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FROM *CALDER* TO *MITCHELL*: SHOULD THE COURTS PATROL CULTURAL BORDERS?

Peter W. Hutchins*
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In what sense is an era ever truly finished — who sets the boundaries and how are they patrolled. Do we not have overwhelming evidence, in our time and in every period we study of an odd interlayering of cultural perspectives and a mixing of peoples, so that nothing is ever truly complete or unitary.¹

The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.²

... Constitutional protection of indigenous difference ought to extend beyond protection of certain customs, practices, and traditions integral to Aboriginal cultures to include protection of interests associated with territory, sovereignty, and the treaty process.³

I. INTRODUCTION — THE INITIAL VISION

In *Mitchell* the Supreme Court of Canada reversed the judgments of two lower courts by (1) re-characterizing the right claimed by the plaintiff and (2) re-evaluating the evidence led by the plaintiff in support of this newly characterized right.⁴

Our analysis of the *Mitchell* decision focuses on four matters. What does the decision say about predictability and consistency in Aboriginal rights litigation?

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The authors disclose that they both acted as counsel for Grand Chief Michael Mitchell in *Mitchell v. M.N.R.* before the Federal Court Trial Division, the Federal Court of Appeal and the Supreme Court of Canada. They also appeared for George Weldon Adams in *R. v. Adams* before the Supreme Court of Canada. Peter Hutchins appeared before the Court in *R. v. Pamajewon* and Anjali Choksi in *R. v. Côté*. Peter Hutchins has appeared in the Supreme Court and in the courts below on numerous other occasions for Aboriginal parties. The authors express their appreciation for comments supplied by William Henderson in an earlier version of this paper.

¹ Gallagher and Greenblatt, *Practicing New Historicism* (2000) at 7.

² Holmes, “The Path of the Law” (1897) 10 Harv. L.R. 160, at 160 [hereinafter *Holmes*].

³ Macklem, *Indigenous Difference and the Constitution of Canada* (2001) at 49.

⁴ [2001] 1 S.C.R. 911 [hereinafter *Mitchell*, SCC].

What does the decision say about how the *Van der Peet* test⁵ is being applied? How does the rights discourse and analysis in *Van der Peet*, as argued by the Crown and applied by the Court in *Mitchell*, compare with the rights discourse which Canada and the provinces promote in negotiation of Aboriginal claims? And, finally, are there alternatives to the *Van der Peet* rights analysis which can be proposed?

There are two seemingly contradictory forces at work in the judgment of the Supreme Court of Canada in *Mitchell v. M.N.R.*:

- On one hand, it reflects the increasingly misguided attempts of the courts to impose judicial positivism on history and culture;
- At the same time, it introduces further confusion and uncertainty into an area of law, crying out for certainty, by throwing into doubt the robustness of established and developing judicial doctrine, including:
 - deference to the Trial Judge;
 - response to the pleadings as framed;
 - the role of the justification test in protecting society; and
 - the role of section 35 in reconciling Crown sovereignty and pre-existing Aboriginal societies.

Professor Mark Walters in his excellent paper entitled “The Right to Cross a River?: Aboriginal Rights in the Mitchell Case” writes that:

Within the space of three paragraphs in *Mitchell* the law of Aboriginal rights in Canada was reduced to doctrinal shambles.⁶

In our view, damage has certainly been done. Before we examine the Court’s approach to Aboriginal/Crown relations and Aboriginal legal issues in the final decades of the 20th century and the dawning of the new millennium, it might be instructive to consider how the Court was dealing with these issues at the end of the Victorian period. As Chief Justice Dickson and La Forest J. pointed out in their reasons in *Sparrow*, in the earlier period, Aboriginal⁷ cases “were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises”.⁸ The people whose rights and interests were at stake were rarely, if ever, parties in court. In 1895, Sedgewick J. in *In Re Indian Claims* acknowledged this but went on to announce how our courts, with the consent of

⁵ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*].

⁶ Walters, “The Right to Cross a River?: Aboriginal Rights in the Mitchell Case” prepared for the Toronto Conference of the Pacific Business and Law Institute, October 25, 2001, at 7 [hereinafter *Walters*].

⁷ Or as the expression was at the time “Indian”.

⁸ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1103 [hereinafter *Sparrow*].

the Crown and of all of our governments, should approach “all questions between Her Majesty and ‘Her faithful Indian allies’”. He wrote:

Another consideration has a bearing on the matter. The contest in this case is not between the Indians on the one hand and the Government on the other; it is in its last analysis a contest between Ontario and Quebec. The principle of generous construction so ably and correctly pointed out by the learned Chancellor would very properly be applicable were it a case of the former kind. Had the rights of the Indians been in question here — were their claims to the increased annuity disputed — did that depend upon some difficult question of construction or upon some ambiguity of language — courts should make every possible intendment in their favour and to that end. They would with the consent of the Crown and of all of our governments strain to their utmost limit all ordinary rules of construction or principles of law — the governing motive being that in all questions between Her Majesty and “Her faithful Indian allies” there must be on her part, and on the part of those who represent her, not only good faith, but more, there must be not only justice, but generosity. The wards of the nation must have the fullest benefit of every possible doubt.⁹

In the context of *Mitchell*, the reference to the Queen’s “faithful Indian allies” is particularly poignant given the role of the Mohawks as crucial military forces and allies for the British during the French/British and British/American conflicts in North America through to the end of the War of 1812 and how this military tradition, so useful to the British for so long,¹⁰ was turned against them by the Supreme Court in *Mitchell*. Also of interest in the words of Sedgewick J. is the suggestion that there must be on the part of Her Majesty not only good faith, not only justice, but generosity. The latter quality is remarkably absent in the manner in which the Court re-characterized Chief Mitchell’s claim as expressed in the pleadings and reiterated in the evidence at trial.

Two years later in *St. Catharines Milling and Lumber Co. v. The Queen*, Strong J. in lengthy dissenting reasons (but not of this point) invoked once again the role of Indian Nations as faithful allies of the Crown and how this condition had been won through a system whereby the British recognized their rights to lands and guaranteed their protection in the possession and enjoyment of such lands. He wrote:

That the more liberal treatment accorded to the Indians by this system of protecting them in the enjoyment of their hunting grounds and prohibiting settlement on lands which they had not surrendered, which it is now contended the British North America Act has put an end to, was successful in its results, is attested by the historical

⁹ [1895] 25 S.C.R. 434, at 534-35.

¹⁰ See, for instance, *Mitchell v. M.N.R.*, [1997] 4 C.N.L.R. 103, at 157, 171-180 (F.C.T.D.) [hereinafter *Mitchell Fed. Court*].

fact that from the memorable year 1763, when Detroit was besieged and all the Indian tribes were in revolt, down to the date of confederation, Indian wars and massacres entirely ceased in the British possessions in North America, although powerful Indian nations still continued for some time after the former date to inhabit those territories. That this peaceful conduct of the Indians is in a great degree to be attributed to the recognition of their rights to lands unsundered by them, and to the guarantee of their protection in the possession and enjoyment of such lands given by the crown in the proclamation of October, 1763, hereafter to be more fully noticed, is a well known fact of Canadian history which cannot be controverted. The Indian nations from that time became and have since continued to be the firm and faithful allies of the crown and rendered it important military services in two wars — the war of the Revolution and that of 1812.¹¹

The Supreme Court's current voyage of discovery on the matter of Aboriginal title and rights can be said to have commenced with *Calder* in 1973.¹² Although *Calder* involved Aboriginal title, what we now refer to as a title case, it is instructive to see how the two justices writing the substantive reasons, Judson and Hall J.J., approached the matter of characterizing Aboriginal culture, in this particular case that of the Nisga'a Nation.

The fact is that both justices appeared comfortable in characterizing the rights being claimed in general terms based upon the fact of Aboriginal occupation and were at pains to avoid as much as possible imposing narrow Western legal concepts.

Justice Judson in an oft cited passage expressed the situation as follows:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the goodwill of the Sovereign".¹³

Justice Hall, in quoting Frank Calder in cross-examination, appeared comfortable with the characterization of the right as asserted by the Nisga'a Nation:

The nature of the title of the interest being asserted on behalf of the Nishgas was stated in evidence by Calder in cross-examination as follows:

¹¹ (1887) 13 S.C.R. 577, at 609-610.

¹² *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313 [hereinafter *Calder*].

¹³ *Ibid.*, at 328.

From time immemorial the Naas River Nishga Indians possessed, occupied and used the Naas Valley, Observatory Inlet, and Portland Inlet and Canal, and within this territory the Nishgas hunted in its woods, fished in its waters, streams and rivers. Roamed, hunted and pitched their tents in the valleys, shores and hillsides. Buried their dead in their homeland territory. Exercised all the privileges of free men in the tribal territory. The Nishgas have never ceded or extinguished their aboriginal title within this territory.¹⁴

In reviewing the jurisprudence both of the United States and the Commonwealth, Hall J. noted the general characterization of the relationship between Indian Nations and the European newcomers preferred by the courts:

The dominant and recurring proposition stated by Chief Justice Marshall in *Johnson v. McIntosh* is that on discovery or on conquest the aborigines of newly-found lands were conceded to be the rightful occupants of the soil with a legal as well as a just claim to retain possession of it and to use it according to their own discretion, but their rights to complete sovereignty as independent nations were necessarily diminished and their power to dispose of the soil on their own will to whomsoever they pleased was denied by the original fundamental principle that discovery or conquest gave exclusive title to those who made it.¹⁵

Approximately 10 years after *Calder*, Dickson J. in *Guerin* had the occasion to review the Court's earlier jurisprudence on Indian title and Indian interests in lands this time in the context of submissions regarding the legal character of the Crown's fiduciary duty.¹⁶

Once again, the majority of the Court, speaking through Dickson J., came to the conclusion that attempts at precise juridical characterization of the Indian interest was "both unnecessary and potentially misleading". Justice Dickson wrote:

It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has nonetheless arisen because in neither case is the categorization quite accurate.

¹⁴ *Ibid.*, at 351.

¹⁵ *Ibid.*, at 383. The so-called Marshall trilogy: *Johnson v. McIntosh*, 8 Wheat. 543 (1823), *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831), and *Worcester v. Georgia*, 6 Pet. 515 (1832), established the direction of U.S. Indian law.

