

**IN THE PATH OF OUR ANCESTORS:
THE ABORIGINAL RIGHT TO CROSS
THE CANADA- UNITED STATES BORDER**

By

Pamela D. Palmater

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DEDICATION

This thesis is dedicated to my two children, Mitchell and Jeremy.

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ABSTRACT

In this thesis, I will argue that the Aboriginal peoples whose traditional territories straddle the Canada – United States border have the right to pass and repass the border freely. With this right comes the ability to live and/or work in either country without having to apply for permission each time with Immigration officials. I have suggested that instead of litigating these rights, the governments of both Canada and the United States should commence tri-partite discussions on how best to accommodate these rights, both on an interim basis and permanently through legislation. One of the measures that I have suggested is a form of identification that indicates the individual holders of Aboriginal and Treaty rights to pass the border freely.

I have argued that these mobility rights apply to the Aboriginal Nations who comprise the Wabanaki Confederacy, which includes the Mi'kmaq and Maliseet Nations who occupy present-day New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, and Maine. It is my position that these groups have both Aboriginal rights and Treaty rights to cross the border without interruption. Both Aboriginal Title claims and self-government claims by the above groups would also address the issue of mobility within that same territory which includes land in both Canada and the United States. I have also detailed my position with regards to who should benefit from these rights, and I have advocated for an inclusive definition of "Aboriginal people" so that non-status Indians, off-reserve Indians and Metis people of both Canada and the United States are not left out.

In addition, certain international treaties namely, the *Jay Treaty of 1794* and the *Treaty of Ghent* recognized and guaranteed the "Indian Nations" their right to cross the border freely, and that the border was never meant to affect them. I have argued that these international treaties should be recognized as treaties to be protected under section 35(1) of the *Constitution Act, 1982*, in so far as the specific Articles address Indian rights. Even if the Crown or the courts felt that these international treaties were not "deserved" of protection in that sense, the fiduciary duty that the Crown owes to Aboriginal peoples should mandate legislative recognition of the promises contained in these treaties with regards to the border.

The honor of the Crown demands that fair treatment be afforded to the Aboriginal peoples on this Continent called Turtle Island by its First Peoples. The Crown can not now in good faith refuse to recognize the very rights it promised to uphold so that they could settle this country for themselves. The Aboriginal and Treaty rights with regard to border passage already exist, and it is time the Crown worked in partnership with Aboriginal people to facilitate these rights, instead of rely on litigation. If litigation will continue to be the default position for the Crown, then I hope this thesis adds to the position of our peoples.

CHAPTER ONE:
THE BATTLE INSIDE AND OUT:
THE STRUGGLE FOR MOBILITY AND
THE POLITICS OF WHO
GETS TO GO.

“Attack them with your best courage and conduct and do your utmost to take, kill and destroy them... By all possible means, find out, suppress, and destroy the Indian enemy.”¹

INTRODUCTION:

The focus of this thesis will be on INDIAN COUNTRY and our rights as the guardians of this territory to pass freely over the border; the political line of colonialism.² This land has been Indian Country since time immemorial, and will continue to be viewed as such by the Aboriginal Nations of this land, despite the incredible hardships our peoples have endured and managed to survive, in order that they could pass something better on to their children’s children, seven generations into the future.³ The Aboriginal Nations of what is now called Canada and the United States, live on the land that we call TURTLE ISLAND. Since the European populations settled this land, Aboriginal Nations have been cheated out of their traditional lands, and some of those Nations no longer exist due to the bounties awarded by Europeans for their scalps. There

¹ *Letters of Colonel Thomas Westbrook and Others – New England History*, vol.47. [hereinafter *Letters of Westbrook*] (no page reference available).

² I am writing this paper in my capacity as a student at Dalhousie University as a part of the requirements to obtain my Master’s Degree in Law. The opinions and ideas expressed herein are my own unless otherwise stated and in no way represent the views of my employer the Department of Justice Canada. In addition, the views expressed herein do not reflect the views of my client the Atlantic Regional Office of the Department of Indian and Northern Affairs Canada.

³ Please note that some of the sources listed were obtained from the Confidential Land Claim and Treaty Files at the New Brunswick Aboriginal Peoples Council (N.B.A.P.C.) in Fredericton, New Brunswick. Permission was obtained from the President of the Organization to use these documents in furtherance of various Aboriginal issues. As a result, the sources do not always have full bibliographic material available for the purpose of footnotes and bibliographies.

was one single European motto that rang out for all Aboriginal people to heed, lest they choose to assimilate into oblivion:

**BY ALL POSSIBLE MEANS, FIND OUT, SUPPRESS,
AND DESTROY THE INDIAN ENEMY.⁴**

Even for those Aboriginal peoples who did survive European colonization, their families and cultures were still attacked by European politics and values. Even today, the right to call oneself an “Indian” is determined by the Canadian government through the *Indian Act*, R.R.S.C. 1985, c I-5. Now, instead of being identified as a Mi’kmaq, Mohawk or Cree, the federal government has reserved unto itself the right to pronounce which Aboriginal people in Canada are deserved of the right to be called an “Indian”. This right confers upon the holder the right to live on a reserve and receive various benefits under the *Indian Act*. Unfortunately, with this “privilege” also came domination, poverty, loss of culture, discrimination, suicide and perhaps worst of all, division among formerly united Aboriginal groups.⁵

It is from this social context that Aboriginal groups today are asserting their rights and litigating them in court. The path which has emerged from the courts is a case by case, Nation by Nation and right by right approach for determining the scope of Aboriginal rights. This creates difficulty in the sense that we only get one small piece of the picture each time a case is litigated, but for now, this being the set path, I will make my arguments for one aspect of aboriginal rights: mobility, for one small part of Turtle Island: the Atlantic provinces, and for one part of the larger Aboriginal groups in Canada;

⁴ *Letters of Westbrook, supra note 1.*

⁵ G. York, *The Dispossessed: Life and Death in Native Canada* (Toronto: G. York, 1989).

the members of the Wabanaki Confederacy. It is from this political context that I plan to make my arguments for an Aboriginal right to cross the Canada – U.S. border.

It is my submission that the Aboriginal Nations which have traditionally lived on or near the Canada-U.S. border have a right to cross the border unmolested, for traditional purposes. By traditional purposes I do not refer to a “frozen rights” concept whereby they could only cross the border to hunt deer with stone tools. I believe that every culture has a right to evolve and thus a modern evolution of their rights would include travel by car to visit family or attend a pow wow or many other activities. These purposes might include travel for hunting, work, cultural gatherings and other ceremonial purposes. This right should also include the right of free passage for the purpose of choosing to live in either country to be with family or to start a new family. A related right would be to import goods tax and duty-free for the purposes of personal consumption or for consumption by the traveler’s family. I have chosen to deal with the mobility issue as a separate issue from the importation of goods due to time and space limitations.

It is my assertion that the member Nations of the Wabananki Confederacy have a right to cross the border unmolested for the purposes listed above. When I say “unmolested” I am using the concept as it was used in the early treaties of the 1700’s which were signed with the member nations of the Wabanaki Confederacy. The treaties and promises made by the Crown included rights for Indians to go about their activities as they have always done with the promise that they would be left alone or “unmolested” by either the settlers or representatives of the Crown. Today, this term would be balanced with the Crown’s right to protect its borders and could mean that some form of identification could be used to determine the beneficiaries of such a border-crossing right,

as opposed to being detained at the border, forced to attend immigration hearings or filling out numerous forms.

The identification to be used at the border to signify Aboriginal border crossing rights, could be an agreed list of cards that would be acceptable to both the Aboriginal peoples and the Immigration officials, such as status cards or membership cards for Aboriginal organizations such as the New Brunswick Aboriginal Peoples Council who represents status and non-status Indians living off reserves. A similar process exists for other federal organizations such as the Department of Fisheries and Oceans to identify Aboriginal fishers. Another form of identification might also be worked out whereby membership lists are supplied to Immigration for them to issue special border cards. It is not acceptable to many in the Aboriginal community to go through the current process as it exists under the Immigration rules and policy. Some of our traditional members would take offense to signing declarations asking the government to accept a traditional marriage as the basis of the right to cross the border. They do not wish to have to ask for permission to cross the border on a regular basis. They wish to assert the right they already have, as one based on Aboriginal rights, as recognized by the *Jay Treaty*⁶ and not one which stems from modern day immigration laws. In the end, it is not the form of the identification that is significant, but the recognition of the right itself.

Due to time limitations, this paper will not deal with such issues as the right to import firearms or tax-free goods for the purpose of commercial sale. I will base my arguments on various aspects of Aboriginal rights including “international treaties”,

⁶ *The Jay Treaty, 1794 – Treaty of Amity Commerce and Navigation.* By D.I.A.N.D., (Ottawa). I will be dealing with the *Jay Treaty* in much more detail in Chapter Three.

Indian treaties, Aboriginal rights and negotiated rights incidental to Aboriginal title and self-government. I have written this thesis with the hope that it may prove to be of benefit to those Aboriginal Nations who have difficulties traversing the Canada-U.S. border in their attempts to work, visit their families, participate in cultural activities or other traditional activities. While some of my arguments could be applied to other “border” tribes who may also be able to establish Aboriginal rights with regards to crossing, I have limited my arguments to the specific state of the Wabanaki Confederacy and their particular treaties and cultural traits, etc.

This issue of border crossing is especially relevant to the members of the Wabanaki Confederacy whose member Nations occupy the present-day Atlantic provinces and Maine. I will assert that these groups have an Aboriginal right to pass freely over the Canada – United States border. One of the most controversial sources of this right comes from the *Jay Treaty of 1794* and the promises that were made to the Aboriginal Nations about free passage over the then newly formed border. While the courts have not recognized the *Jay Treaty* as an international treaty that has been incorporated into our law today, there remains the unresolved issue of the Crown’s promises made to the Indian Nations so long ago. It is my assertion that not only do the later Indian treaties serve to reinforce those earlier promises, but the provisions of the *Jay Treaty* dealing with the rights of Aboriginal peoples should itself be recognized as an Indian treaty. At a minimum, the *Jay Treaty* provides evidence of an Aboriginal right to cross the border.

There are modern ways in which to correct the problem if the court was so inclined to protect the interests of Aboriginal peoples. It would be unconscionable to

allow the Crown to benefit from the promises made by the Indians to refrain from hostilities, while at the same time failing to live up to their own promises to the Indians of free border passage. The Indian Nations relied on these promises to their detriment, in the sense that they refrained from attacking, only to have the law recognizing these rights, revoked years later. In addition, Aboriginal title claims in the same area add strength to the quest for free passage based on Aboriginal title rights over the land and the corresponding right to govern within those Aboriginal territories.

The case law tends to deal almost exclusively with the “legal” aspects of Aboriginal rights and the legal reasons why justices decide in favor or against the Indian Nations seeking affirmation of a particular right. Recent decisions have come a long way towards understanding and developing unique methods by which to assess these claims and give validity to the modern-day exercise of them. There is an inherent limitation on these cases, as the judges must base their decisions on legislation, common law, property law and contract principles, in order to resolve Aboriginal issues, as the Canadian justice system expects of them. It is this very system of Justice, which uses foreign languages, values, rules and laws to adjudicate Aboriginal issues that underlies the erratic way in which courts have dealt with Aboriginal people and our issues. They have recognized that the issues are *sui generis*, yet still rely heavily on the very common law concepts they warn about. In the end, the *sui generis* principle is just another legal principle and needs litigation to be put to any use. While the purpose of this paper is to present possible legal arguments why Wananaki members should have the right to cross the border, it is important to understand that there exists many other views in the Aboriginal community as to the spiritual and cultural sources of such a right, which is not the focus of this thesis.

