is unnecessary to consider the Crown's argument that whatever aboriginal rights in this respect may have existed were extinguished by border controls enforced by Canada prior to April 17, 1982.

Conclusion

174 I would allow the appeal.

Appeal allowed.

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