¹⁶ *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

... The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.¹⁷

With respect to the contradictions in the Court's judgment in *Mitchell* to which we referred at the outset, what is curious is that the Chief Justice who wrote the majority reasons in *Mitchell* had previously, in her dissenting reasons in *Van der Peet*, appeared to question not only the legal positivism at work in the Court's test but also the appropriateness of using certain cultural concepts as "the markers of legal rights".

On the first point, the Chief Justice quite rightly points out in her dissent in *Van der Peet* that the Court originally used the concept of integrality in a completely different context in *Sparrow*:

... The governing concept of integrality comes from a description in the *Sparrow* case where the extent of the aboriginal right (to fish for food) was not seriously in issue. It was never intended to serve as a test for determining the extent of disputed exercises of aboriginal rights.¹⁸

In another section of her dissenting reasons the Chief Justice takes a considerably more flexible approach to determining whether modern practices constitute Aboriginal rights than is apparent in her majority reasons in *Mitchell*:

If a specific modern practice is treated as the right at issue, the analysis may be foreclosed before it begins. This is because the modern practice by which the more fundamental right is exercised may not find a counterpart in the aboriginal culture of two or three centuries ago. So if we ask whether there is an aboriginal right to a particular kind of trade in fish, *i.e.*, large-scale commercial trade, the answer in most cases will be negative. On the other hand, if we ask whether there is an aboriginal right to use the fishery resource for the purpose of providing food, clothing or other needs, the answer may be quite different. Having defined the basic underlying right in general terms, the question then becomes whether the modern practice at issue may be characterized as an exercise of the right.

This is how we reconcile the principle that aboriginal rights must be ancestral rights with the uncompromising insistence of this Court that aboriginal rights not be frozen. The rights are ancestral; they are the old rights that have been passed down from previous generations. The exercise of those rights, however, takes modern forms. **To fail to recognize the distinction between rights and the contemporary form in which the rights are exercised is to freeze aboriginal societies**

¹⁷ *Ibid.*, at 382.

¹⁸ *Van der Peet*, *supra*, note 5, at para. 255.

in their ancient modes and deny to them the right to adapt, as all peoples must, to the changes in the society in which they live.

I share the concern of L'Heureux-Dubé J. that the Chief Justice defines the rights at issue with too much particularity, enabling him to find no aboriginal right where a different analysis might find one. By insisting that Mrs. Van der Peet's modern practice of selling fish be replicated in pre-contact Sto:lo practices, he effectively condemns the Sto:lo to exercise their right precisely as they exercised it hundreds of years ago and precludes a finding that the sale constitutes the exercise of an aboriginal right.¹⁹

With respect to the Court engaging in cultural analysis, the Chief Justice stated in her reasons in *Van der Peet*:

The problem of overbreadth thus brings me to my second concern, the problem of indeterminacy. **To the extent that one attempts to narrow the test proposed by the Chief Justice by the addition of concepts of distinctiveness, specificity and centrality, one encounters the problem that different people may entertain different ideas of what is distinctive, specific or central. To use such concepts as the markers of legal rights is to permit the determination of rights to be coloured by the subjective views of the decision-maker rather than objective norms, and to invite uncertainty and dispute as to whether a particular practice constitutes a legal right.**²⁰

We suggest that if one focuses on the language highlighted in the preceding passages, one is presented with an approach to understanding and characterizing claims of Aboriginal title and rights that is considerably more liberal than the ultimate reasoning in *Mitchell*. They demonstrate a holistic and dynamic perspective both as to what Aboriginal societies once were and also as to what they have become. They suggest that the reconciliation so urged by the courts should involve not an act of reconciling contemporary non-Aboriginal society with a museum diorama approach to Aboriginal societies, to use Professor Brad Morse's apt image,²¹ but rather with the contemporary and evolving Aboriginal societies which exist across this land.

¹⁹ *Ibid.*, at paras. 239, 240, 241 (emphasis added).

²⁰ *Ibid.*, at para. 257 (emphasis added).

²¹ Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997), 42 McGill L.J. 1011 [hereinafter Morse].

II. PREDICTABILITY IN ABORIGINAL RIGHTS LITIGATION

1. Seeking *Terra Firma*

The renowned American jurist Oliver Wendell Holmes, in his article entitled *The Path of the Law* discussed the object of the study of law in the following terms:

When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.²²

Justice Holmes concluded the passage above by identifying the object of the study of law as prediction and, in particular, prediction of the “incidence of the public force through the instrumentality of the Courts”. The area of the law applying to Aboriginal peoples is and has been a rapidly evolving one over the past decades. Chief Justice Lamer himself acknowledged this in *Delgamuukw v. British Columbia*.²³ *Mitchell* represents at least a pause in this evolution, as well as a challenge to counsel and clients attempting what Holmes J. referred to as the prediction of the incidence of the public force through the instrumentality of the courts.

Professor Brian Slattery, who in a very real sense has been our medium in this area of law, published an article which he entitled *Making Sense of Aboriginal and Treaty Rights*. He introduced that article as follows:

Over the past thirty years, the Supreme Court of Canada has begun remapping the neglected territory of aboriginal and treaty rights. It has done so piecemeal, in a series of important decisions extending from *Calder* in 1973 to the recent *Marshall* case. When it started, the Court had little to go on. The results of previous forays into this territory had been uncertain at best and misleading at worst. The leading authority on the subject, the Privy Council decision in *St. Catharine's Milling and Lumber Company*, was replete with dubious assumptions and obscure terminology. In effect, the Supreme Court inherited a sketch map of shadowy coasts and fabulous isles, with monsters at every turn.

²² Holmes, *supra*, note 2, at 160.

²³ [1997] 3 S.C.R. 1010, at paras. 75, 79 and 159 [hereinafter *Delgamuukw*].

Let it be said that the Supreme Court has fared well in its initial ventures. Little-known areas have been brought to light and apocryphal seas dispelled. We now know broadly what is *terra firma* and what is not, and the monsters have been largely tamed or banished to the decorative margins. Nevertheless, the first fruits of the Court's labours amount to a series of explorer's charts, enlightening so far as they go, but covering different areas, drawn in varying projections, and sometimes bearing an uncertain relation to one another. We lack a reliable *mappamundi*. The purpose of this paper is to attempt such a map — one that surveys the subject as a whole and displays the various parts in their proper dimensions and inter-relationships.²⁴

Now when Professor Slattery wrote those words, the Supreme Court of Canada had not yet handed down its judgment in *Mitchell v. M.N.R.* Where would Professor Slattery place the *Mitchell* decision in his *mappamundi*? He states that:

We now know broadly what is *terra firma* and what is not, and the monsters have been largely tamed or banished to the decorative margins.²⁵

After *Mitchell* one might be inclined to be sceptical.

Professor Kent McNeil is less sanguine about the progress of our courts in charting the *terra firma* and banishing the monsters:

Despite vacillations in policy from treaty acknowledgement of tribal sovereignty and land rights through removal, allotment, reorganization, termination and self-determination, the doctrinal foundations of Indian law have been fairly well settled in the United States since the *Marshall* Court decisions of the 1820s and 1830s. Not so in Canada, where the courts are only beginning to address some major Aboriginal rights issues. Prominent among these are the issue of the nature of Aboriginal rights to land (commonly known as Aboriginal title), and the question of whether the Aboriginal peoples have an inherent right of self-government.²⁶

Does *Mitchell* assist us in locating Professor Slattery's *terra firma*? Does it help to tame or banish the monsters that have intimidated our political and judicial systems when faced with claims of Aboriginal peoples? We believe the answer is no on both counts. In its judgment, the Supreme Court shifted the ground under Aboriginal litigants' feet and one must wonder if it was not the fear of monsters, in this instance an Aboriginal claim asserted in respect of the international border, which caused the Court to do so despite Chief Mitchell's best efforts to frame his case narrowly and responsibly.

²⁴ Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. Bar Rev. 196, at 197.

²⁵ *Ibid.*

²⁶ McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (2001), at 59.

2. Do Aboriginal Plaintiffs Have the Prerogative to Characterize the Rights They Claim?

It might be instructive to point out immediately that the pleadings in *Mitchell* were framed years before the Supreme Court's realignment of this area of law through the *Van der Peet* trilogy.²⁷ In fact those judgments were rendered approximately one month before *Mitchell* went to trial in September 1996.

Before the Federal Court Trial Division, three distinct purposes for bringing goods across the international border were identified and two sources of those rights were pleaded. At issue was the right when bringing goods across the border for personal purposes, for community purposes or for the purpose of trade with other First Nations, to do so duty free. On this basis, evidence was led at trial. Two sources of these rights were pleaded, an Aboriginal right and treaty rights.²⁸

With respect to the scope of the rights claimed, it is instructive to refer to the plaintiffs' opening statement on the first day of trial. A number of points were stated very clearly:

Plaintiff is not asking this Court to endorse activities or behaviour that could be said to be antisocial or that threaten the state or its citizens.

Chief Mitchell's progress across the Cornwall International Bridge on March 22, 1988 was not an act of defiance against Canadian sovereignty;

There was nothing at all clandestine about the actions involved in this case. Chief Mitchell made a truthful oral declaration concerning the description and destination of the goods.

So that it will be perfectly clear from the outset of the trial, 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 fire-arm 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 seeking any judicial determination of that issue in this case.

²⁷ *Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Gladstone*, [1996] 2 S.C.R. 723 [hereinafter *Gladstone*]; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672.

²⁸ The treaty rights argument was based upon the rights in Article XV of the *Treaty of Utrecht* and Article III of the *Jay Treaty* as confirmed by Article IX of the *Treaty of Ghent*, as well as on treaty councils between the Crown and First Nations which took place in 1795, 1796 and 1815. The treaty rights argument was unsuccessful in both the Federal Court Trial Division and the Federal Court of Appeal and was not pursued in the Supreme Court of Canada.