ABORIGINAL MOBILITY

WHAT IS MOBILITY FOR US?

This thesis will begin with an introduction to the concept of Aboriginal mobility within the Wabanaki Confederacy. This introduction is followed by an explanation of the politics of Aboriginal issues and who gets to benefit from positive court decisions. Too often Aboriginal issues are cast in light of the theoretical legal arguments and neglect the very people they most affect. Once a decision has been handed down from the Supreme Court of Canada, the idea is that now the Crown and Aboriginal people will sit down and work out a process by which to implement the particulars of the right. The question of who gets left out of the bargaining process is either ignored or left out, with claims that this issue is too complex. There are groups which are habitually left out, including Aboriginal people who live off reserve or do not qualify for status under the *Indian Act* as an "Indian". While I can not spend much time solely on this issue, it will be included in the analysis of court decisions and possible solutions for the future. I will attempt to present this thesis in my own voice and do not profess to be the voice for all Aboriginal people. Just as other peoples around the world have differing views within their own culture, so too do Aboriginal people differ on many political, social and legal issues. This is a positive aspect of our peoples and I only desire to add to the discussion. In the end, I hope that we can work through a solution to the problem of free passage over the border for the benefit of those Aboriginal Nations who live near, work or travel over the border that is inclusive of the Aboriginal people affected.

There are certain characteristics of Aboriginal Nations which appear to be common knowledge among anthropologists, sociologists, archaeologists, historians and anyone who has researched into the ways of life of different Aboriginal people. Some of the more common traits include living in large extended families, living off the lands and the seas as hunters and gatherers, and following either nomadic or semi-nomadic lives. For the most part, each Nation or alliance of Nations had their own particular territories in which to hunt and fish. Sometimes wars would change the territories and sometimes the Nations moved according to the ability of the land to sustain them. Some Nations lived in one place in the summer months and other places in the winter months, whereas others just moved according to food supplies or alliances. There are various sources for this type of anthropological and historical information and often experts prepare reports for court about the particular Nation in litigation. Aboriginal people know their histories through the oral stories told by their elders which are passed down from generation to generation. The non-Aboriginal researchers know this information through their various studies which include observing groups and documenting cultural traits and languages and other characteristics. Mobility, was no doubt the key to survival for many Aboriginal Nations as a part of adaptability and the slow evolution or progression of time within a culture. The purpose of my paper is to present the legal arguments for free passage over the border. Due to time and space limitations, I can not present an archeological or anthropological overview of the various Nations of the Wabanaki Confederacy other than to refer briefly to examples of the type of historical evidence that would be referred to in litigation. That kind of in-depth historical research would be necessary for future

litigation in order to support the legal assertions with regards to establishing Aboriginal rights.

What mobility means to us spans over thousands of years of traditional usage of our lands which we know has been done since time immemorial. While each of our separate Nations may have had different territories, we were neighbors and as such traveled this common territory for trade, intermarriage and warfare. The traditional territories of the Mi'kmaq, Maliseet, Passamaquoddy and Penobscot comprise the areas of what are today referred to as Maine, New Brunswick, Nova Scotia, P.E.I., Newfoundland and Quebec. Our elders tell us of ancient travels over territories that would now span territory in both present-day Canada and the United States. Unfortunately, I will not have the time to include an anthropological or ethnohistorical background on all the member Nations of the Confederacy. Obviously, in any future litigation the specific group asserting mobility rights would have to complete such a task, but for my purposes, I will use the Mi'kmaq as an example and present a brief overview of evidence relating to territory, trade and travel.

The Mi'kmaq peoples were considered by anthropologists and other social scientists, to be part of the Maritime Archaic tradition which dates back from 7500 to 3000 years ago. These peoples of which the Mi'kmaq were a part, relied primarily on maritime resources for survival. Many archaeologists consider that their territories along with the other tribes of the Confederacy spanned an area from northern Labrador to Maine. Later archaeological finds contained evidence of trade as between Nations in this area. Trade items included both products made from ivory tusks of sea mammals and

tools flaked from distinctive stone.⁷ One particular site in northeastern New Brunswick referred to as the “Augustine Mound” contained evidence that these people “...were in contact with religious ideas and ceremonial practices from far to the south.”⁸ These items were unmistakably not local:

Stone artifacts interred with the dead include large finely flaked points and knives, gorgets (polished stone pendants, perforated for wearing on the chest), and pipes. Many wealth goods were made of raw materials not available locally, the most spectacular of which were thousands of rolled copper beads and implements of native copper, a raw material obtained from the western Great Lakes region.⁹

The artifacts and burial practices indicate affiliation with the Adena culture far to the south, with its centre in the Ohio Valley.¹⁰

It is this kind of evidence that would be used to assert that the Aboriginal peoples of the maritime area, later members of the Wabanaki Confederacy, had trade contacts and religious affiliations with peoples far to the south into present day United States. Groups like the Mi’kmaq and Maliseet continued their relations with Nations from the United States through the Confederacy and were most strongly allied with the Penobscot of Maine. Interestingly enough, today, while the federal government has placed most Mi’kmaq on reserves in New Brunswick and Nova Scotia, a large concentration of Mi’kmaq remain in Boston. Even in modern times, many Mi’kmaq people have remained transient or mobile and continue to travel, work and live on both sides of the border, so

⁷ A. D. McMillan, *Native Peoples and Cultures of Canada* (Vancouver: McMillan, 1988) at 31-53. [hereinafter *McMillan*]

⁸ *Ibid.* at 38.

⁹ *Ibid.*

much so that the concentration of Mi'kmaq in Boston is considered to be larger than the concentration found on most of the Mi'kmaq reserves in the Maritimes.¹¹ There will be little trouble substantiating the claim that the member Nations of the Wabanaki Confederacy traveled the border area for political, social and ceremonial, as well as trade reasons. Their history spans thousands of years on this continent, since time immemorial.¹²

A recent court case dealing with the Aboriginal rights of Mohawks with regards to the border addressed the issue of trade and how this impacts the analysis of the possible Aboriginal rights. One significant finding by the trial judge in *Mitchell v. Canada (Minister of National Revenue – M.N.R.)*¹³, was the fact that trade was found to be integral to the Mohawk culture. The evidence from ancient village sites indicated that trade started at about 3,000 B.C. and definitely by 300 B.C. The interesting factor in the trade evidence was who and where they traded, which included a trade route eastward to the Atlantic coast for marine-shell beads. The focus of this thesis is on the Nations that inhabit the Atlantic coast area and Maine, which include the member Nations of the Wabanaki Confederacy. While the judge found that the trade may not have been on as large a scale as it was for the Hurons, it was enough to be considered of “*vital importance*” to their culture.¹⁴ For the purpose of this thesis, I will use this kind of evidence in my analysis of the Aboriginal rights of this group as a whole.

¹⁰ *Ibid.*

¹¹ *Ibid.* at 52-53.

¹² *R. v. Van der Peet*, [1996] 2 S.C.R. 507. [hereinafter *Van der Peet*].

¹³ *Mitchell v. Canada (Minister of National Revenue)* [1997] 4 C.N.L.R. 103. (Fed. T.D.). [hereinafter *Mitchell, trial*].

¹⁴ *Ibid.* at para. 108.

The question which is yet to be answered is how this type of information would be treated if it were submitted as evidence to establish a claim of border crossing rights by an Aboriginal group. What if the different Nations of the Wabanaki Confederacy asserted as an Aboriginal right, the right to be nomadic or semi-nomadic? It does not sound like a right which has far-reaching implications such as an Aboriginal right to fish or hunt or claim a certain area of land. On its face, it would appear that if a Mi'kmaq person or an Abenaki person wanted to live in one place in the winter and another in the summer, they would simply go ahead and do it as an exercise of their ancient traditions. By comparison, many Canadians have winter homes and summer homes or fly to hotter places in the winter and stay at home for the summer. Very few people would deny a New Brunswick'er the right to move to Nova Scotia in the summer and Florida in the winter. The only limitation for these Canadian citizens, is that they must go through Immigration as all international travelers must. By comparison, Canadians have a right to travel within their own geographical territory, free from restrictions based on provincial borders. An individual could have a criminal record and that would not supercede his or her right to travel freely within his or her Canadian territory. Aboriginal peoples are asking for no less than the right to travel freely within their traditional territory, which includes land in both the United States and Canada.

Canadian citizens derive their right to leave and return to Canada from the specific provisions of the *Immigration Act* which details who has this right of mobility. Aboriginal peoples have an additional protection of their rights: constitutional protection of their existing Aboriginal and treaty rights. Providing that they could show that they have an existing Aboriginal or Treaty right of cross border movement, these rights could

not be so easily restricted under the *Immigration Act* without justification and consultation. Non-aboriginal Canadians do not have this added protection and therefore, it follows that the rules would be different as between Aboriginal peoples and Canadian citizens. I will argue in my thesis that Aboriginal peoples do have this right and its constitutional protection mandates a different set of rules for Aboriginal peoples.

The individual Nations of the Wabanaki Confederacy wish to exercise their traditional modes of mobility, yet are experiencing Immigration problems going back and forth over the Canada - United States border. I am not suggesting that Canada open up its borders to all peoples without restriction. The Crown has a valid right to protect its citizens by maintaining control over the border, but this right must be balanced by the Aboriginal rights at issue. The Supreme Court of Canada in *Van der Peet, supra*, has already held that Crown sovereignty must be reconciled with the Aboriginal and Treaty rights. It follows then that those Crown interests must also be balanced with Aboriginal rights which relate to free passage over the border. The Crown's legislation must not infringe the rights of Aboriginal peoples protected under the *Constitution Act* without justification, possible compensation, consultation and minimal impairment.¹⁵

While the Federal Government has legislated certain "rights" for status Indians under the *Immigration Act*, the scope of these rights are yet to be determined. There also remains the interests of non-status Indians and Metis with regards to cross border movement that are not specifically dealt with under the *Immigration Act*.¹⁶ It is notable

¹⁵ *R. v. Sparrow*, [1990] 1 S.C.R. 1075. [hereinafter *Sparrow*].

¹⁶ I have chosen not to include the Inuit, as they are northern peoples who have not occupied territories that span the southern Canada-United States border areas. As the basis of my thesis relies on traditional usage of the area, this would only include what have been referred to as border tribes such as the Mohawk, and

that these rights were legislated without regard to the different rights which may exist as between border and non-border tribes.

By individual account, the problem until recently, has not been with the United States border as they used to let Canadian Indians back and forth to live work or visit without having to have an alien card or green card, without having to register at the post office as an alien, and without having to obtain work authorization. However, in recent times the U.S. border has been more stringent about the exportation of tobacco and other sellable items and also travel generally. Nonetheless, there has been little problem with Canadian Indians going back and forth to live, work or visit in the United States. The problem appears to be at the Canadian border, with Canadian officials refusing to let American-born Indians back and forth over the border without a great deal of paperwork, if at all.¹⁷ The Canadian government appears to be taking action based on the citizenship of the persons as Canadian or American and ignoring their membership in their own particular Aboriginal Nations and that of the Wabanaki Confederacy. Subject of course to issues of national concern, associations with terrorist organizations and other such safety issues, I will argue that the members of the individual Nations which make up the Wabanaki Confederacy have the right to pass freely over the Canada-U.S. border to live, work and travel regardless of their citizenship as Canadians or Americans.

the member Nations of the Wabanaki Confederacy. At the same time, I do not wish to be seen to exclude them from any future claims in that regard. I have also not dealt with the Aboriginal peoples who live in Alaska and any possible arguments they may have to cross the arctic borders due to time limitations in my thesis.