The modern context in which the Plaintiff seeks recognition of his Aboriginal right involves addressing the responsible exercise of rights and responsibilities and the appropriate respective roles for Mohawk authorities and Canadian authorities.²⁹

The trial judge understood the right as characterized by Chief Mitchell and the efforts by Chief Mitchell to frame the claims responsibly. His order, following 85 pages of analysis, read in part:

1. 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 from the United States into Canada for personal and community use without having to pay customs duties on those goods. Goods for personal and community use includes goods used for sustenance, household goods and goods used for First Nations' custom. The Aboriginal right includes the right to bring these goods from the United States into Canada for non-commercial scale trade with other First Nations.

As the plaintiff has explained, the Aboriginal right does not include the right to bring into Canada any form of firearm, restricted or prohibited drug, alcohol, plants and the like. The Aboriginal right is also limited to the extent that any Mohawk of Akwesasne entering Canada with goods from the United States will be subject to search and declaration procedures at Canadian Customs.³⁰

The trial judge, while upholding the Aboriginal right, found that the right as pleaded was not to be found in a treaty within the meaning of section 35(1) of the *Constitution Act, 1982*. The trial judge, however, did refer to the *Jay Treaty* as useful evidence of the historical context of the treatment of First Nations and of what the European powers were prepared to stipulate on behalf of the First Nations.³¹

In the Federal Court of Appeal, all three judges once again acknowledged that the claim contemplated goods being brought across the border for various distinct purposes. Justice Létourneau in his reasons would have limited the

²⁹ *Mitchell v. M.N.R.*, Federal Court Trial Division, plaintiff's opening statement, Sept. 1996, trial transcript Vol. 1, pp. 17, 18 and 50.

³⁰ *Mitchell Fed. Court*, *supra*, note 10, at 192.

³¹ He stated

"...The treaty does not have legal validity and is not enforceable in Canada, however, it is a historical document and therefore has some historical significance. Consequently it is useful as evidence of the historical context of the treatment of First Nations during that period. However, since the First Nations were not involved in the negotiations, drafting or ratification of the agreement, at best it is evidence of what two countries were prepared to include in an agreement between themselves on behalf of a third party."

ibid., at 187.

right to an Aboriginal right constitutionally protected by sections 35 and 52 of the *Constitution Act, 1982*:

...when crossing the international border at Cornwall Island, to bring with himself in Canada, for personal use or consumption, or for collective use or consumption by the members of the community of Akwesasne, goods bought in the State of New York without having to pay any duty or taxes to the Canadian government or authority.³²

Justice Sexton, with Isaac C.J. agreeing, defined the right as follows:

1. the plaintiff as a Mohawk of Akwesasne resident in Canada has an existing aboriginal right which is constitutionally protected by sections 35 and 52 of the *Constitution Act, 1982*, when crossing the international border from New York to Ontario or Quebec, to bring with him to Canada, for personal use or consumption, or for collective use or consumption by the members of the community of Akwesasne, or for non-commercial scale trade with First Nation communities in Ontario or Quebec, goods bought in the State of New York without having to pay any duty or taxes to the government of Canada.³³

Something strange happened to Chief Mitchell's right as pleaded when it arrived at the Supreme Court of Canada. It is interesting to note that McLachlin C.J., in summarizing the decisions below, acknowledged that both the courts below had included in their orders goods for personal and community use as well as goods for non-commercial scale trade with other First Nations. The Chief Justice then proceeded to re-characterize the Aboriginal right claimed.

Notwithstanding that Chief Mitchell had characterized his claim as including three categories of goods, personal goods, community goods and goods for small scale trade, and notwithstanding that the four judges in the courts below had understood the claim to include those three categories of goods, the Chief Justice at paragraph 16 decided that the claim was really about bringing goods across the Canada/United States border for purposes of trade. The Chief Justice effectively telescoped the various and distinct elements of the right pleaded into, coincidentally, the characterization which might be seen to be the most controversial. Suddenly Chief Mitchell's actions became entirely focused on trade. Suddenly, the evidence led by Chief Mitchell concerning the historical importance of trade to the Mohawks was represented as excluding evidence in regard to personal and community goods.

³² *Mitchell v. M.N.R.*, [1999] 1 F.C. 375, at 394 (F.C.A.) [hereinafter *Mitchell Fed. Court Appeal*] in reference to the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter "*Constitution Act, 1982*"].

³³ *Ibid.*, at 399 (emphasis added).

The trial judge, while finding that one reason for Chief Mitchell's actions was to renew an historical trading relationship with Tyendinaga through the giving of gifts, also found that the evidence showed that personal and community goods were included in what Chief Mitchell brought across the border. This included supplies for a community store.³⁴

With respect, we note that there may be an inconsistency in the reasons of the Chief Justice as to what pre-contact activities must appropriately be invoked in support of a claim for Aboriginal rights. We have seen that the Aboriginal activities of transporting personal goods or community goods were not considered in the Court's characterization of Chief Mitchell's claim. There was, as we have described it, a telescoping of Aboriginal activities relating to personal, community and trade goods. On the other hand, when it came to Chief Mitchell's considerable efforts to circumscribe his claim and the relief sought by limiting the nature of the goods in issue, by agreeing to stop and declare at Canadian Customs and by limiting the relief respecting trade to trade with other First Nations outside the commercial mainstream, the Court saw this as Chief Mitchell neglecting to invoke relevant Aboriginal activities and thus artificially and unjustifiably limiting his claim and his relief sought. The Chief Justice announced that :

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 gov-

³⁴ The trial judge wrote:

The women who decided what goods would be brought across the border interpreted personal goods as being food products and household appliances. The rest of the food and personal items were for trade. As stated earlier, the motor oil was destined for Jock's Store. Chief Mitchell testified that ninety-nine percent of the clientele at Jock's Store are from the community of Akwesasne. The store sells groceries, household items, food products, and anything else that the community desires. It is regarded as an institution by the residents on Cornwall Island. Customs officers go in the store occasionally for small items. However, anyone coming from Canada to the store must pay a toll of \$2.50 each way; non-Akwesasne residents rarely pay the toll to shop at Jock's Store. Chief Mitchell described the most expensive item in Jock's Store as a pair of work gloves. Chief Mitchell further testified that the goods supplied in the store are for the community of Akwesasne. If community members were unable to get the goods they needed at the store because of sales to a non-native, the store owner would have to answer to the community.

Mitchell Fed. Court, [1997] 4 C.N.L.R. 103, at 110 (F.C.T.D.). (Jock's Store is a community store in Akwesasne).

ernment 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.³⁵

In fact, what Chief Mitchell had done in framing his case and in pursuing it through the Federal Court of Canada was to make every effort to ask the courts for declarations regarding an exercise of rights which reflected and respected concerns for health and security, which reflected and respected concerns regarding disclosure of goods at Canada Customs and, in regard to the trade issue (and here is the great irony), which reflected and respected the evidence before the Court on the historical trade patterns of the Mohawks.

On this latter point, it is difficult to see what the Chief Justice meant when she wrote “however, narrowing the claim cannot narrow the Aboriginal practice relied upon which is what defines the right”.³⁶ After trial and the hearing before the Federal Court of Appeal, the claim in regard to trade with other First Nations had been narrowed precisely to reflect the Aboriginal practice relied upon as revealed by the evidence.

In any event, it seems a trifle unfair to Aboriginal litigants that after years of being told by the Supreme Court of Canada and the courts below that only claims cast specifically as to people, site and activity can be adjudicated by the courts (*Kruger and Manual, Van der Peet, Adams, Côté, Pamajewon*),³⁷ they are now instructed that their claims and the relief sought must embrace the *totality* of “relevant” Aboriginal practice at the time of contact. For some reason, the Mohawks’ Aboriginal practice of travelling throughout their territory with personal and community goods was not relevant in characterizing Chief Mitchell’s claim. On the other hand, the full range of pre-contact Aboriginal activity, which included for Binnie J. “pre-contact warrior activities” and “engaging in military adventures on Canadian territory”,³⁸ should have been included as integral elements in Chief Mitchell’s claim.

Professor Walters rushed to the defence of plaintiffs and their counsel in this context stating:

³⁵ *Mitchell SCC*, [2000] 1 S.C.R. 911, at para. 20. It should be noted that contrary to what the Chief Justice here stated, Chief Mitchell “limited” his claim before the Federal Court of Appeal and this was acknowledged appreciatively by Letourneau J.A. in the Federal Court of Appeal, *Mitchell Fed. Court Appeal*, *supra*, note 32, at para. 20.

³⁶ *Mitchell SCC*, *ibid.*, at para. 20

³⁷ *Kruger v. The Queen*, [1978] 1 S.C.R. 104; *Van der Peet*, *supra*, note 27; *R. v. Adams*, [1996] 3 S.C.R. 101 [hereinafter *Adams*]; *R. v. Côté*, [1996] 3 S.C.R. 139 [hereinafter *Côté*]; *R. v. Pamajewon*, [1996] 2 S.C.R. 821 [hereinafter *Pamajewon*].

³⁸ *Mitchell SCC*, *supra*, note 35, at para. 153.

In relation to aboriginal rights, however, the Court asserts the discretion to re-characterize the claim. Says McLachlin C.J. in *Mitchell*, it is “tempting” for the claimant “to tailor the right” to their advantage, as if there is something morally wrong about framing one’s action in a manner that might lead to success. In fact, lawyers are under a professional obligation to do so; it is not a temptation but, one could say, an obligation upon the lawyer and a right of the claimant to “tailor the right” to achieve success.³⁹

We will leave it at that.

The Chief Justice had not finished with the re-characterization of Chief Mitchell’s claim. She stated: “In another attempt at limitation, Chief Mitchell denies that his claim entails the right to pass freely over the border, i.e. mobility rights.”⁴⁰ She is quite right. In his factum before the Supreme Court, Chief Mitchell stated:

The right at issue in this Appeal, as determined after adjudication by two levels of the Federal Court of Canada, is clearly a right which applies when and if the Respondent enters into Canada. When the right at issue is properly understood, the Appellant’s arguments on sovereignty and characterization fall away.⁴¹

As we have seen, the judgment of the Federal Court of Appeal under review before the Supreme Court of Canada clearly demonstrated that the justices of the Court of Appeal understood that Chief Mitchell was not invoking a mobility right. In any event, if the order of the Federal Court of Appeal had seemed ambiguous to the Supreme Court on the matter of mobility, it would not have been a difficult matter to have modified it so as to ensure that no such ambiguity remained. After all, the three justices of the Court of Appeal understood the plaintiffs’ position that mobility was not in issue and Chief Mitchell had stated it unequivocally in his submissions to the Supreme Court.

3. Assessing the Weight to be Given to the Evidence Led

The Supreme Court of Canada has repeatedly held that findings of fact reached by the trial judge, including findings of fact based upon inference, can only be reversed if the trial judge has made a “palpable and overriding error”.⁴²

³⁹ Walters, “The Right to Cross a River?: Aboriginal Rights in the Mitchell Case” prepared for the Toronto Conference of the Pacific Business and Law Institute, October 25, 2001, at 10.

⁴⁰ *Mitchell SCC*, *supra* note 35, at para. 22.

⁴¹ *Mitchell v. M.N.R., SCC, ibid.*, Respondent’s Factum, para. 23.

⁴² *Van der Peet, supra*, note 27; *Delgamuukw, supra*, note 23; *Schwartz v. Canada*, [1996] 1 S.C.R. 254.

Very recently the Court has re-articulated the many and sound reasons for this rule, incorporating language from a judgment of the United States Supreme Court:

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' ... rather than a 'tryout on the road.'" ... For these reasons, review of factual findings under the clearly-erroneous standard — with its deference to the trier of fact — is the rule, not the exception.

Further comments regarding the advantages possessed by the trial judge have been made by R. D. Gibbens in "Appellate Review of Findings of Fact" (1992), 13 *Adv. Q.* 445, at p. 446:

The trial judge is said to have an expertise in assessing and weighing the facts developed at trial. Similarly, the trial judge has also been exposed to the entire case. The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.⁴³

It is striking that the focus of the Supreme Court's analysis in *Mitchell* was on reviewing, re-evaluating and discounting particular items in the evidentiary record. This appears inconsistent with the principles articulated in *Housen v. Nikolaisen*, especially given that the trial in *Mitchell* lasted over 30 days. The majority of the Federal Court of Appeal, in contrast, appreciated the trial judge's handling of the "totality" of the evidence.⁴⁴

⁴³ *Housen v. Nikolaisen*, 2002 SCC 33, paras. 13-14. At the beginning of this passage the Court is quoting the United States Supreme Court in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), at pp. 574-75. See also note 46.

⁴⁴ *Mitchell Fed. Court Appeal*, *supra*, note 32, Letourneau J.A., at para. 41 and Sexton J.A., at para. 47. Over 25 days of evidence was led at trial. The complete record, including expert reports and transcripts from the trial is close to 100 volumes of material. In accordance with the Rules of

With respect to archaeological evidence, for example, the Supreme Court discounted evidence that the Mohawks traded in copper which originated on the north shore of Lake Superior because it found that the evidence only showed that the copper originated on the north shore of Lake Superior and not that the Mohawks obtained the copper through direct trading with their northern neighbours. The Court discounted a second archaeological document because it only provided evidence in north-south trade in a single item — this the Supreme Court found was not sufficiently compelling.

With respect to this aspect of the evidence, we note simply that the Court did not find that the trial judge had in any way erred in taking into account the archaeological evidence — it simply disputed the weight which he (and the majority of the Court of Appeal) had placed upon it. It is also striking that, while the Court made much of what it saw as a contradiction in McKeown J.'s finding of an Aboriginal right on the basis of "little direct evidence", the Court also found that: "McKeown J. correctly observed that indisputable evidence is not required to establish an aboriginal right. *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".⁴⁵

If the evidentiary inquiry mandated by the *Van der Peet* test is so flexible that an appellate court can re-evaluate the weight to be accorded to evidence which, by its very nature, is scarce, then what has become of the principle that appellate courts owe considerable deference to findings made by the trial judge concerning the facts which prove, or fail to prove, an Aboriginal right?⁴⁶ The latter principle is, in theory, affirmed in the *Mitchell* decision.⁴⁷ In effect, however, it was clearly jettisoned.

It is early to say what the effects of the *Mitchell* decision will be on the integrity of the trial process. It is safe to predict, however, that both plaintiffs and defendants will be inclined to rely upon the judgment to argue that, at least in cases concerning issues of Aboriginal rights, appellate courts may and, indeed should, review and re-evaluate the weight given to the evidence by a trial judge.

the Supreme Court, a very much condensed application record of some six volumes was filed before the Supreme Court of Canada and one copy of the entire case was sent up from the Court of Appeal.

⁴⁵ *Mitchell SCC, supra*, note 35, at para. 52, quoting *Van der Peet, supra*, note 27, at para. 62 [emphasis added].

⁴⁶ A principle reaffirmed in both *Van der Peet*, [1996] 2 S.C.R. 507, and *Delgamuukw*, [1997] 3 S.C.R. 1010.

⁴⁷ *Mitchell SCC, supra*, note 35, at para. 51.

III. THE SOVEREIGN INCOMPATIBILITY TEST — ONE BULLET DODGED

At the Supreme Court of Canada, the Crown invited the Court to adopt a test related to compatibility with Crown sovereignty that would, if accepted, seriously compromise a great deal of the work of the Supreme Court and other courts over the past several decades in examining the promise of section 35 of the *Constitution Act, 1982*.⁴⁸ The Chief Justice succinctly stated the Crown's position in her reasons:

... 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.⁴⁹

The Chief Justice, quite rightly in our view, declined the invitation of the Crown on this point and stated that in the past the Court had:

...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.⁵⁰

In essence, the Crown's contention was that in the case of Aboriginal activities deemed to be incompatible with the historical and modern exercise of Crown sovereignty, no right would crystallize. We can see how problematic this would be for establishing virtually any Aboriginal right in the context of the Court's contention in *Mitchell* that the entire bundle of Aboriginal activities must be pleaded as rights. Justice Binnie in his minority reasons raised the spectre of Mohawk military pre-contact activity and the fact that the evidence showed in this case that Mohawks regularly exploited lands in what is now Canada for many purposes including that of war. Indeed, this had already been acknowledged by the Supreme Court in *R. v. Adams*, a case in which the Court, notwithstanding direct linkages between Mohawk warrior activity and fishing activity, still felt comfortable recognizing the specific pre-contact activity of fishing as giving rise to an Aboriginal right to fish.⁵¹ There was no suggestion

⁴⁸ *Sparrow*, [1990] 1 S.C.R. 1075.

⁴⁹ *Mitchell SCC*, *supra*, note 35 at para. 61.

⁵⁰ *Ibid.*, at para. 63.

⁵¹ *Adams*, *supra*, note 37, at para. 44-46.

in *Adams* that warring activities would have to be grafted on to the activity of fishing in Lake St. Francis.

In *Mitchell*, however, Binnie J. returned to the pre-contact warrior activity of Mohawks:

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.

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.⁵²

Justice Binnie concluded:

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.⁵³

The problem we see with Binnie J.’s test is twofold.

⁵² *Mitchell SCC, supra*, note 35, at paras. 152, 153 [emphasis added].

⁵³ *Ibid.*, at para. 154.

First, the doctrines of extinguishment and sovereign incompatibility are too definitive and irrevocable. While the matter has not yet been settled by the courts in Canada, one wonders whether a right that has been held to be extinguished by the Supreme Court of Canada could possibly be resurrected in a future age under other conditions. The same applies with respect to the doctrine of sovereign incompatibility which suggests that a right did not crystallize during the complex process of sovereign succession or the merging of sovereignties. Again, could such a right later be found on the basis of revised judicial analysis or newly understood history to have in fact survived sovereign succession or the merging of sovereignties? In the post-1982 constitutional context, Binnie J.'s theory introduces a measure of vulnerability for rights understood to have received protection through section 35.

The second difficulty we have is that the test is subjective, is applied without evidence and depends upon the referents of time and place.⁵⁴ It involves two stages of characterization — characterizing the right in issue and then characterizing the sovereignty to which the right is alleged to be incompatible.

We see the first problem in *Mitchell* where, as developed above, the Court in our respectful opinion, mischaracterized the right being claimed. This enabled the minority justices, after endorsing the “sovereign incompatibility” test, to review the national and international law on the matter of the movement of persons and goods across international boundaries and to find that, inherent to national sovereignty, was the power to control the entrance of persons and goods into a state. This made it easier for them to then find that the re-characterized right, expressed as an “international trading/mobility right”, did not meet the sovereign incompatibility test. Whether this is so, or not, is entirely irrelevant to the case that Chief Mitchell put to the courts for adjudication.

The second problem relates to the characterization of the attributes of sovereignty. There was a time in the western world when church and state were one and many a heresy was considered incompatible with the sovereignty of the state. Indeed, we should remind ourselves that certain attributes of Afghan “sovereignty” under the Taliban may have been rendered totally irrelevant only in the last several months and that many activities which would have been candidates for sovereign incompatibility in that country on September 11, 2001 are now being exercised and indeed celebrated.

While these are perhaps extreme examples of shifting standards considered to be essential to state sovereign interests, they do represent past realities, not future speculation. The reality of the interface between Canadian sovereignty

⁵⁴ See the dissenting reasons of McLachlin J. (as she then was) in *Van der Peet*, *supra*, note 46.

and the claims of Aboriginal peoples has also shifted in the past, albeit less dramatically, and this process has accelerated with the development of the international regime for indigenous peoples⁵⁵ and, of course, the introduction of section 35 into the Constitution of Canada.⁵⁶ One interesting manifestation of this would be the changing understanding of the relationship between Canada's international obligations and her obligations towards the Aboriginal peoples of Canada in the context of the application of the *Migratory Birds Convention of 1916*.⁵⁷

The Crown's international treaty power would surely be said to be an essential condition of statehood and an integral element of Canadian sovereignty. The Crown may enter into and has entered into international treaties in which it commits itself to protect certain species of wildlife. Prior to 1982, the position taken by the Crown was that if the exercise of this aspect of sovereignty conflicted with Aboriginal practices, those practices would have to be considered irreconcilable with Crown sovereignty. The Crown in Right of the United Kingdom entered into just such a treaty with the United States of America in 1916, with respect to migratory birds — the *1916 Migratory Birds Convention*. Parliament enacted the *Migratory Birds Convention Act*⁵⁸ to give effect to the international convention in Canada prohibiting the hunting of migratory birds during certain times of the year and regulating various other activities related to migratory birds and their habitats. These prohibitions conflicted with, and indeed were irreconcilable with, Aboriginal and treaty rights to hunt.