¹⁷ *Facts About the Jay Treaty for Canadian-Born Native Americans*, online: Wabanaki Legal News Homepage <http://www.ptla.org/wabanaki/jay.htm> (visited: 13 November 1998). Pine Tree Native American Unit. 1997. See also *Important Information for Canadian-Born Native Americans: Cross Border Rights*, online: Wabanaki Legal News Homepage <http://www.ptla.org/wabanaki/info'98.htm> (visited 13 November 1998). Pine Tree Native American Unit, 1997.

WHO ARE “WE”?

The question of “who we are” is more a question of politics, than it is what we mean to each other as the First Peoples of this continent. This is a sad situation to find ourselves in, but I also realize that we have evolved to this position as a result of tremendous hardships, racist government policies and decades of suffering and isolation from ourselves and our traditional ways of life. At the same time, we have to take responsibility for our children and our cultures and sincerely try to focus on what is important about our struggle and set aside the discrimination which exists among some of us due to ignorance, greed and petty politics. When I say petty politics, I do not mean our organization into groups to advance our causes particular to our territories or Nations. I fully support this type of advocacy to advance our causes on the political front. What I do not support is the divisions within our own Nations that would see us see women’s issues as separate from children’s issues and family issues and men’s issues or community issues as a whole. There are also divisions that relate to who’s family is in power at the band level. The worst division is among not only the Federal Government, but also our own Aboriginal politicians who profess to decide who can be considered an Aboriginal person based solely on their own self-interest without considering the issue in its entirety and deciding what will be best for the future generations. Until recently, this has included limiting the voting pool. The Supreme Court of Canada in *Corbiere v. Canada (Minister of Indian Affairs and Northern Development)*¹⁸, held that section 77 of *Indian Act* which deals with the prevention of off-reserve members from voting on Band matters offended

¹⁸ *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] S.C.J. No.24 (S.C.C.), online: QL (S.C.J.). [hereinafter *Corbiere*].

section 15 of the Canadian Charter of Rights and Freedoms. With regard to off-reserve band members, the court explained:

*In the context of this vulnerable group, and these important interests, this distinction reinforces the stereotype that band members who do not live on reserves are “less Aboriginal”, and less valuable members of their bands than those who do. A reasonable person in the position of the claimants, fully apprised of the context, would see the differential treatment contained in s.77(1) as suggesting that off-reserve band members are less worthy or valuable as band members and members of Canadian society, and giving them less concern, respect and consideration than band members living on reserve.*¹⁹

There seems to be a prevailing fear amongst some of us that if we open our communities to those who have been forced to separate from their reserves or for those who never had the benefit of close relations with families members due to adoption, Ministerial apprehension of children or simply by birth, or the *Indian Act*, that somehow everyone in Canada would be able to claim they were an “Indian” and all would be lost. In reality, I do not think the statistics bear that doomsday prediction out. Currently, Aboriginal people are projected to comprise 2.7%²⁰ of the population, according to Statistics Canada. To pose that everyone one of that two percent has had relations with the other 98% is more than incredulous. I can’t imagine why they would want to make arguments to support the Federal government’s definition of who we are as First Peoples and members of unique Aboriginal Nations. Certainly being defined as “...a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an

¹⁹ *Ibid.* at 120.

²⁰ Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at 15. [hereinafter *RCAP*, vol.1].

Indian,²¹ would not only take the culture out of who we are, but belittles us to mere administrative numbers that do little more than tell the government who they have to pay for with regards to services. Given the fact that there are a sufficient number of children and women who hold status as “Indians” under the *Indian Act*, but have no Aboriginal blood running in their veins, or any cultural history with the Nation, stands for the fact that one does not even have to share the same culture as our ancestors to qualify as a “government Indian”.

What is worse is that even “government Indians” are not treated equally, nor do they have the same “privileges” as others from within this group. Aside from the voting issue as explained above, here is how Indian status entitlement is established under the *Act*:

6. (1) Persons entitled to be registered – Subject to section 7, a person is entitled to be registered if

(a) that person was registered or entitled to be registered immediately prior to April 17, 1985;

(b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;

(c) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(d) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4,

²¹ *Indian Act*, R.S.C. 1985, c. I-5, s. 2(1).

1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(e) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951,

(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section; or

(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject matter as that section; or

(f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

(2) *Idem* – *Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).*

(3) *Deeming provision* – *For the purposes of paragraph (1)(f) and subsection (2),*

(a) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(a); and

(b) a person described in paragraph (1)(c), (d), (e), or (f) or subsection (2) who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that provision.²²

The Act does not say much about ancestry, culture or community. A simpler way to understand entitlement is as follows: a section 6(2) Indian can not pass on their status

to their children unless they marry another 6(2) Indian or a 6(1) Indian. In contrast, a 6(1) Indian can pass on their status regardless of the status of their spouse, although, without their spouse having status, their children would “only” be 6(2) Indians. This explanation sounds just as ridiculous as the sections from the *Act* look. The government has concocted this racial formula to decide who will and will not be considered as Indians in this country without regard to tradition, culture or the community. The arbitrary nature of these formulas and cut-off dates for who can be an Indian determines the rights of only part of the Aboriginal population and stands without justification. There were groups of Aboriginal peoples recognized as such for hundreds of years before the *Indian Act*, as the concept of registration only came about in 1951. The *Act* was originally designed as an assimilistic tool to ensure that within a few generations the Indian population would be well subsumed into the broader more “civilized” population.²³ Larry Gilbert argues that these provisions of the *Indian Act* are “...bold attempts at reducing the Aboriginal population...” of Canada.²⁴ With regards to this mandate of reducing the Aboriginal population, Gilbert explains:

...that the current Indian Act continues with that tradition. Subsection 6(2) of the present Indian Act is a case in point which many observers consider to be a draconian attempt by Parliament to limit the number of Indians in Canada. It is often referred to as the second generation cut-off rule. Subsection 6(2) is simply a new technique for an old habit of Ottawa's: it was often called purging or correcting band lists...²⁵

²² *Indian Act*, R.S.C. 1985, c.32 (1st Supp.), s.4; c.43 (4th Supp.), s.1.

²³ L. Gilbert, *Entitlement to Indian Status and Membership Codes in Canada*, (Toronto: Thomson Canada, 1996). [hereinafter *Membership Codes*].

²⁴ *Ibid.* at 12.

²⁵ *Ibid.*

Today, this kind of policy justification would not stand up to any of the test the courts have created for Aboriginal rights. The issue of who we are, involves more than just *Indian Act* definitions. We are divided among many social and political lines. The Aboriginal peoples of Turtle Island have their own "Nations" such as the Mi'kmaq, Cree and Mohawk Nations as well as those traditional unions such as the Iroquois Confederacy or the Wabanaki Confederacy. These larger unions were organizations of smaller Nations for the protection of territories and cultures. Today, these once strong united Nations are now divided for the most part into bands under the *Indian Act*. Each band under the *Act* is headed by a chief and councilors usually elected by the residents of the reserve. The struggle to have some power over the life of your family and yourself after years of poverty and depression, while understandable, detracts from the larger political issues. Where is the debate over fishing rights or the plan for how we will unite to organize negotiations for self-government or land claims? The larger picture is lost in the battle to provide for one's family. Therein lies the agony of decision, since many of us put our families before all else, but how can we effectively balance this need to survive with the needs of our children's families into the future?

This is not to say that this band system has not ever worked. What I am saying is that this system is a foreign one to our Nations, one imposed on us by the *Indian Act* and has failed miserably for many Nations. The system is made worse by decades of poverty and dislocation from our histories and our traditional beliefs. An aspiration to get back to our traditional beliefs does not mean that I am advocating the views of those few who are attempting to go back to the ways things were 800 years ago. But certainly, we can learn

from our ancestors about what we can do to improve the path to our future. At the present, many of us are left wondering who are we and who represents us?

Given those unanswered questions, we still have the many political lines as they are currently drawn. We may be members of our Nations, in the traditional sense of the larger Mi'kmaq Nation or other Nations. We may be status Indians, registered under the *Indian Act*. We may also be members of a particular band or reserve. These bands are represented generally by the chief and council who for us in the Maritimes, usually means an affiliation with the provincial Union of Chiefs. For example, many of the bands in New Brunswick are represented by the Union of New Brunswick Indians (U.N.B.I.), which is a larger scale political union of the chiefs in the province. Some dissatisfaction with this group has lead some of the bands to pull away from the Union and join forces under the auspices of the MAWIW Council which has been loosely described as an association of the non-U.N.B.I. bands.²⁶ In Nova Scotia, their sister organization is called the Union of Nova Scotia Indians (U.N.S.I.). Nationally, the Assembly of First Nations (A.F.N.) claims to represent the interests of the chiefs and First Nations, as bands are often called. Within the provinces, there are also tribal associations such as the Saint John Tribal Council in New Brunswick. All of these organizations demand recognition and involvement in the political arena. Often their claims as to who they represent overlap with other groups, and sometimes Aboriginal people fall through the cracks.

Even the larger National organizations are challenged by other political organizations such as the National Native Indian Women's association which promotes women's issues. These women's issues include the issues of all Aboriginal women in

Canada, and do not necessarily depend on an affiliation with the AFN. The Inuit Taprisat of Canada (I.T.C.) represents the concerns of the northern Aboriginal peoples on a national basis. The Metis National Council (M.N.C.) claims to represent the Metis “Nation” of Canada which by their own voice, are those Metis who are descendants of the Red River Valley Metis. They refer to the Metis as a separate and distinct culture as opposed to a group comprised of members with mixed ancestries. There is also the Congress of Aboriginal Peoples (C.A.P.) formerly known as the Native Council of Canada (N.C.C.), which represents Aboriginal peoples on a national basis. CAP claims to represent the interests of those Aboriginal people who live off reserves in Canada. This includes people who identify as status Indians, non-status Indians, and Metis. They have affiliates in the provinces that represent at a local level, off-reserve Aboriginal people in the various provinces.

For New Brunswick, the New Brunswick Aboriginal Peoples Council claims to represent the off-reserve Aboriginal community and for Nova Scotia it is the Native Council of Nova Scotia. These organizations often have a hard time being heard by governmental departments or securing funding for their projects due to the uncertainty which befalls being an Aboriginal person without also being registered as an Indian under the *Indian Act*. This, of course, ignores the fact that many of their members also have their status under the *Act*. Within the provinces there are also other organizations which put yet another layer of politics into this already complex mix. In New Brunswick for instance, there are also other ad hoc groups which form as a result of current political issues in the news, such as the Native Loggers Association which formed after the recent

²⁶ MAWIW is a Maliseet word that loosely translates into “the people”.

timber rights cases, to negotiate the rights of native loggers. There is also the recently formed accountability group who are demanding more accountability from their politicians at the band level.

This year was my first year in Nova Scotia and I have met many people through the law school. One of the first things I noticed was how the Aboriginal people I met introduced themselves. Every single one associated himself or herself with a band or political organization or local lobby group. Not one person said, I am a Mi'kmaq from the Mi'kmaq Nation of Nova Scotia or their own particular group. I know for me, I have been easily caught up in the politics and have felt the same disassociation from my culture as others. I see no reason why there can not be both the active political lobbying and the cultural identity with one's Nation. Even this simple, idealistic comment, invites the highly political questions of who then can claim to be a member of the Nation. Many chiefs and persons worried about having to share resources and social programs would limit membership to those who meet the requirements of the *Indian Act* for both status and band membership. This method of identification as stated earlier is a arbitrary, racist formula that I believe will not stand up to the many challenges to the Bill C-31 legislation to shortly come before the courts. This legislation, while reinstating some women with their status, at the same time imposed the second-generation cut-off rule and excluded many people from "qualifying" as status Indians under the *Indian Act*.²⁷ The *Act* is simply not compatible with our method of determining who can claim rights such as treaty rights and Aboriginal rights, and who we are as members of our Nations.