⁵⁵ Referred to to some extent by Binnie J. in *Mitchell SCC*, *supra*, note 35, at paras. 81-83. See for further illustration: *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976; *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991; *Report of the Nuuk Meeting of Experts to review the experience of countries in the operation of schemes of internal self-government for Indigenous peoples*, U.N. Doc. E/CN.4/1992/42, 25 November 1991; *Draft Declaration on the Rights of Indigenous Peoples*, E/CN.4/Sub.2/1994/2/Add.1 (1994); *Proposed American Declaration on the Rights of Indigenous Peoples* (Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th Regular Session), OEA/Ser/L/V/II.95 Doc.6 (1997); *Economic and Social Council Resolution 2000/22*, U.N. Doc. E/RES/2000/22, 28 July 2000 establishing the Permanent Forum on Indigenous Issues; *Mayagna (Sumo) Community of Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R., August 31, 2001; Office of the High Commissioner for Human Rights Fact Sheet No.9 (Rev.1), *The Rights of Indigenous Peoples* at <http://www.unhcr.ch/html/menu6/2/fs9.htm>.

⁵⁶ *Adams*, *supra*, note 37, at 121-122 and *Côté*, *supra*, note 37, at 174.

⁵⁷ *1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States*, signed in Washington, August 16, 1916.

⁵⁸ *Migratory Birds Convention Act*, R.S.C. 1985, c. M-7.

In cases decided prior to 1982 dealing with treaty rights of Aboriginal persons to hunt migratory birds, it was held by the Courts, sometimes with much regret,⁵⁹ that treaty rights were not justiciable in the face of conflicting federal regulatory provisions. During that same period, Canada took the position in treaty negotiations with Aboriginal peoples that it was bound under international law not to recognize the Aboriginal right to hunt migratory birds year round.⁶⁰

Two things happened following the enactment of section 35 of the *Constitution Act, 1982*. First, the courts began to read down the sovereign international obligations of Canada under the Convention and to declare and secure Aboriginal and treaty rights to hunt birds in purported violation of the Convention. Of considerable significance here is the fact that in so doing the courts held that there had been no pre-1982 extinguishment of the Aboriginal rights thought at the time to be incompatible with Canada's sovereign commitments under international treaty. At the same time, in clear confirmation that reconciliation of Crown sovereignty with pre-existing Aboriginal societies and their activities is a reciprocal exercise, Canada initiated negotiations with the United States of America to amend the 1916 Convention to bring it into line with the Aboriginal and treaty rights of the Aboriginal peoples of Canada. Parliament repealed the *Migratory Birds Convention Act* replacing it with the *Migratory Birds Convention Act 1994*, to implement the amended Convention.⁶¹

So surely it can be asked: by whom and at what point in the historical continuum is the decree made that an activity is so incompatible with state sovereignty that it cannot possibly ever result in rights or in title?

Furthermore, any argument about sovereign incompatibility is going to be a purely theoretical construct in the absence of evidence of how the exercise of the Aboriginal right would be incompatible with Canadian sovereignty. In *Mitchell*, the essence of the Crown's argument on sovereign incompatibility was that any Mohawk practice of cross-border trade was incompatible with the Crown's sovereign interest in regulating its borders. This is an argument which

⁵⁹ See Johnson J. of the Northwest Territories Court of Appeal in *R. v. Sikyea* (1964), 43 D.L.R. (2d) 150, at 158 (N.W.T.C.A.); affd [1964] S.C.R. 642; *R. v. George*, [1966] S.C.R. 267.

⁶⁰ See, for example, *James Bay and Northern Quebec Agreement*, s. 24, paras. 24.14.2, 24.14.7; *The Western Arctic Claim — The Inuvialuit Final Agreement*, ss. 14(11), 14(12), 14(37), 14(38); *Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon*, ch. 16, paras. 16.3.9 and 16.3.12; *Sahtu Dene and Metis Comprehensive Land Claim Agreement*, para. 13.3.5 and the *Nunavut Land Claims Agreement*, art. 5, part 9, para. 5.9.4.

⁶¹ *Protocol Between Canada and the United States of America Amending the 1916 Convention for the Protection of Migratory Birds in Canada and the United States*, signed on December 14, 1995, ratified on September 9, 1999, preamble, s. II 4(a); *Migratory Birds Convention Act 1994*, at ss. 2(3), 4, and 12(2).

might, if proved, justify limitation of the exercise of an Aboriginal right and as such properly belongs at the “justification” stage of the inquiry into Aboriginal rights.⁶²

As will be developed further, the only appropriate approach to assertions of incompatibility between Aboriginal rights and Crown sovereignty is to exercise control, if control is necessary, at the level of the exercise of rights, not the existence of those rights. What is more, the law and its interpreters should strive to identify and achieve reconciliation between apparently competing claims rather than to seek out incompatibility.

IV. THE APPLICATION OF THE *VAN DER PEET* TEST AND “INDIANNES”

A review of the work of the Court in attempting to reconcile Aboriginal rights and Aboriginal title with Crown sovereignty reveals a spectrum. At one end of the spectrum are situated what are considered to be the classical traditional activities of Aboriginal peoples — hunting, fishing, trapping and gathering. At the other end of the spectrum are situated what are perceived to be commercial, industrial and economic activities. At the traditional end of the spectrum, reconciliation has meant recognition and protection of Aboriginal rights and title and an accommodation by the Crown. As we move along the spectrum, however, the balance shifts and as we arrive at the other end reconciliation results in the reading down of Aboriginal rights and title in favour of Crown sovereignty. This, of course, is the “integral to a distinctive society” test being applied in a rather self-serving way.

Contrasting the Supreme Court decision in *R. v. Adams* with *Mitchell v. M.N.R.* is instructive as the two cases involved the same people — Mohawks — and essentially the same territory — southern Quebec and Ontario. In *Adams* Lamer C.J. reviewed the expert evidence and concluded as follows:

The general picture presented by the testimony of Parent and Trigger, when considered together, is that prior to 1603 it is unclear which aboriginal peoples made use of the St. Lawrence Valley, although there is evidence to suggest that at that time the lands were occupied in part by a group of Iroquois unrelated to the Mohawks. From 1603 to the 1650s the area was the subject of conflict between various aboriginal peoples, including the Mohawks. During this period the Mohawks clearly fished for food in the St. Lawrence River, either because the Mohawks ex-

⁶² This was an argument made by counsel for the Mohawks of Akwesasne before the Supreme Court of Canada. Interestingly, Manitoba supported this argument in its factum and agreed, on this one issue, with the Mohawks’ contention that sovereign incompatibility was essentially an argument on justification.

exercised military control over the region and adopted the territory as fishing and hunting grounds, or because the Mohawks conducted military campaigns in the region during which they were required to rely on the fish in the St. Lawrence River and Lake St. Francis for sustenance.

This general picture, regardless of the uncertainty which arises because of the witnesses' conflicting characterizations of the Mohawks' control and use over this area from 1603 to 1632, supports the trial judge's conclusion that the Mohawks have an aboriginal right to fish for food in Lake St. Francis. Either because reliance on the fish in the St. Lawrence River for food was a necessary part of their campaigns of war, or because the lands of this area constituted Mohawk hunting and fishing grounds, the evidence presented at trial demonstrates that fishing for food in the St. Lawrence River and, in particular, in Lake St. Francis, was a significant part of the life of the Mohawks from a time dating from at least 1603 and the arrival of Samuel de Champlain into the area. The fish were not significant to the Mohawks for social or ceremonial reasons; however, they were an important and significant source of subsistence for the Mohawks.

... No aboriginal group will ever be able to provide conclusive evidence of what took place prior to contact (and here the witnesses agree that it is unclear which aboriginal peoples were fishing in the fishing area prior to 1603); evidence that at contact a custom was a significant part of their distinctive culture should be sufficient to demonstrate that prior to contact that custom was also a significant part of their distinctive culture. The appellant here has clearly demonstrated that at the time of contact fishing in the St. Lawrence River and Lake St. Francis for food was a significant part of the life of the Mohawks. This is sufficient to demonstrate that it was so prior to contact.⁶³

Contrast this with how the Court dealt with evidence respecting the same people and the same territory in *Mitchell*, evidence found sufficient by the trial judge and the Federal Court of Appeal. The Court is obviously less comfortable with the idea that trading practices and northerly travel coincided prior to the arrival of Europeans than that fishing practices and northerly travel coincided in that period. In *Mitchell*, the Chief Justice wrote:

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 ex-

⁶³ *Adams*, [1996] 3 S.C.R. 101, at paras. 44-46 (emphasis added).

change 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.⁶⁴

After a careful reading of the judgments in *Adams* and *Mitchell* it is not clear how the evidence accepted by the Court in *Adams* was that much more probative than that in *Mitchell*.⁶⁵

Other examples of harsher scrutiny being applied by the Court when it comes to so-called commercial or economic activities are to be found in the jurisprudence.⁶⁶

The Supreme Court has previously signalled a reluctance to include so-called “commercial activities” within the meaning of Aboriginal rights in its judgment in *R. v. Pamajewon*.⁶⁷ In that case the fact situation and the right claimed involved gambling — in the words of the Court “high stakes gambling” — and a claim that the Aboriginal claimants’ right to self-government encompassed the right to regulate on-reserve gambling.

These claims were rejected outright. While the Court was prepared to assume, without deciding, that section 35(1) included self-government rights, it insisted that those rights must be proven in accordance with the “integral to the distinctive culture” test. The Court rejected the argument that a more general right to manage Aboriginal reserve lands could encompass the right to organize and regulate high stakes gambling.

In *Pamajewon*,⁶⁸ the Court expressed its agreement with an observation made by the trial judge that “commercial lotteries such as bingo are a twentieth century phenomena and nothing of the kind existed amongst aboriginal peoples and was never part of the means by which those societies were traditionally sustained or socialized”. Thus, any commercial activity which the Crown can successfully characterize as “a twentieth century phenomenon” may not come within the ambit of Aboriginal rights protected by section 35(1).⁶⁹ Indeed, any

⁶⁴ *Mitchell SCC*, [2001] 1 S.C.R. 911, at para. 41 (emphasis added).

⁶⁵ *Adams, supra*, note 63, at paras. 44, 45; *Mitchell SCC, ibid.*, at paras. 48, 49, 101.

⁶⁶ *Gladstone*, [1996] 2 S.C.R. 723, may be considered an exception although the product being traded was rather specialized — herring spawn on kelp — and was a product associated with the “Indianness” of the Heiltsuk people.

⁶⁷ *Pamajewon*, [1996] 2 S.C.R. 821. See also Morse, “Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*” (1997), 42 McGill L.J. 1011.

⁶⁸ *Ibid.*, at para. 29.

⁶⁹ For a recent example see *R. v. Marshall* (2001), 191 N.S.R. (2d) 323, at para. 90-95, affd on appeal in (2002), 202 N.S.R. (2d) 42.

contention that Aboriginal rights encompass commercial activity is met with harsh scrutiny.⁷⁰

This propensity to limit the scope of Aboriginal rights to matters outside of the “commercial mainstream” is also evident in recent decisions from the Federal Court of Appeal concerning the ambit of section 87 of the *Indian Act*. In these decisions, that Court has limited the protection of income from taxation so that income which is earned in the “commercial mainstream” is not considered to be located on reserve. Such income is, therefore, not tax exempt in virtue of section 87.⁷¹ Thus in its recent decision in *Shilling v. Canada*, the Federal Court of Appeal stated:

That an Indian is employed on a reserve is an indication that he or she is acquiring employment income as an Indian *qua* Indian, in employment integral to the life of the reserve: *Folster, supra*, at paragraph 14. The opposite would also be true, that is, employment off-reserve is an indication that the Indian is acquiring employment income in the commercial mainstream.⁷²

This dichotomy between “Indian activities” which are protected by section 87, and “commercial mainstream” activities, which are not, has its origins in statements made by the Supreme Court of Canada in *Mitchell v. Peguis Indian Band*. That case was about the meaning and scope of sections 87, 89 and 90 of the *Indian Act*. For the majority, La Forest J. stated of those sections:

... the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens. An

⁷⁰ The irony is, of course, that commercial dealings were at the heart of Aboriginal/European relations from coast to coast as evidenced by the importance of the fur trade in its many manifestations from coast to coast to coast. Ray, *Indians in the Fur Trade; Their Role as Hunters, Trappers and Middlemen in the Lands Southwest of Hudson Bay* (1974), Chapter 11, especially at 205-212; Milloy, *The Plains Cree: Trade Diplomacy and War, 1790 to 1870* (1988), at 105.

The idea of restricting Aboriginal commercial activity was born when fear of competition with settler activity arose. This occurred even in the face of treaty promises to assist in economic development. Dr. Carl Beal has noted “Access to markets was controlled by the Indian Agent through the permit system. The Indian agent regulated both sales and purchases by Indians. That system had been authorized by the *Indian Act of 1876*, reinforced by an Order in Council in 1880, and further strengthened after 1888 to curtail as far as possible Indian access to markets to sell agricultural surpluses and purchase agricultural equipment. The Department even sought legislation to forbid the giving of credit to Indians.” Beal goes on to note that after 1890, Indian Commissioner Hayter Reed strictly regulated Indian access to farm equipment. Beal, *Money, Markets and Economic Development in Saskatchewan Indian Reserve Communities, 1870-1930s* (1994), at 186-187.

⁷¹ *Southwind v. Canada*, [1998] 2 C.N.L.R. 233 (F.C.A.); *Recalma v. Canada*, [1998] 2 C.N.L.R. 279 (F.C.A.); *Indian Act*, R.S.C. 1985, c. I-5.

⁷² [2001] F.C.A. 178, at para. 48. (Application for leave to appeal refused by the Supreme Court of Canada, March 14, 2002.)

examination of the decisions bearing on these sections confirms that Indians who acquire and deal in property outside lands reserved for their use, deal with it on the same basis as all other Canadians.⁷³

It would be erroneous to apply an approach developed with respect to the statutory protection in section 87 to limit the scope of constitutionally protected rights, and we do not mean to suggest that the “commercial mainstream” criterion which has been developed in the case-law on section 87 was applied by the Court in *Mitchell*. However, *Mitchell* was another case in which activities deemed by the Court to be commercial in nature appear to have been scrutinized more closely than activities which were generally understood to be associated with “Indianness”, such as hunting and fishing.⁷⁴

However relevant the concepts of the “commercial mainstream” as opposed to “Indianness” may be to the content of section 87 of the *Indian Act*,⁷⁵ they are irrelevant to the issue of Aboriginal rights. It cannot seriously be argued that Aboriginal societies in pre-contact times did not have an economy, or that they did not govern themselves. Yet, by placing the burden of proof upon Aboriginal claimants to prove in minute detail the historical activity and practices which form the modern right today, the *Van der Peet* test forces us to engage in an inquiry which essentially presumes that Aboriginal nations did not have an economy or that they did not govern themselves. The test certainly attributes virtually no weight to those cultural and societal markers. The particularization of the right, which is mandated by the test, forces us to dissect culture and society into its smallest elements in order to determine if the exact practice required to prove the right being exercised today prevailed four hundred years ago rather than focusing attention on viable and dynamic cultures and societies in which such activities would have naturally occurred or evolved.

Inevitably, the rights which are most often presumed to have their origins in pre-contact times are those which involve traditional subsistence activities: hunting and fishing for food and cultural needs. All other activities are subject to a tremendous burden of proof in order to be established as a right.⁷⁶ Ironi-

⁷³ [1990] 2 S.C.R. 85, at 131.

⁷⁴ Compare with *Adams, supra*, note 63. Interestingly, there even continues to be a debate about trapping as an Aboriginal activity, see, for instance *Delgamuukw*, [1997] 3 S.C.R. 1010, at paras. 22 and 55.

⁷⁵ And we do not mean to suggest that we agree with the application of this distinction in the statutory interpretation of s. 87.

⁷⁶ Stuart Rush, in his article “The Treatment of Evidence in *Mitchell*”, presented to The National Conference on Canadian Aboriginal Law — 2001 of The Pacific Business and Law Institute, in Toronto, Ontario, October 25, 26, 2001, has argued that no Aboriginal claimant has been successful in establishing anything other than hunting and fishing rights under the *Van der Peet* test, at p. 1.

cally, in *Mitchell*, at least three of the provincial interveners before the Supreme Court of Canada took the position that trading rights could not be an Aboriginal right as all human beings historically engaged in trade, and there was nothing particularly “Aboriginal” about it.⁷⁷ This demonstrates not only the extent to which presumptions regarding “Indianness” have been subsumed into the *Van der Peet* test but also how that test effectively marginalizes Aboriginal culture and society.

V. THE *VAN DER PEET* TEST AND CONTEMPORARY CROWN/ABORIGINAL NEGOTIATIONS

There exists an intriguing dichotomy between the rights discourse and analysis enshrined in the *Van der Peet* test and that promoted by government in negotiations with Aboriginal peoples. The focus of the *Van der Peet* test is on the distant past — the period of first contact between a First Nation and Europeans. In *Mitchell*, this meant that considerable evidence and analysis was devoted to a time period some four hundred years ago.

The determining factors in the decision of the Supreme Court in *Mitchell* were not what was culturally meaningful to the Mohawks of Akwesasne and their ancestors.⁷⁸ Trade with other First Nations was a central distinguishing feature of Mohawk society. But, that fact alone was apparently insufficient to ground the right in this case, rather the Court required evidence that such trade took place in a northerly direction. The focus is on the *cultural significance of the geographic direction of the activity some 400 years ago*, rather than the importance of trade to Mohawk society.⁷⁹

The *Van der Peet* test, as it was applied in *Mitchell*, fails to take into account any relevant contemporary factors. The test is utterly frozen in time. It requires the judiciary to peer back into a time centuries ago to determine what was culturally relevant and significant *to a specific people at that time*, and to define contemporary rights on that basis.⁸⁰

⁷⁷ *Mitchell SCC*, *supra*, note 64; see the Intervener factums filed by Quebec, New Brunswick and Manitoba.

⁷⁸ For a more detailed analysis on this particular point, see Walters, “The Right to Cross a River?: Aboriginal Rights in the Mitchell Case” prepared for the Toronto Conference of the Pacific Business and Law Institute, October 25, 2001.

⁷⁹ The Supreme Court had previously decided, in *Adams*, *supra*, note 63 that the Mohawks of Akwesasne had Aboriginal rights in Akwesasne and the surrounding area. Thus the historical links between the area of Akwesasne and the ancestors of the Mohawks had already been established to the satisfaction of the Court.

⁸⁰ This is precisely what McLachlin J. (as she then was) criticized in her dissenting reasons in *Van der Peet*, see *supra*, notes 18, 19, 20.

It is important to recall that the Mohawk Territory of Akwesasne is traversed by the international border and in puzzling ways. In order to cross from the Quebec side of the reserve to the Ontario side it is necessary to cross the international border and international customs and immigration posts, but to cross from the Quebec side into the New York side there is no customs and immigration post and indeed no discernible boundary line. Everyday life in Akwesasne involves coping with these multiple, superimposed jurisdictions. This reality was very much a focus of the evidence at trial in *Mitchell*.

How can the *Van der Peet* test be meaningful to the contemporary aspirations and realities of First Nations communities, such as the Mohawks of Akwesasne, when those everyday realities are ignored at the expense of a historical investigation into their ancestors' precise activities some 400 years ago?

If, as the Supreme Court has implied in *Pamajewon*, activities which are characterized as "twentieth century phenomena" can never form the subject of an Aboriginal right, there is little content to the Aboriginal rights protected by section 35(1) for Aboriginal peoples whose visions of and aspirations for their societies and their future go beyond hunting, fishing and trapping for food and social activities. How would this approach to judicial analysis of rights and power be viewed in other areas of the law such as fundamental freedoms and equality rights, the Charter and criminal law or federalism and judicial independence?

The rights analysis suggested by the *Van der Peet* test is rendered all the more incongruous when it is contrasted with the contemporary discourse of the government of Canada in its evolving policy on Aboriginal peoples and in its negotiations with Aboriginal peoples through a continuing and constitutionally mandated treaty process.