²⁷ *An Act to Amend the Indian Act*, R.S.C. 1985 c. 27.

When we speak of treaties, other layers of subtle politics creep into play. Those who claim to be the beneficiaries of local treaties are quick to point out the difference between territorial Indians and non-territorial Indians. This is rightfully so, given the forethought and sacrifices our ancestors made so that our children and their children could preserve as much of what was ours as possible. Other Nations did this for their own peoples and we must respect the path our ancestors set for us. For Nova Scotia, a simple way of explaining a non-territorial Indian would be someone who belongs to an Aboriginal Nation who's traditional territory did not include present day Nova Scotia, such as the Mohawks, the Tlingits, or the Innu of Northern Canada. The essence of a treaty right as set by the courts to date is that you must prove a substantial connection to the original group of signatories to the treaty.²⁸ These Treaty rights are also tied to the land base or traditional territories of the signatories. So, if the Mi'kmaq were signatories to a treaty then presumably, modern day Mi'kmaq could claim the benefit of any of those treaty provisions. The questions remains though, who are the Mi'kmaq aside from the broad theoretical concept of Nation. Would these people be only status Indians registered under the *Indian Act* and who are members of the local Mi'kmaq bands in Nova Scotia? I don't think so. We have a few cases which support the concept that all that is required is a substantial connection. So, in the *Fowler* case for instance, it was good enough that the accused hunter show his direct lineage to his mother who was a status Indian and a member of the band that could be traced to the original signatories. While this court appeared to have attempted to come to a fair and reasonable determination of the beneficiary issue, they were doing so based on the law. The question is really whether the

²⁸ *R. v. Fowler*, [1993] 134 N.B.R. (2d) 361. (Prov. Ct.)

courts are an appropriate forum for deciding such matters that are inherently tied into the culture and politics of Aboriginal Nations seeking self-governing powers.

In a recent case from the Ontario Provincial court, *R. v. Powley*²⁹, a man and his son defended charges for unlawfully hunting game by claiming they were Metis and as such had valid Metis rights to hunt. Neither of the men were status Indians and the provincial wildlife legislation only excluded status Indians from the act. The court held that the Powleys were of mixed ancestry and therefore Metis, and that the Metis had a right to hunt for food. As a result, there was no justification for excluding Metis rights in the provincial hunting legislation. Vaillancourt Prov. J. held:

*If the Metis exercise their Aboriginal rights without the benefit of a license, they are not only putting themselves at risk of legislative sanctions but they have are forced to skulk through the forests like criminals as opposed to hunters exercising their constitutional rights.*³⁰

This case relied on *Fowler, supra*, in not limiting the rights of Aboriginal peoples to only status Indians. Often Aboriginal people are made to feel inferior or less worthy than those registered under the *Indian Act* as Indians. This right to be recognized as an Aboriginal person in the eyes of the law, will have to be incorporated into the limited right of Aboriginal Nations to control their membership. The Royal Commission recognizes the legitimacy and indeed the right of Aboriginal Nations to determine their own citizens or members, but that it should not be an unfettered right. The Commission recognizes that due to the history of Aboriginal peoples in Canada, the lack of sufficient

²⁹ *R. v. Powley* [1999] 1 C.N.L.R. 153. (Ont.).

³⁰ *Ibid.* at para 16.

land bases and resources, that this would factor into the membership issue and some Nations might be inclined to restrict membership unfairly.³¹

I believe that in the end we will have to come up with a reasonable concept of membership that will include a connection, but it is neither too stringent, nor arbitrary like the *Indian Act*. The connection can not be too remote so as to have no limit, but not so stringent as to deny Aboriginal peoples their valid claims to ancestry. Clearly the jurisdiction to control the membership lists and the process by which to make determinations must be retained by the Aboriginal Nations themselves as part of their cultural rights and inherent right to self-government. At the same time, there will have to be a set of checks and balances in place to ensure fairness is part of the process. The politics are such that I suspect that in the beginning there will be many challenges to the denial of individual memberships. There are many Aboriginal people with valid ancestral links that should not be excluded arbitrarily. I would support a method by which we adhere to the “substantial connection” test. It appears to provide the necessary flexibility and reasonableness necessary when dealing with human beings and their cultural, social and political associations. The Royal Commission on Aboriginal Peoples concluded that we can not rely on racial characteristics to determine who Aboriginal people are:

3. Aboriginal peoples are not racial groups; rather they are organic political and cultural entities. Although contemporary Aboriginal groups stem historically from the original peoples of North America, they often have mixed genetic heritages and include individuals of varied ancestry. As organic political entities, they have the

³¹ Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996). [hereinafter *RCAP vol.2*].

*capacity to evolve over time and change in their internal composition.*³²

With regards to the issue of First Nations and the large number of non-status Indians who are not permitted to reside within their Nation's territories by virtue of disqualification under the *Indian Act*, the RCAP states that the federal government must fully disclose their policy with regards to this issue. The commissioners recognized that given the power of self-government, the Aboriginal Nations may unfairly exclude this group of Aboriginal peoples:

*Since an Aboriginal Nation must be constituted in an inclusive manner to qualify for the right of self-determination, a large-scale membership dispute of this kind could be very significant.*³³

So, we are left with the question of not who we are, but who will we be? It is obvious that at least for the time being, we are a varied bunch, but who will we be in the new millennium? It is interesting to note that the *Constitution Act* refers to Aboriginal peoples as Indian, Inuit and Metis, without providing corresponding definitions for each of those terms. It is equally interesting to note that when doing the federal census, Statistics Canada divides Aboriginal peoples into four groups, those being: (1) North American Indians registered under the Indian Act; (2) North American Indians not registered under the Indian Act; (non-status population); (3) Metis people; and (4) Inuit. It is interesting for two major reasons, one that there is some recognition that the non-status population also comprises part of the Aboriginal population and more specific to my paper, that these numbers include more than just Canadian Indians, and includes Indian of

³² *Ibid.* at 177.

³³ *Ibid.* at 183.

North America, namely Indians who originated in the United States. The approximate numbers of recorded “Indians” are as follows: 438,000 status Indians and 112,600 non-status Indians. RCAP warns that the effects of BILL C-31 must be addressed or there will be rapid decline in status Indians and the non-status population will swell.

Although the Metis peoples are protected in our *Constitution Act*, according to RCAP, the federal government did not keep records on them. Only 139,000 people identified as Metis in the 1991 census, whereas the Inuit population is about 38,000. Despite ancient predictions that Aboriginal peoples would soon be extinct and despite the assimilationist laws within the *Indian Act* which attempted to fulfill this prophecy, RCAP has recently reinforced the fact that:

It is clear that, despite declining fertility rates, Aboriginal people will be a continuing presence in Canadian society; indeed, their population share is projected to increase. Demographic projections thus reinforce the assertion of Aboriginal people that they will continue as distinct peoples whose presence requires a renewed relationship with the rest of Canadian society. ³⁴

It is reality then, that demands that the issue of Aboriginal peoples’ rights and concerns, be dealt with and a new relationship formed. It also demands that issues of identity and membership be dealt with in a principled, fair and open manner so as to be inclusive of all Aboriginal peoples and not just those registered under the *Indian Act* as Indians. This issue, while avoided at all costs by most politicians, must be dealt with if any of these Aboriginal legal issues brought before the courts can be resolved effectively. It is too easy to say that Mi’kmaq people have a treaty right to hunt in Nova Scotia, but it is much more difficult to develop a method that will determine who is a Mi’kmaq. This is

the reason why I thought it crucial that I present this issue before I proceed with the legal argument for why Aboriginal people have a right to cross the Canada-U.S. border. I think the background is relevant and so too is the modern-day politics. While we have no definitive method of resolving the issue yet, I want to reiterate that when I speak of Aboriginal peoples in my thesis, I will be using that term in an inclusive manner to include those that live off the reserve and those who do not have status, but nevertheless form part of our many Nations. I will be focusing this paper on the Nations which comprise the Wabanaki Confederacy to give the issue a concrete context from which to develop my legal arguments.

WABANAKI CONFEDERACY:

The Wabanaki Confederacy was essentially an alliance of the different Algonkian groups whose territories were comprised of the present day Atlantic Provinces and our neighbor state of Maine.³⁵ Historical sources use Indian names interchangeably and it can be difficult to sort out the difference between the Abenaki and Wabanaki Confederacies, the Eastern Indians and the Abenaki Nation themselves. Anthropologists, historians and missionaries all used a different means to distinguish between the Nations, using similar names for different combinations of groups, leading to even more confusion for present day researchers. A passage from a doctoral thesis on the Abenaki illustrates this historical confusion:

Anthropologists have come to use the term Wabanaki to refer collectively to six different Algonkian groups ranging

³⁴ *Ibid.* at 23.

³⁵ *Map of the Northeastern Algonkian* from: J.T. Adams, *Atlas of American History* (New York: Charles Scribner & Sons, 1943) at 39. [hereinafter *Map of Algonkian*].

from the Pennacook in the west to the Micmac in the east. In addition, the special case use of Abenaki for the entire group, and Abnaki for the local population of the Kennebec river creates distinctions that seventeenth- and eighteenth-century terms do not support. There are further complications. Alvin Morrison notes that the Etchemin "either developed into, or were replaced by, today's Malecite and Passamaquoddy peoples." Pierre Baird, the first Jesuit missionary in the area, used Etchemin to designate both Kennebec and Penobscot Abnaki. The early French in Acadia also referred to the Indians of southern Maine as the Almouchiquois, while the English spoke of all the Indians east of the Piscataqua River as the "Eastern Indians". Historical usage and anthropological taxonomy remains in conflict. For historical purposes it seems clearer to refer – as in standard French practice – to the Abnaki as a generic term for the entire Indian population of what is now the State of Maine and to distinguish groups by their riverine or coastal location: Sacos, Androscoggins, Kennebecs (synonymously the Norridgewocks after the village site), Penobscots and Passamaquoddies.³⁶

The Confederacy was primarily formed to combat the increasing pressure from Iroquois warfare. It was probably established sometime around the mid-eighteenth century and at times the Confederacy was also allied with the Ottawa Indians and the catholicized Mohawks at Canawagua³⁷. The Groups of Nations had a history of alliances as they lived in close proximity throughout the territory presently know as New Brunswick, Nova Scotia, Newfoundland , Prince Edward Island , Maine and the surrounding areas.³⁸ Their strong ties were evident during the treaty conferences and negotiations in the late 1600's and early 1700's. The various Nations often let the larger groups send representatives to meet with English officials about treaty signing and

³⁶ K. Morrison, *The People of the Dawn: The Abnaki and Their Relations with New England and New France, 1600 - 1727*. (Maine: University of Maine, 1975) at 11,12. [hereinafter *People of the Dawn*].

³⁷ McMillan, *supra* note 7 at 51.

ratifications. Many of the smaller Abenaki tribes named as parties to the peace-making process have disappeared or been absorbed into the bands in western New England and Quebec. These included the Arresaquantacook, Ahwenok, Passanawack, Pamadniak, Weesungawok and some others.³⁹

While I do not have the time to get into a thorough review of the history of the Wabanaki, for the purposes of my thesis, I will assume that based on the above information, the Confederacy included at least the Mi'kmaq, Maliseet, Passamaquoddy, Penobscot, Norridgewocks and the Abnaki. The main groups are the Mi'kmaq and Maliseet as they have territories in the Atlantic provinces and Maine. I have chosen the member Nations of the Wabanaki Confederacy as they were all participants in the conferences leading up to the Treaties of 1725 and 1726 which I will discuss later, in Chapter Two of this thesis. They also occupy the general territory of the Atlantic provinces and Maine, thereby "qualifying" as border-tribes, based on their history of trading patterns, close political ties and intermarriage which spanned across the border. I will therefore present arguments that they have Aboriginal rights to cross the border, and rights flowing from Aboriginal title to the area as well. They would have also been located close to the action when the *Jay Treaty* was being signed promising Indians rights of free passage over the border. I am not making general arguments that would apply to other Aboriginal groups as some would not have lived near the border and others would

³⁸ *18th Century Maritimes and New England : Selected Features Map* from: Native Communications Society of Nova Scotia , *The Mi'kmaq Treaty Handbook* (Nova Scotia: Native Communications Society, 1987). [hereinafter *18th Century Map*].

³⁹ Department of Indian Affairs and Northern Development, *We Should Walk in the Tract Mr. Dummer Made* (New Brunswick: DIAND, 1992) at 74 - 76. [hereinafter *Dummer's Tract*].

have signed different treaties. I intend to present all of these arguments in my thesis solely with regard to the member Nations of the Wabanaki Confederacy.

CHAPTER TWO:
FAITH IN OUR ANCESTORS:
MOBILITY THROUGH ABORIGINAL
AND TREATY RIGHTS

“This land where you want to become absolute master, this land is mine. I have come out of it like the grass, it is where I was born and reside, it is my land that is mine Indian...”⁴⁰

INDIAN TREATIES: IMPLIED MOBILITY?:

Indian Treaties in Eastern Canada are agreements that were negotiated by specific Aboriginal Nations and the British Crown in the 1600 and 1700's. The treaties signed in the Atlantic provinces included the members of the Wabanaki Confederacy and have been called Peace and Friendship Treaties as they were signed generally to secure peace from the various local Indian Nations. At one time, the Indian Nations far outnumbered the British population and were very skilled in war. The British relied on the kindness of the Indians to survive on this Continent. The Indian Nations signed these treaties often to ensure that while they were permitting settlers to occupy minimal territory, they also wanted to ensure that this would not affect their rights to their lands, and their rights to hunt, fish, and so forth. Today, the sacredness of these documents are seen differently by the Aboriginal Nations than they are by the governments in Canada. The Royal Commission on Aboriginal Peoples explained the difference in viewpoint between the two cultures:

To the Aboriginal nations, treaties are vital, living instruments of relationship. They forged dynamic and powerful relationships that remain in effect to this day. Indeed the spirit of the treaties has remained more or less consistent across this continent, even as the terms of the treaties have changed over time.

⁴⁰ Collection of unpublished documents on Canada and America: Published by French Canada, I. 17-19.

*Canadians and their governments, however, are more likely to look on the treaties as ancient history. The treaties, to Canada, are often regarded as inconvenient and obsolete relics of the early days of this country. With respect to the early treaties in particular, which were made with the British or French Crown, Canadian governments dismiss them as having no relevance in the post-Confederation period. The fact remains, however, that Canada has inherited the treaties that were made and is the beneficiary of the lands and resources secured by those treaties and still enjoyed today by Canada's citizens.*⁴¹

There are other treaties which affect Aboriginal peoples which have not been considered in the same light as Indian Treaties. The *Jay Treaty* and the *Treaty of Ghent* are considered international treaties and to date have not been useful in securing rights for Aboriginal peoples with regards to the border, despite the fact that they specifically provide for Aboriginal mobility rights. Despite the fact that Aboriginal rights were recognized and protected in these international treaties, they have not been held to be enforceable by Aboriginal people largely because the Indian Nations were not signatories to the treaties. I will deal with these international treaties in the next Chapter.

There have been numerous Indian Treaties negotiated and signed since contact, but one of the most important series of treaties for this geographical area are those that were signed by the Indian Nations and the British Crown. For the purposes of my thesis, I will only be dealing with two of the numerous treaties and promises that were issued between 1675 and 1794. I have chosen the *Treaty of 1725 /26*⁴² for its inclusion of all the Nations of the Confederacy, and the *Treaty of 1752*, as this treaty has been interpreted by the Supreme Court and provides a useful precedent by which to analyze the possible

⁴¹ *RCAP vol.I*, supra note 20 at 128-130.

⁴² *The Submission and Agreement of the Eastern Indians*, December 15, 1725, Boston, New England.

mobility rights.⁴³ There are simply too many treaties and historical information for me to cover all of them in this thesis. It is my belief that the mobility right could be established relying only the two treaties I have chosen.

These treaties have gained renewed importance in the lives of Aboriginal people in the years following the protection of Treaty rights in section 35 of the *Constitution Act*. Treaties have been used to validate Aboriginal hunting rights, fishing rights, and even rights to limited commercial activities of the particular Aboriginal Nation signatories. The validity of some of these treaties has already been recognized and given effect in many lower court decisions in the Maritimes. The only one that has been analyzed by the Supreme Court of Canada to date is the Treaty of 1752, called the *Treaty or Articles of Peace and Friendship Renewed, 1752*. The courts find themselves having to interpret various provisions in the treaties with very little written context or explanation. Given the importance of the Crown's role in securing these treaties, the courts must guide their interpretations with this history in mind. The Supreme Court of Canada recently held in *R. v. Badger*:

*The key interpretive principles which apply to treaties are first, that any ambiguity in the treaty will be resolved in favour of the Indians and, second, that treaties should be interpreted in a manner that maintains the integrity of the Crown, particularly the Crown's fiduciary obligation towards aboriginal peoples.*⁴⁴

Taken from: *Dummer's Tract*, supra note 37. [hereinafter *Treaty of 1725*].

⁴³ *Treaty or Articles of Peace and Friendship Renewed, 1752*, [hereinafter *Treaty of 1752*].

Taken from: G. Gould, A. Semple, *Our Land The Maritimes*, (Fredericton: NBAMNSI, 1980). [hereinafter *Our Land*].

⁴⁴ *R. v. Badger*, [1996] 1 S.C.R. 771. at 781. [hereinafter *Badger*].

The court dealt with the historical background to the treaty era of Canadian and Indian history and summarized the rules from previous case law that lends sensitivity to the unique nature of these agreements. Cory J. in *Badger*, outlined the basics of treaty interpretation:

First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred...Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned... Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed...Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of clear and plain intention on the part of the government to extinguish treaty rights...⁴⁵

I will focus on the *Treaty of 1752* as its interpretation by the Supreme Court of Canada has set the precedent for treaty interpretation in Canada and will apply to my analysis of the other, earlier *Treaty of 1725/26* that has not been interpreted by the Supreme Court of Canada to date. This analysis will provide the background to my review of the international treaties and why I think they too, provide enforceable rights for the member Nations of the Confederacy.

⁴⁵ *Ibid.* at 793-794.

THE TREATY OF 1752:

In *Simon v. The Queen*⁴⁶ the Supreme Court specifically dealt with the Treaty of 1752 as it pertained to the hunting rights of the Mi'kmaq in Nova Scotia. This case involved a band member of the Shubenacadie Indian Brook Band who was registered as an Indian under the *Indian Act*. James Matthew Simon was charged under the Nova Scotia *Lands and Forests Act*⁴⁷ for possessing shot larger than the prescribed limit and possessing a rifle during closed hunting season. Simon admitted the all the elements of the charge but asserted that his right to hunt in the *Treaty of 1752* was protected from provincial legislation by virtue of section 88 of the *Indian Act*, which provides as follows:

*88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to an in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or nay order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.*⁴⁸

The Treaty was upheld by the court as a valid and binding, as were the hunting rights contained therein. The Supreme Court of Canada in so holding, set out a method for treaty analysis which is relevant to my analysis as to whether the Treaty of 1752 contains any rights upon which the Aboriginal beneficiaries might claim a right to pass freely over the Canada - U.S. border. The relevant questions as set by the Supreme Court were:

(1) Was the Treaty of 1752 validly created by competent parties?

⁴⁶ *R. v. Simon*, [1985] 2 S.C.R. 387. [hereinafter *Simon*].

⁴⁷ *Lands and Forests Acts*, R.S.N.S. 1967, c.163, s. 150(1).

⁴⁸ *Indian Act*, *supra* note 21, s. 88.

(2) Does the Treaty contain a right to hunt and what is the nature and scope of that right?

(3) Has the Treaty been terminated or limited?

(4) Is the appellant covered by the Treaty?

On the first question of the capacity of both parties to enter into the treaty, Dickson, C.J. cited the case of *Nowegijick v. The Queen*⁴⁹ as standing for the principle that treaties should be construed liberally and any ambiguities resolved in favor of the Indians. The court in *Nowegijick* held:

It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians...

*In Jones v. Meehan, 175 U.S. 1 (1899), it was held that Indian treaties "must ...be construed, not according to the technical meaning of [their] words ... but in the sense in which they would naturally be understood by the Indians"*⁵⁰

It was on this basis that Justice Lamer in *R. v. Sioui*⁵¹ held that the courts should adopt a broad and generous interpretation of what constitutes a treaty as well as the preliminary question of capacity to sign. Justice Lamer explained that capacity must be seen from the point of view of the "Indians" in determining whether it was reasonable for them to assume that the other party they were dealing with had the authority to enter into a binding treaty. He went on to state that the person making the agreement on behalf of the Crown need not have special powers, as the "Indians" were not on par with a

⁴⁹ *Nowegijick v. R.*, [1983] 1 S.C.R. 29. [hereinafter *Nowegijick*].

⁵⁰ *Ibid.* at 36.

⁵¹ *R. v. Sioui* [1990] 1 S.C.R. 1025. [hereinafter *Sioui*].

sovereign state, and thus fewer formalities were required. The simple requirement is that the person must have represented the Crown in an important, authoritative function.⁵²

In *Simon* the court pointed out that many courts have already assumed that the *Treaty of 1752* was validly created. Chief Justice Dickson held that not only did the Mi'kmaq delegates have the authority to bind the Mi'kmaq Nation, but so did Governor Hopson, as he was a representative of His Majesty and thus had sufficient authority to bind the Crown.⁵³ The court only dealt with the Mi'kmaq Nation and thus the treaty would have to be re-examined if another Nation were to assert that they fell under the same Treaty. The relevant part of the Treaty which states who the parties are, provides that it is between His Majesty in the old territories of Nova Scotia, also called Acadie and:

*Major Jean Baptiste Cope chief Sachem of the Tribe of **Mick Mack Indians**, inhabiting the eastern Coast of the said Province, and Andrew Hadley Martin, Gabriel Martin and Francis Jeremiah **members & Delegates of the Said Tribe**, for themselves and their said Tribe and their heirs and the heirs of their heirs forever.⁵⁴
(emphasis added)*

It seems clear that the only signatories or intended beneficiaries to this Treaty are the members and heirs forever of the Mi'kmaq Nation. Not only does the Treaty specifically state Mick Mack, but they also mention their general territory, i.e. the eastern coast of the said province, which at that time was old Nova Scotia. Looking at the map of old Nova Scotia⁵⁵ and the tribal territories⁵⁶, it is easy to see that the Mick Mack were

⁵² *Ibid.*

⁵³ *Simon*, supra note 46.

⁵⁴ *Treaty of 1752*, supra note 43.