In negotiations with government on the exercise and implementation of Aboriginal rights, the focus is on the future. While the past is certainly still relevant to matters such as title claims, negotiations over governance issues, economic development and other matters are typically oriented towards the future. Generally, this is at the behest of the federal and provincial governments which do not wish to focus on a past where Aboriginal rights were, more often than not, honoured in the breach.⁸¹ Thus the 1997 policy paper *Gathering Strength: Canada's Aboriginal Action Plan* announced:

In developing its Aboriginal Action Plan, the Government of Canada sincerely hopes and believes that Aboriginal and non-Aboriginal people can develop a common vision for the future. This vision must include the means for Aboriginal people to participate fully in the economic, political, cultural and social life of Canada in a

⁸¹ *Sparrow*, [1990] 1 S.C.R. 1075, at 1103.

manner which preserves and enhances the collective identities of their communities, and allows them to build for a better future. This can and will be achieved as all parties accept, in a spirit of mutual respect and mutual responsibility, the challenge of strengthening the partnership between Aboriginal and non-Aboriginal Canadians.⁸²

Treaty negotiations today, whether on the inherent right to governance or territory and resources, are focused upon how rights will be exercised in a contemporary way and within the context of contemporary Canadian society. While Aboriginal and Canadian government negotiators often disagree about how the rights can be reconciled in this contemporary context, there is no question that the focus of this rights discourse is relevant and meaningful.

In *Gathering Strength*, we read the following under the heading “A Treaty Relationship”:

A vision for the future should build on recognition of the rights of Aboriginal people and on the treaty relationship. Beginning almost 300 years ago, treaties were signed between the British Crown and many First Nations living in what was to become Canada. These treaties between the Crown and First Nations are basic building blocks in the creation of our country.⁸³

In its Inherent Rights Policy, the government of Canada states:

The Government of Canada recognizes the inherent right of self-government as an existing right within section 35 of the *Constitution Act, 1982*. **It has developed an approach to implementation that focuses on reaching practical and workable agreements on how self-government will be exercised**, rather than trying to define it in abstract terms. The Government believes that this approach is flexible and will allow all interested parties to make meaningful progress in the realization of Aboriginal self-government.⁸⁴

While we would take issue with the Policy insofar as it limits negotiation of the inherent right solely to matters which the Government of Canada unilaterally defines as “internal”, we note that the focus of negotiations, according to the Policy, is on working out arrangements and structures for the contemporary *exercise* of the rights.

Shin Imai, in a short commentary on the effects of the *Mitchell* decision, asserts that the approach adopted by the Supreme Court hampers negotiations

⁸² Indian and Northern Affairs Canada, *Gathering Strength — Canada’s Aboriginal Action Plan* (1998), http://www.ainc-inac.gc.ca/gs/chg_e.html.

⁸³ *Ibid.*, at 6.

⁸⁴ Indian Affairs and Northern Development, *Federal Policy Guide on Aboriginal Self-Government*, 1995. Introduction, at 1 (emphasis added).

because of its focus on recreating historical situations rather than contemporary issues:

Why does this approach detrimentally affect negotiations? It does so by forcing the parties to place all their energies into recreating a historical situation that existed over four hundred years ago. There is little incentive to compromise on a historical vision, especially if it is that vision of history which will determine the outcome of litigation. The parties are not rewarded for attempting to make compromises or address the concerns of the other party.⁸⁵

We are not suggesting that Aboriginal peoples should abandon litigation to concentrate solely on negotiations. Negotiation and litigation work in tandem in advancing Aboriginal claims,⁸⁶ and it is clear that the Government of Canada has often been moved from intractable negotiation positions through Aboriginal victories in the courts.⁸⁷ However, as long as the rights inquiry mandated by the *Van der Peet* test remains resolutely focused on establishing and characterizing events or activities prevailing hundreds of years ago at the expense of a discourse about the exercise of Aboriginal rights in the context of contemporary Canadian society, it will not provide a solid foundation for negotiations. A solution to this unfortunate state of affairs must be found.

VI. CONCLUSIONS: ALTERNATIVES TO THE *VAN DER PEET* RIGHTS ANALYSIS

On numerous occasions the Court has referred to section 35 of the *Constitution Act, 1982* as providing the constitutional framework for reconciliation of the pre-existence of distinct Aboriginal societies occupying the land with Crown sovereignty.⁸⁸ This is a just and reasonable reading of the constitutional provision and the spirit underlying that provision. In our respectful opinion, however, the Court has proceeded from this point to develop a concept of reconciliation and a role for section 35 which is neither just or appropriate.

What the Court has proceeded to do, in fact, is to fashion reconciliation with Crown sovereignty by defining and dissecting Aboriginal society virtually to

⁸⁵ S. Imai, *2002 Annotated Indian Act and Aboriginal Constitutional Provisions* (Toronto: Carswell, 2002) preface, at xliii-xliv.

⁸⁶ And this has been recognized by the courts: see for instance, *Dumont v. Canada (Attorney General)*, [1990] 1 S.C.R. 279; *Montana Indian Band v. Canada*, [1991] 2 F.C. 30, at 38-39 and *Delgamuukw*, [1997] 3 S.C.R. 1010, at para. 186.

⁸⁷ For instance, the decisions in *Calder*, [1973] S.C.R. 313; *Sparrow*, *supra*, note 81; and *R. v. Marshall*, [1999] 3 S.C.R. 533 [hereinafter *Marshall*].

⁸⁸ *Van der Peet*, [1996] 2 S.C.R. 507, at para. 42.

the vanishing point in contemporary terms. Crown sovereignty, on the other hand, is assumed to evolve, flourish and reflect contemporary reality.

We suggest that there is a better and a fairer way and that this better and fairer way is found in the Court's first judgment on the scope of section 35(1) — *R. v. Sparrow*.⁸⁹ The twin ideas which the Chief Justice and La Forest J. appeared to be announcing in their reasons in *Sparrow* were, first, that on the matter of the existence and scope of Aboriginal rights, section 35 implied an accommodation *by* sovereign claims, not an accommodation *towards* such claims; and, second, that legitimate sovereign concerns were to be accommodated with respect to the *exercise* of Aboriginal rights, not through denying those rights. How else can we read the portion of the reasons of the Chief Justice and La Forest J. commencing at page 1102 in which they examine the background of section 35(1)? In this portion of their reasons they commence by juxtaposing early British policy towards the "Native" population based on respect for the right to occupy their traditional lands as evidenced by the *Royal Proclamation of 1763* with the fact that from the outset there had never been any doubt that sovereignty and legislative power to such lands vested in the Crown.⁹⁰ They then proceed to observe that: "For many years, the rights of the Indians to their aboriginal lands — certainly as *legal* rights — were virtually ignored."⁹¹ Then they trace what they characterize as the "long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights".⁹² They find that section 35(1) represents the "culmination" of this struggle. And they quote Professor Lyon who suggests that section 35 "calls for a just settlement for aboriginal peoples" and implies the end of "the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown".⁹³ The placement of this passage by Professor Lyon in the reasons in *Sparrow* surely can be construed as an acceptance by the Court that the just settlement for Aboriginal peoples and the reconciliation mandated by section 35 implied for Aboriginal societies, not death by a thousand definitions, but rather room to grow.

⁸⁹ *Sparrow*, *supra*, note 81, at 1082, 1083 where the Chief Justice and La Forest J. opened their reasons as follows:

This appeal requires this Court to explore for the first time the scope of s. 35(1) of the *Constitution Act, 1982*, and to indicate its strength as a promise to the aboriginal peoples of Canada.

⁹⁰ *Ibid.*, at 1103.

⁹¹ *Ibid.* (emphasis added).

⁹² *Ibid.*, at 1105.

⁹³ *Ibid.*, at 1106.

This is borne out by the Court in *Sparrow* supporting the position of Hall J. in *Calder* rather than Judson J. on the matter of the vulnerability of Aboriginal rights to Crown power even prior to the enactment of section 35. The Chief Justice and La Forest J. stated:

...That in Judson J.'s view was what had occurred in *Calder, supra*, where, as he saw it, a series of statutes evinced a unity of intention to exercise a sovereignty inconsistent with any conflicting interest, including aboriginal title. But Hall J. in that case stated (at p. 404) that "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and *that intention must be 'clear and plain'*". The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.⁹⁴

At the same time, the Court in *Sparrow* provided the tools for the ongoing reconciliation of Crown power with Crown duty and that was to suggest that, with justification, the exercise of Aboriginal rights could be restrained through government regulation.⁹⁵

The Supreme Court of Canada's first judgment on the origins and nature of Indian title — and, by extension, all Aboriginal rights — was its judgment in *Calder* in 1973. Six judges of the Court rejected the argument that upon the "discovery" of North America by Europeans, all rights of the indigenous inhabitants were promptly extinguished or superseded. While three members of the Court found that Indian title was subsequently extinguished by colonial legislation, six members of the seven member bench held that Aboriginal, or Indian, title was a pre-existing right which was not created by any colonial act. What was significant was the *fact* of prior occupation, the fact in Judson J.'s words that: "...when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."⁹⁶

It is interesting that a reader of Lamer C.J.'s reasons in *Van der Peet* would form an impression from the opening passages that the Chief Justice was headed in the direction of *Calder* in his discussion as to what "Aboriginal" meant in Aboriginal rights. For example, the Chief Justice wrote:

In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all

⁹⁴ *Ibid.*, at 1098-1099 (emphasis added).

⁹⁵ *Ibid.*, at 1109.