⁵⁵ *18th Century Map*, supra note 38.

the only tribes within that territory in the eastern part of the Province at all, and the rest were in the south and west. A different interpretation might have been possible had the Treaty stated “Eastern Indians” as opposed to solely the Mick Mack, since the English often referred to all the tribes who occupied the territory in old Nova Scotia as Eastern Indians, or Abenaki. The framers were not only specific in the tribe name, but also their territory and since past treaties included all the names of tribes, or used a generic name to include them all, it is assumed the framers did this purposely to treat only with the Mick Mack. With such specificity, it is doubtful that broad, liberal principles in treaty interpretations could be used to enlarge the category of these particular beneficiaries.

It has also been argued that not only is the Treaty of 1752 limited to the Mi’kmaq, but it was only referring to a small Band of Mi’kmaq living in Eastern Nova Scotia at the time of the Treaty. I believe that this is the narrowest of interpretations and is not befitting the unique nature of relations among the entire Mi’kmaq Nation. The Treaty referred to the Mi’kmaq, their heirs and their heirs forever. Following the liberal interpretive principles as discussed above, and given that there is ambiguity in the wording of the document, this clause should be read in favour of the entire Mi’kmaq Nation. Therefore, while the actual signatories may have only resided in one area of the Mi’kmaq Nation, that does not mean that there was no intention to cover the Mi’kmaq as a whole, in a representative capacity.

Regardless of whether or not those particular Mi’kmaq did sign the Treaty in a representative capacity or not, the broad, liberal interpretative principles would apply to what is meant by the “heirs and heirs forever”. Who the Mi’kmaq consider as “heirs” may

⁵⁶ *Tribal Territories: Approximate Boundaries Map*, from: *Dummer’s Tract*, *supra* note 39.

not be the same as what the British intended it to mean. Mi'kmaq today still have large extended families and often even non-relatives are referred to as "Auntie" or "Uncle" and are treated in every other way as family, because to that particular Mi'kmaq family, they are family. It would be an onerous burden to expect a Mi'kmaq person to trace their ancestry back to the particular group of Mi'kmaq that signed the treaty. The court in *Simon* warned against imposing such difficult burdens:

The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present-day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this treaty.⁵⁷

I would argue that while the *Treaty of 1752* is not so broad so as to apply to all of the member Nations of the Wabanaki Confederacy, it is equally not so narrow so as to apply only to a handful of Mi'kmaq and not the whole Nation. With respect to the rest of my analysis of the *Treaty of 1752*, I will proceed on the basis that the rights contained therein, applies only to the Mi'kmaq, but to all of the Mi'kmaq. The court in *Simon* was dealing not only with the hunting rights that were contained in the *Treaty*, but also rights which may be incidental to the free exercise of those hunting rights. The relevant portion of the *Treaty* states:

It is agreed that that the said tribe of Indians shall not be hindered from, but have free liberty of hunting and fishing as usual ...⁵⁸

The court went on to explain that the phrase "as usual" did not limit the types of weapons that could be used to hunt to those used in 1752, but was to be interpreted in a

⁵⁷ *Simon*, *supra* note 46 at 408.

flexible way that is sensitive to the evolution of hunting practices over time. It was held that the right to carry a weapon was a right which was incidental to the free exercise of hunting contained in the treaty. While subsequent cases dealing with Aboriginal rights holds that a right can only be protected if it is not incidental to a larger right, the same is not true of treaty rights.⁵⁹ It is my view that a right to cross the Canada-U.S. border is necessarily incidental to the “free liberty of hunting and fishing as usual” since it was promised that they should never be hindered from the exercise of this right.

The prohibition by Immigration officials against the free passage of Indians would not only hinder hunters who wanted to hunt in their traditional territory, but totally prohibit it. Since these rights are protected in the *Constitution Act* under section 35(1), I would argue that these immigration laws should be of no force and effect to the extent that they are inconsistent with Aboriginal treaty rights as per section 52 of the *Constitution Act, 1982*. The relevant portions of the *Immigration Act* do not amount to a clear and plain intent to extinguish these rights, nor does it specifically address the issue of treaty rights with regards to mobility across the border. Yet, the other articles of the Treaty are relevant to the issue of the necessity of free movement over the border in order to exercise their treaty rights. Article Three of the Treaty deals with the promise by the Mi'kmaq to:

*...use their utmost Endeavors to bring in the other Indians
to Renew and Ratify this Peace, ...*⁶⁰

⁵⁸ *Treaty of 1752*, *supra* note 43.

⁵⁹ See *Van der Peet*, *supra* note 12, See also *R. v. Gladstone*, [1996] 2 S.C.R. 723. [hereinafter *Gladstone*] and *R. v. N.T.C. Smokehouse*, [1996] 2 S.C.R. 672. [hereinafter *Smokehouse*].

⁶⁰ *Treaty of 1752*, *supra* note 43.

Presumably, the Mi'kmaq would have to have the ability to travel throughout the territory in order to bring in the other Nations who signed the *Treaty of 1725/26* to renew the peace by signing the *Treaty of 1752*. This would involve traveling across the lands of what is now Canada and the United States in order to accomplish this task. Not only are there rights which involve present-day cross-border mobility, but there was an obligation which necessarily inferred the right to cross what is now the Canada – U.S. border. Given that these treaties were signed in good faith by both parties, the Mi'kmaq would have every right to believe that they would forever have the right to travel over these territories. Any other interpretation would lead to an absurd result, in that promises and obligations were made that could not be carried out. Certainly, this can not be the result that either party intended. In addition, the *Treaty of 1752* confirms the rights promised in the earlier *Treaty of 1725/26*. As I will argue in the next section, I believe that the earlier treaties recognized the right to cross the border, if not explicitly, then implicitly. I would submit that the *Treaty of 1752* recognizes previous rights and obligations that necessarily infer a right to freely travel the lands that are now divided by the Canada – U.S. border.

In regards to the third branch of the treaty analysis, the court held that the evidentiary requirements for proving the termination of the Treaty had not been met. First of all, an Indian Treaty is sui generis and not created nor terminated according to the rules of international law. As well, once it has been established that the Treaty is valid, the party arguing its termination bears the burden of proof of termination. Strict proof is also required if extinguishment is to be proven, which in this case, it was not. The court contemplated the possibility of whether a Treaty could be extinguished, but gave no

answer.⁶¹ That question has been answered in more recent cases on s.35(1) of the *Constitution Act*, which have held that treaty rights protected under s.35 can not now be extinguished, although they might have been able to be extinguished prior to 1982.⁶² Thus, the court in *Simon* held that the *Treaty of 1752* is of as much force and effect today, as it was in 1752.⁶³ At least in terms of the Mi'kmaq members of the Wabanaki Confederacy, they should have the right of free passage over the border at least to facilitate traditional and modern day hunting, fishing and trading practices, and to maintain social and political relations as guaranteed in the Treaty with the other member Nations. Unfortunately, the Treaty of 1752 may provide little assistance for other Nations of the Wabanaki Confederacy.

THE TREATY OF 1725/26:

The *Treaty of 1725/26* is another treaty between His Majesty and the various Nations within the area of New England and Nova Scotia. This Treaty was ratified by the Nations in several documents, including Mascarene's ratification, his promises to the Indians, and the 1726 Nova Scotia ratification and Governor Doucette's like promises to the same "Indians". The relevant portion of the *Treaty of 1725* reads:

Saving unto the Penobscot, Naridgwalk and other Tribes within His Majesty's Province aforesaid and their natural descendants respectively all their lands, liberties and properties not by them conveyed or sold to or possessed by any of the English Subjects as aforesaid. As also the priveledge of fishing, hunting and fowling as formerly.⁶⁴
(emphasis added)

⁶¹ *Ibid.*

⁶² *Van der Peet*, *supra* note 12.

⁶³ *Simon*, *supra* note 46.

⁶⁴ *Treaty of 1725*, *supra* note 42.

At the conference of the “Indian” delegates with Governor Dummer in Boston several promises were made by Dummer to ensure the “Indians’ ” concerns with regards to the effect of the Treaty were addressed. One particular promise read:

*That the said Indians shall peaceably Enjoy all their lands and properties which have not been by them conveyed and sold unto or possessed by the English, and be no ways molested or disturbed in their planting or improvement; and further that there be allowed them the free liberty and privilege of Hunting, Fishing, and Fowling, as formerly.⁶⁵
(emphasis added)*

As well, Mascarene made promises to the Indians, after their ratification, which included:

*That the Indians shall not be molested in their persons, Hunting Fishing and planting grounds nor in any other lawful occasions by His Majesty’s subjects or their dependents nor in the exercise of their religion ...⁶⁶
(emphasis added)*

Similarly, Lt. Governor Doucette’s promises at the 1726 Nova Scotia ratification of Mascarene’s articles included:

And I do Further promise in the absence of his honour the Lt. Gov.R of the province in behalf of this said Government, That the said Indians shall not be molested in their Person’s, Hunting, Fishing and Shooting & planting on their planting Ground nor in any other their lawful Occasions, By his Majesty’s subjects or their Dependents nor in the exercise of their religion...⁶⁷

⁶⁵ Governor William Dummer’s Promises to the Delegates of the Eastern Indians. from: *Dummer’s Tract*, *supra* note 39.

⁶⁶ Mascarene’s Articles of Submission and Agreement, 1725 and Mascarene’s Promises to the Delegates of the Eastern Indians, *Ibid*.

⁶⁷ Ratification of the Articles Entered Into at Boston by Chiefs of the Eastern Indian Tribes and Promises Made by the Lt. Governor Doucette to the Chiefs of the Eastern Indians. *Ibid*.

The Crown promised repeatedly that the Indians would have the liberty to hunt and fish, practice their religion and carry out any other lawful activity without molestation, as had been done formerly. The minutes of various conferences about the Treaties between the government officials and the delegates evidence the necessity that their rights be protected in order that they would even consider signing these Treaties. Even in the 1700's, the "Indians" knew they had rights and reminded the English officials of this fact. Most recent court cases on hunting or fishing rights of the Mi'kmaq or Malecite in the area have assumed the validity of the Treaty of 1725 and upheld it. As a result, I would argue that were the *Treaty of 1725* put to the test in the Supreme Court treaty analysis as set out in *Simon*, it would be found to be in full force and effect today.

Thus, to apply the treaty analysis to the *Treaty of 1725*, these four questions would have to be answered according to the evidence:

- (1) Was the Treaty of 1725 validly created by competent parties?
- (2) Does the Treaty of 1725 contain either direct mobility rights or rights incidental to the primary rights which would give a mobility right, and what is the nature and scope of such rights?
- (3) Has the Treaty of 1725 been terminated or limited?
- (4) Are the various tribes of the Wabanaki Confederacy covered by this Treaty?

The first question is one of the Indian delegates' and Crown delegates' capacity to enter into a valid and binding treaty. The court in *Simon* accepted the case law which permits extrinsic evidence in the determination of uncertainties or ambiguities in treaties.

The *Treaty of 1725* mentions the names of two Penobscots who claimed they were empowered to enter into the Treaty for all the tribes. Historical documents such as

conference minutes indicate that the four chiefs who ended up signing the Treaty did so with the authority of the other tribes. One British observer wrote:

*... tribes sent belts to those tribes for confirmation of their agreeing to what shall be concluded.*⁶⁸

As well, the later ratifications of the Treaty by all the tribes is further evidence that the delegates had the authority to speak for the other tribes. Major Mascarene had spent the whole summer of 1726 ratifying the peace with those tribes. Journals were kept of the day to day business regarding the Indians and presents were recorded for each tribe who ratified or signed duplicates of the Treaty. There is corroborating evidence that the original signers to the Treaty of 1725 had ample authority to sign on behalf of all. There is also anthropological evidence, already mentioned, which describes the political ties between the group of Aboriginal Nations often referred to as the “Eastern Indians”, “Abenaki” or Wabanaki Confederacy. The Penobscot were considered the superior or stronger of the groups and it would therefore be natural, taking into account their relationship, that they would assume a lead role or be spoke persons in Treaty negotiations.⁶⁹ The Penobscot were so outspoken about their land rights in negotiations because they were responsible for the welfare of the other tribes and they took that responsibility seriously.⁷⁰

The second part of the first issue on capacity is the capacity of Governor Dummer to negotiate the Treaty of 1725 on behalf of the King of Great Britain. The questions to answer would be: (1) Was Governor Dummer a representative of the King who held an

⁶⁸ *Documentary History of the State of Maine, Conference With The Delegates* vol. III. (no page reference).

⁶⁹ *New Brunswick Magazine, Origin of the Maliseets* vol. I, no. I, 1898. (no page reference).

⁷⁰ *Penhallow's Indian Wars* (no bibliographical information available).

important and authoritative position? and (2) Would it be reasonable for the Aboriginal Nations to conclude that Governor Dummer had the requisite power to bind the British Crown with this Treaty?

On the first question, Dummer had been given specific instructions as a Governor on how he was to deal with the tribes. These instructions included a mandate to maintain or establish peace and friendship with the Indians and to deal justly with them in their lands and possessions.⁷¹ Governor Dummer was the Governor of the whole Massachusetts Bay Colony, which included old Nova Scotia⁷², where the Treaty was negotiated and was the highest up in the chain of political power in the colony. He was a direct “arm” of the King of Great Britain who gave him his commission and thus, his position was one of great authority.⁷³

Due to his high ranking position, it would be reasonable for the Nations to have believed that he could bind the British Crown. In the Conferences between the English and the Aboriginal Nations, usually the chiefs were sent as delegates and Governor Dummer as the representative of the Crown. Even when Major Mascarene was sent to have the Treaty ratified by the Nations in 1726, he was assisting Governor Dummer, and the Nations were well aware of that fact. Any questions or disputes regarding the Treaty were mostly addressed to Governor Dummer.⁷⁴ Thus, considering their various dealings with Governor Dummer on Treaty issues and alliance issues and his high ranking

⁷¹ *Our Land*, *supra* note 43 at 140- 156.

⁷² *18th Century Map*, *supra* note 37.

⁷³ *Ibid.*

⁷⁴ *People of the Dawn*, *supra* note 36.

⁷⁵ *Treaty of 1725*, *supra* note 42.

position, I would argue that it would have been reasonable for the tribes to believe he had the capacity to bind the British Crown.

The next issue set out in *Simon* is whether or not the Treaty contains direct mobility rights or rights incidental to the exercise of the primary rights which would include a mobility right, and an indication of the scope of those rights. Again, the court accepted that the case law had demonstrated that a fair, large and liberal interpretation of ambiguous treaty provisions is necessary. Again, it is to be noted that the Treaty is to be read as it was understood by the Indians and not that of the Crown's lawyers. The court in *R. v. Horse*⁷⁵ also agreed that wording alone does not suffice to determine the legal nature of a treaty and therefore extrinsic evidence may be used. Finally, in *R. v. Taylor and Williams*⁷⁶ the court had to interpret a Treaty with regard to hunting rights. The court allowed the use of the minutes of the negotiations leading up to the treaty which detailed the concern by the chiefs for protection of those rights. In this case, the minutes of the council were as much a part of the Treaty as were the written articles. The court held that extraneous material is properly before the court when there is ambiguity in the treaty.⁷⁷

It is documented the concerns the Aboriginal Nations had in regards to the borders between the different powers and constantly queried of their mobility rights. The accumulation of these concerns were later addressed again in the *Jay Treaty*, which specifically recognized that Indians living on both sides of the border had the right of free passage. Thus, I would argue that these promises of free passage be included in any definition of "free liberty of the person" and "non-molestation of the person" in the

⁷⁵ *R. v. Horse*, [1988] 1 S.C.R. 187. [hereinafter *Horse*].

⁷⁶ *R. v. Taylor and Williams*, (1981), 34 O.R. (2d) 360. (Ont. C.A.).

present treaty's text. It was noted time and time again in the minutes of the conference leading to the *Treaty of 1725*, that the Indian Nations were not giving up their lands and that while some small settlement was permitted, the Indians retained all the rights associated with their traditional territories which would include mobility.

From the case law, it is appropriate to look at the context of a word or phrase when trying to establish its scope within a treaty. Knowing all the concerns Indians had over their ability to travel their territories, undisturbed, for hunting and fishing and other travel it is not surprising that they had their concerns addressed in the later *Jay Treaty*. The *Jay Treaty* simply addressed concerns that were already present and put to paper, the ability to cross the border. The promises under the *Jay Treaty* were meant to address mobility concerns that had evolved after the *Treaty of 1725* was signed and the Indian Nations saw the power struggle between the two European powers over Indian land. Given the large, liberal interpretation that treaties are entitled to, I would argue that the "free liberty" and "non-molestation" promises in regards to hunting and other activities, referred to in the *Treaty of 1725* would include the right to cross the traditional territories, now divided by the border, to hunt, fish, trade or any other traditional activity, without being subject to the *Immigration Act*. Certainly, these rights would preclude Confederacy members from being harassed or detained or in any way imposed upon by either government at the border. I believe these rights would be in keeping with the principles as enunciated in *Simon*.

The court in *Taylor, supra* held with regard to Crown actions:

⁷⁷ *Horse, supra* note 75.

In approaching the terms of a treaty... the honor of the Crown is always involved and no appearance of "sharp dealing" should be sanctioned. ⁷⁸

The occurrence of "sharp dealings" on the part of the Crown generally in treaty negotiations is well documented. An English official wrote to the Council of Trade and Plantations about the then recent wars with the Indians, where he stated in part:

Their quarrels and wars were not for ambition, empire or bloodthirstiness but to defend their property and bounds... Their injuries have been very great, as divesting them of their land by force or fraud, first making them drunk and then to sign what they knew not what... Ad to this our inhumanity to them ... We vilify them with all manner of names, and opprious language, cheat abuse and beat them, sometimes to the loss of limbs, pelt them with stones and set dogs upon them ... too often an Article of Peace has run in one sense in English and quite contrary in Indian, by the Governor's express order... ⁷⁹

As can be seen from this passage, the English admittedly dealt unjustly with Aboriginal Nations, through the use of force, intimidation, alcohol, fraud and false promises. It would be hard to think of a situation more unjust and thus I would argue that these actions by the Government further justifies giving the rights contained in the Treaty, and any incidental rights, as broad and large an interpretation as possible.

The scope or extent of the rights should be considered from the perspective of the "natural understanding of the Indians". In this case, the Nations throughout history stressed repeatedly the importance of their ability to pass freely within their territory which was not fashioned around the political borders of the English. Not only were the

⁷⁸ *Ibid.* at 367.

⁷⁹ *T. Bannister to the Council of Trade and Plantations, Calendar*, vol. 28. (no page reference). [hereinafter *Bannister*].

groups promised free liberty of their traditional hunting and fishing practices as usual, they were promised truck houses, freedom of religion and that no one would molest them in their “travels” as evidenced in the Treaty, its ratifications and promises, as well as conference minutes. Similarly in the later *Jay Treaty*, the Indians were given an exemption from border duties to compliment their right of free passage. One of the most important historical documents supporting a specific right of free passage over English territories and borders, were the instructions to Crown officials directing them to promise the Indians:

... they will never be molested in their hunting, travels or fishing, nor at any time wronged or imposed upon in their trade or truck of their furs, etc.⁸⁰ (emphasis added)

I would argue that the signatories have a Treaty right to not be molested, wronged or imposed in their travels, which includes travels for the purpose of transporting or trucking their furs for trade or their travels in the pursuit of hunting or fishing. They also have an Aboriginal treaty right to not be molested in the practice of their religion which would include the performance of ceremonies in traditional territories oblivious to any “borders” as set by the European powers. This would include all their traditional activities whether it be sustenance activities or social and political interaction. All of these treaty rights are drawn from the articles of the Treaty of 1725/26 and the corresponding promises as provided above which are also part of the Treaty.

The third issue in the interpretation of this Treaty is whether or not the Treaty has been terminated or limited.⁸¹ In *Simon, supra*, the court dealt with termination by

⁸⁰ *L.G. Dunbar to Mr. Popple*, Colonial Papers Calendar vol. 37. (no page reference). [hereinafter *Dunbar*].

⁸¹ *Simon, supra* note 46.

hostilities and termination by extinguishment and held that once it has been established that a valid treaty has been entered into, the party arguing for its termination bears the burden of proving the circumstances and events justifying the termination. Thus, in regards to a claim for the right to free passage, uninterrupted travel or non-molestation of hunting or religion, it would be up to the Crown to identify any specific hostilities and prove that these hostilities if any, had the effect of terminating the Treaty. The burden is the same should the government allege extinguishment. As explained earlier, the Crown requires “strict proof of the fact of extinguishment” as well as evidence of clear and plain intention to extinguish treaty rights. I believe that the Crown would have no more evidence in a claim today, to establish termination or extinguishment, than they did in *Simon*, and thus the *Treaty of 1725* would be of as much force and effect today, as it was at the time it was concluded.

The fourth issue is whether those who submit a claim are covered by the *Treaty of 1725*. The case law and the historical documents already presented, are evidence that the Cape Sables (Mi’kmaq), St. John’s (Maliseet), Penobscot, Naridgwalk and the other smaller tribes previously mentioned, were included in the Treaty. Also, the journals of English officials and minutes at Conferences refer to the Eastern Indians, Abenaki and various tribes interchangeably. If there had been any doubt as to whether the Mi’kmaq and Maliseets and Penobscots were included, Colonel Westbrook in his letter noted that:

... *St. John and Cape Sable Indians have agreed to abide by what the Penobscot Indians have agreed to and abide by what they shall agree to - they are willing to be at peace...*⁸²

⁸² *Letters of Westbrook, supra note 1.*

Their inclusion in the Treaty is mainly evidenced by their ratification of the Treaty during the summer of 1726. The Chief of the Cape Sables Indians ratified the Treaty on May 31, 1726 with Major Mascarene. I believe we can conclude that the entire group of Abenaki or Eastern Indians as described in the territorial maps provided, are covered by this Treaty. Further I would argue that the Treaty of 1725 gives the Indian Nations their mobility rights either directly as a protection from imposition of their travels or incidental to their rights of free exercise of their hunting, trading and religious rights, and is still in force today. As a result, that Treaty would be protected under section 35(1) of the *Constitution Act, 1982* as an “existing” treaty right.

As well, section 88 of the *Indian Act*, provides that the terms of a treaty will be paramount to any provincial legislation which may be in conflict. Therefore, it would follow that provincial laws should fall in the face of a treaty right. Unfortunately, the case law has held those treaty rights to the same justification test as seen in *R. v. Sparrow*,³³ a case on Aboriginal rights that will be dealt with later in this chapter. In the case of border rights, we are dealing with federal legislation, under the *Immigration Act*. With regards to federal legislation generally, there is a divergence of opinion as to whether the same principles that apply to Aboriginal rights, should also apply to Treaty rights.

I think there is an inherent difference between Aboriginal and Treaty rights in the sense that while the former is significant for its basis in the history and culture of a Nation, the latter has those characteristics and an additional solemnity in the good faith exchange of rights and responsibilities that the Aboriginal Nations have relied on to the most part to their detriment. Patrick Macklem in his *article “First Nations Self-*

*Government and the Borders of the Canadian Legal Imagination*⁸⁴ argues that treaties are solemn agreements that should remain paramount over both provincial and federal legislation. He explains:

*Justice Lamer's statement in Sioui that "{the} very definition of a treaty ... makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians involved" ought to be taken seriously as precedential support for the proposition that federal and provincial legislation is not paramount over conflicting treaty guarantees: promises made to natives by the Crown ought to be imagined as setting the boundaries of permissible legislative activity in the future. Imagining treaties in this way forces reconsideration of traditional understandings of the nature of legislative authority; its end result would be to view treaties entered into by the Crown with native peoples as constitutional documents demarcating permissible and impermissible spheres of legislative authority as it intersects with native interests.*⁸⁵

I agree with the above interpretation of the paramountcy of Aboriginal treaties.