⁹⁶ *Calder, supra*, note 87, at 328. Three other judges, led by Hall J. found that the colonial legislation in question had not had the effect of extinguishing Aboriginal title. In *Sparrow, supra*, note 81, Hall's judgment on extinguishment was adopted by the Supreme Court of Canada.

other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.⁹⁷

In fact, the Chief Justice in *Van der Peet* specifically acknowledged the contribution of Judson J. and Hall J. in *Calder* in this analysis and explained that no distinction needed to be made between determining Aboriginal title as in *Calder* and determining Aboriginal rights:

The position of Judson and Hall JJ. on the basis for aboriginal title is applicable to the aboriginal rights recognized and affirmed by s. 35(1). Aboriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the common law recognizes aboriginal land rights. As such, the explanation of the basis of aboriginal title in *Calder, supra*, can be applied equally to the aboriginal rights recognized and affirmed by s. 35(1). Both aboriginal title and aboriginal rights arise from the existence of distinctive aboriginal communities occupying “the land as their forefathers had done for centuries” (p. 328).⁹⁸

The Chief Justice in the early portion of his reasons in *Van der Peet* also seems to consider important the dynamic character to Aboriginal rights. He cites Professor Mark Walters as suggesting that the essence of Aboriginal rights is their bridging of Aboriginal and non-Aboriginal cultures:

The challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined . . . a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives.⁹⁹

Immediately following this passage, the Chief Justice invokes Professor Slattery and his suggestion that the law of Aboriginal rights: “is a form of intersocietal law that evolved from long-standing practices linking the various communities”.¹⁰⁰

The Chief Justice sums up his review of Canadian, American and Australian jurisprudence and the doctrine as follows:

The Canadian, American and Australian jurisprudence thus supports the basic proposition put forward at the beginning of this section: the aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of

⁹⁷ *Van der Peet, supra*, note 88, at para. 30.

⁹⁸ *Ibid.*, at para. 33.

⁹⁹ *Ibid.*, at para. 42.

¹⁰⁰ *Ibid.*

Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of these purposes; the next section of the judgment, as well as that which follows it, will attempt to accomplish this task.¹⁰¹

We do not take issue with the two elements identified. In fact, they contain the seeds of what we would consider to be a more appropriate approach which acknowledges the constitutional recognition of pre-existing Aboriginal societies and which leaves open the possibility of achieving reconciliation through appropriate exercise of rights rather than through dissecting cultures to establish the existence of rights. The Supreme Court in *Sparrow* suggested the appropriate tool over 10 years ago — the justification test.

Unfortunately, after this introduction, the Chief Justice moved immediately to establish a test now known as the *Van der Peet* test which effectively retreats from the Court's approach in *Calder* and *Sparrow* by requiring Aboriginal claimants to prove, amongst other things, (1) that when the settlers came they were indeed living on the land; (2) the nature of their distinctive societies which existed when the settlers came; (3) those elements that were "integral" to their distinctive societies when the settlers came, (4) the manner in which they occupied the land when the settlers came; and (5) continuity between the historical practices and the contemporary claims.

In *Delgamuukw*, the Chief Justice determined that a continuing substantial connection between a people and a territory was sufficient to establish Aboriginal title. Why is it not so that the continued existence of a culture, societal values and activities are not sufficient to establish Aboriginal rights? Why is it that the judicial recognition of the evolving nature of territorial occupation between the time of sovereignty and the present in the case of Aboriginal title is not applied to the individual Aboriginal activities not directly associated with the use and enjoyment of land title?¹⁰² We note that in *Van der Peet*, L'Heureux-Dubé J. adopted just such an approach for Aboriginal rights in her dissenting reasons.¹⁰³

¹⁰¹ *Ibid.*, at para. 43.

¹⁰² The Chief Justice in *Delgamuukw*, *supra*, note 86, wrote, at para. 154:

I should also note that there is a strong possibility that the precise nature of occupation will have changed between the time of sovereignty and the present. I would like to make it clear that the fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained.

¹⁰³ Justice L'Heureux-Dubé in *Van der Peet*, *supra*, note 18, at para. 113:

Aboriginal people's occupation and use of North American territory was not static, nor, as a general principle, should be the aboriginal rights flowing from it. Natives migrated in response to events such as war, epidemic, famine, dwindling game reserves, etc. Aborig-

We propose a return to the first principles originally articulated by John Marshall C.J. of the United States Supreme Court in the foundational trilogy of *Johnson*, *Cherokee Nation* and *Worcester*,¹⁰⁴ first principles also set out in *Calder* by the Supreme Court of Canada and indeed invoked by Lamer C.J. as well as the present Chief Justice and L'Heureux-Dubé J. in *Van der Peet*.¹⁰⁵ These first principles include the existence of self-governing and independent nations or peoples occupying or using determined geographical areas which later became the subject of European sovereign assertions. These European sovereign assertions should not become the lens through which to examine the existence or continuation of the rights and titles of these pre-existing nations or peoples¹⁰⁶ rather the focus should turn to establishing accommodation and reconciliation in the continuing existence and evolution of these societies. Here the *Sparrow* analysis and its emphasis on the exercise rather than the existence of rights would serve well.

We note that the justification analysis of the *Sparrow* test has been elaborated in theory in three Supreme Court judgments: in *Sparrow*¹⁰⁷ the Court set out the justification test in cases involving sustenance rights and other Aboriginal rights that are internally limited; in *Gladstone*¹⁰⁸ the Court set out a separate

inal practices, traditions and customs also changed and evolved, including the utilisation of the land, methods of hunting and fishing, trade of goods between tribes, and so on.

¹⁰⁴ *Johnson v. M'Intosh*, 8 Wheat. 543 (1823); *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831); and *Worcester v. Georgia*, 6 Pet. 515 (1832).

¹⁰⁵ See Lamer C.J., *supra*, notes 97-101, McLachlin C.J., *supra*, notes 18, 19, 20 and L'Heureux-Dubé J.'s dissenting reasons in *Van der Peet*, *supra*, note 88, at paras. 106, 107:

Accordingly, it is fair to say that prior to the first contact with the Europeans, the native people of North America were independent nations, occupying and controlling their own territories, with a distinctive culture and their own practices, traditions and customs.

In that regard, it is useful to acknowledge the findings of Marshall C.J. of the United States Supreme Court in the so-called trilogy, comprised of *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Particularly in *Worcester*, Marshall C.J.'s general description of aboriginal societies in North America is apropos (at pp. 542-43):

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

[Justice L'Heureux-Dubé also referred in this context to Judson J.'s judgment in *Calder*, *supra*, notes 12 and 13, see also page 245 of this volume. This passage was also quoted, with approval, by Hall J. in *Calder*, *supra*, note 12, at 383.]

¹⁰⁶ See Justice L'Heureux-Dubé dissenting in *Van der Peet*, *supra*, note 88, at para. 162: Finally, it is almost trite to say that what constitutes a practice, tradition or custom distinctive to native culture and society must be examined through the eyes of aboriginal people, not through those of the non-native majority or the distorting lens of existing regulations.

¹⁰⁷ *Sparrow*, [1990] 1 S.C.R. 1075, at 1115-1116.

¹⁰⁸ *Gladstone*, [1996] 2 S.C.R. 723, at paras. 56-75.

justification test for trading rights and those that are not internally limited; and, in *Delgamuukw*¹⁰⁹ the Court set out a justification test for interference with Aboriginal title.

Ironically, the justification test has received little more than theoretical treatment by the Supreme Court as the Crown very rarely attempts to justify interference with an Aboriginal right at trial, preferring to argue that the right was not established, that it was extinguished and, as in *Mitchell*, that it is “inconsistent with Crown sovereignty.”¹¹⁰

As we have seen, the seeds of a solution lie buried in the jurisprudence of the Supreme Court of Canada — in *Calder*, in *Sparrow*, in *Van der Peet*, in *Delgamuukw*.¹¹¹

A distillation of the appropriate principles found in this jurisprudence, whether in majority, minority or dissenting reasons, indicates a way forward. No *a priori* assumptions about “Indianness” ought to apply to defeat an Aboriginal claim. Consistent with the recognition in *Calder* of the pre-existence of Aboriginal societies as self-governing, self-sufficient entities, the evidentiary burden relating to the historical existence of a right should be applied with reference to the general characteristics of the relevant Aboriginal society, not the specificity or particularity of discrete activities. Thus, a claim of an Aboriginal right to trade in salmon would be determined by whether, in pre-contact times, the Aboriginal society in question engaged in trade in the products of harvesting generally and whether this activity was meaningful to them. Or, using *Mitchell* as an example, the evidentiary burden would be met by establishing that the Mohawks historically travelled in a determined geographical area, engaged in diplomacy and trade with other First Nations and that these activities constituted meaningful components of their society.¹¹²

Aboriginal plaintiffs would still have to establish that a Canadian law or regulation interfered with their Aboriginal right as prescribed by *Sparrow*. This having been done, the burden of proof would then switch to the government to establish extinguishment or, if that could not be shown, then to establish, on the basis of evidence, justification for the limitation of the exercise of the right.

¹⁰⁹ *Delgamuukw*, [1997] 3 S.C.R. 1010, at paras. 160-169.

¹¹⁰ In addition to *Mitchell*, see *R. v. Badger*, [1996] 1 S.C.R. 771 and *Marshall*, [1999] 3 S.C.R. 533, for examples where the Court noted that the federal Crown failed to lead evidence on justification. Interestingly, provincial Crowns have led such evidence, but only occasionally have successfully demonstrated that a limitation is justified: see also *R. v. Adams*, [1996] 3 S.C.R. 101; *Côté*, [1996] 3 S.C.R. 139.

¹¹¹ And elsewhere. See for example, Lambert J.A.’s reasons in *Van der Peet* in the Court of Appeal for British Columbia, [1993] 4 C.N.L.R. 221, at paras. 137-151.

¹¹² It appears that the Supreme Court was satisfied that general evidence of trade with other First Nations, and its importance to the Mohawks, existed in this case: see para. 41 of its judgment.

Thus, if the Crown could show on the evidence that an Aboriginal right to trade in salmon would result in unacceptable conservation risks to the species, then the right would not be exercisable.

We propose that, consistent with the federal government's stated policy of preferring to focus on reaching practical and workable agreements on how Aboriginal rights will be exercised, the *Sparrow* inquiry should refocus onto questions regarding the exercise of the Aboriginal right in the context of contemporary Canadian society. This would result in a more equal evidentiary burden for the parties when they enter into litigation, and, more importantly, it would focus the inquiry before the courts on questions that are truly meaningful and relevant to contemporary Canadian, and Aboriginal societies.

In this new universe, the Courts could cease patrolling cultural borders and concentrate on applying the law towards reconciling and ensuring the co-existence and collaboration of proud, evolving and interdependent cultures and societies across those borders.

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