There can be no greater "law" or obligation, than a treaty between two Nations who have put their minds to the future and their solemn agreement as to how that future will evolve. Sacrifices are made and compromises are negotiated in good faith with the presumption that both sides will honor their promises. There is no conceivable way in which the Government could justify an infringement of a treaty right. The Treaty is a solemn pact between two Nations that is meant to be honored until such time as both parties consent to a change. The court in *Sioui*, while holding that there was a treaty in that case, interpreted the Treaty in such a way so as to incorporate the "validity" of

⁸³ *Sparrow*, *supra* note 15.

⁸⁴ P. Macklem, *First Nations Self-Government and the Borders of the Canadian Legal Imagination*, (1991) 36 McGill L.J. 382 at 442-4 (references omitted). [hereinafter *Macklem*].

⁸⁵ *Ibid.*

European settlement. So too could the court address issues such as National Security issues as an implied condition of the Aboriginal treaties including the *Jay Treaty*. Justice McLaughlin in her dissent in *Van der Peet* stated that the way to reconcile Aboriginal rights and Crown interests is by negotiation that ends in an agreement; a treaty protected under section 35(1). With regard to reconciliation, McLachlin J. held:

Traditionally this has been done through the treaty process, based on the concept of the aboriginal people and the Crown negotiating and concluding a just solution to their divergent interests, given the historical fact that they are irretrievably compelled to live together. At this stage, the stage of reconciliation, the courts play a less important role. It is for the aboriginal peoples and the other peoples of Canada to work out a just accommodation of the recognized aboriginal rights.⁸⁶

If there are problems with those commitments later, it is for the Aboriginal group and the Crown to try to renegotiate, otherwise, the treaty as intended, stands “as is”. The situation of treaty rights is very different from Aboriginal rights. Although both are protected under section 35(1) of the *Constitution Act, 1982*, treaty rights are by their very nature Aboriginal rights that have already gone through the process of reconciliation. Treaties are the result of the Crown and the Aboriginal Nation reconciling the Crown’s sovereignty with the traditional Aboriginal rights of the Nation. The deal has already been made and reconciled with Crown interests. The Crown at that time not only had input into the reconciliation, but also had the drafters write up the Treaties largely in their favor. The Crown can not in good faith, later suggest that because they have new interests to protect that the Treaty itself must be re-reconciled with these new interests. That process

⁸⁶ *Van der Peet*, *supra* note 12, at 666.

is called re-negotiation and it takes both parties to participate and consent to the changes that will be made to the treaty, if any.

Unfortunately, the current situation in Canada is that any federal legislation would have to pass the justification test as set out in *R. v. Sparrow*.⁸⁷ In this test, once the Aboriginal claimant has shown that they were acting pursuant to an Aboriginal right, the Crown must show that the right has been extinguished or the burden shifts to the Crown to prove that there is a valid legislative objective for interfering with the Aboriginal right. Here, the Crown would have to reconcile its fiduciary duty for Aboriginal people by showing that the right was infringed as little as possible, that where appropriate, compensation was paid, and that the Aboriginal group was consulted.⁸⁸ As stated above, this process of double reconciliation is fundamentally flawed, as with regards to treaties, reconciliation has already taken place.

With regards to the federal *Immigration Act*, I believe, that based on the above discussion, the Mi'kmaq could show that the right to cross the Canada – U.S. exists in the *Treaty of 1725/26*, and that this *Act* interferes with that right. In addition, the Crown bears a heavy burden in proving extinguishment. Given that the court in *Simon* found that the hunting rights under the same *Treaty of 1752* had not been extinguished, and that the evidentiary base would be similar for this treaty, as it was in *Simon*, I have no doubt that the Crown would lack sufficient evidence to establish extinguishment. Finally, with regards to the justification part of the test, I would argue that the justification test does not apply to Treaties. Nonetheless, working within the present case law, I would argue that

⁸⁷ *Badger*, *supra* note 44.

⁸⁸ *Ibid.*

while protecting the Nation's borders would be a valid legislative objective, I believe that the Crown would be unable to demonstrate that they impaired the Treaty right as little as possible or that they have compensated or consulted with the Aboriginal Nations affected by the legislation. I have already alluded to less intrusive ways of dealing with the border issue in my previous chapter, such as identification cards. I think the Crown would be hard pressed to say that there exists no other way, but the current way, when no nation wide consultation has taken place with the Aboriginal groups to find out. No one has offered the Nations any compensation yet, so I doubt the Crown has really put much thought into their fiduciary duty to take these preliminary steps. As a result, the Crown would fail to both justify their legislation and to reconcile their fiduciary duty towards the member Nations of the Confederacy.

The last aspect of the treaty test as set out *Simon* is who can claim to be a beneficiary of the right to cross the border. The Aboriginal Nations of the Confederacy, be they now Canadian or American, should have a complete right to free passage based on their *Treaty of 1725*. The specific Aboriginal people who would be entitled to mobility rights, include the "Status Indians" as defined in the *Indian Act*, as well as the natural born descendants of the original Nations who signed the Treaty. The *Treaty of 1725/26* specifically includes the descendants of the Nation signatories, stating:

... *Saving unto the Penobscot, Naridgwalk and other tribes within his Majesty's province aforesaid **and their natural descendants...***⁸⁹ (emphasis added)

The *Treaty of 1752* was even more specific as it included:

⁸⁹ *Treaty of 1725*, *supra* note 42.

*Major Jean Baptiste Cope chief sachem of the Tribe of Mick Mack Indians, Inhabiting the eastern coast of the said province, and Andrew Hadley Martin, Gabriel Martin and Francis Jeremiah members and delegates of the said tribe, for themselves and their said tribe their heirs and the heirs of their heirs forever.*⁹⁰ (emphasis added)

The case law has only required that the claimant show a substantial connection to the original signers as held in *R. v. Fowler*⁹¹. In the case of status “Indians” in Canada, the substantial connection is a legal one as provided by the *Indian Act*. In regards to the non-status or Metis claimants, the same general test is applied, i.e. whether they have a substantial connection to the original signatory Nations. In the *Fowler* case, the court held:

*A claimant who could ... prove a substantial connection with a signatory of the treaty, could avail himself of the rights enshrined in the treaty without regard to his status under the Indian Act.*⁹²

The accused in that case had shown he was an Aboriginal descendant of the original signatory Nation, by virtue of the lineage traced through his mother who was a status “Indian”, even though he was not a “status” Indian. It is submitted that the same connection test would apply with equal force to American Indian descendants of the treaty signers based on their ancestry. The court in *Simon* held that there should not be an “impossible” burden of proof.⁹³ I would argue that based on the case law and the liberal interpretive principles regarding treaties, that all the Wabanaki members would be beneficiaries of the treaty rights under the *Treaty of 1725/26* be they Canadian or

⁹⁰ *Treaty of 1752, supra* note 43.

⁹¹ *Fowler, supra* note 28.

⁹² *Ibid.* at 367.

American, based on their substantial connection to the treaties as descendants of the signatories. The citizenship imposed on Aboriginal peoples, based on a political border that was established well after the rights were agreed to in the Treaties, should have no affect on those rights. The Crown, whether it is the provincial Crown, the Federal Crown or the American Federal Crown, was still the Crown as seen by the Indians back when the Treaty was signed. The Crown, is the Crown, is the Crown, and can not now say they never intended to fulfil its promises, and must, in good faith live up to its obligations.

⁹³ *Simon, supra* note 46.

“We villify them with all manner of names and opprious language, cheat abuse and beat them, sometimes to the loss of limbs, pelt them with stones an set dogs upon them...”⁹⁴

ABORIGINAL RIGHTS AND CROSS BORDER MOBILITY:

SECTION 35(1) OF THE CONSTITUTION ACT, 1982:

In 1982, section 35(1) was included in the *Constitution Act 1982*. It is under Part II, entitled: *Rights of the Aboriginal Peoples of Canada* and reads:

35. (1) *The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.*
- (2) *In this Act, “Aboriginal peoples of Canada” includes the Indian, Inuit and Metis peoples of Canada.*
- (3) *For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.*
- (4) *Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.*⁹⁵

The problem for the courts, after the new additions to the *Constitution Act*, was how to interpret section 35 as it applied to Aboriginal people and their “Aboriginal rights”. The *Sparrow* case was the first Supreme Court of Canada case to deal with this issue and became “the” definition of Aboriginal rights, although the case specifically dealt with fishing rights. This case set out the test of whether legislation was infringing Aboriginal rights. The case law which followed from the Supreme Court of Canada,

⁹⁴ *Bannister, supra* note 79.

namely *R. v. Van der Peet*,⁹⁶ *R. v. Gladstone*,⁹⁷ and *R. v. N.T.C. Smokehouse*,⁹⁸ sets out a more detailed test, referred to as the “integral to the culture” test for determining whether an Aboriginal right exists. Two other cases which came out in the same year, namely, *R. v. Adams*⁹⁹ and *R. v. Cote*,¹⁰⁰ expanded on some of the evidentiary considerations in litigating Aboriginal rights cases. All of these cases will be discussed in this section, as they relate to Aboriginal rights held by the member Nations of the Wabanaki Confederacy. Aboriginal rights are both part of the common law of Canada and recently, part of Canadian constitutional law, yet they are different from rights as held by non-Aboriginal Canadian citizens. John Burrows in his text on *Aboriginal Legal Issues*,¹⁰¹ explained the difference:

Aboriginal rights differ from other common law rights in another significant respect. Generally, rights in a democracy are dependent upon their recognition or affirmation by governmental authority or law. Aboriginal rights exist because they are derived from aboriginal practices, customs, and traditions. They exist in Canadian law not because of governmental recognition, but because they were not extinguished upon British or French assertions of sovereignty or their establishment of governmental authority in what is now called Canada. By a process known as the Doctrine of Continuity, the rights of the aboriginal peoples remained until such time as the European powers explicitly altered or abrogated them.¹⁰²

⁹⁵ *Constitution Act*, 1982, s.35(1). Sections (3) & (4) were added in 1983.

⁹⁶ *Van der Peet*, *supra* note 12.

⁹⁷ *Gladstone*, *supra* note 59.

⁹⁸ *Smokehouse*, *supra* note 59.

⁹⁹ *R. v. Adams*, [1996] 3 S.C.R. 101. [hereinafter *Adams*].

¹⁰⁰ *R. v. Cote*, [1996] 3 S.C.R. 139. [hereinafter *Cote*].

¹⁰¹ J. Burrows, *Aboriginal Legal Issues: Cases, Materials & Commentary*, (Markham: Butterworths, 1998) at 327. [hereinafter *Burrows*].

¹⁰² *Ibid.*

In the following section, I will review the case law on Aboriginal rights and how it relates to cross border mobility for the member Nations of the Wabanaki Confederacy. I will also address the problem of “American” Indians asserting Aboriginal rights in Canada, and what it means for the Confederacy.

CASE LAW ON ABORIGINAL RIGHTS:

One of the most important aspects of Aboriginal rights is that they are not derived from legislation, nor are they dependent on explicit recognition by the European powers that settled this land and brought their law with them as stated above. Recently, the Supreme Court of Canada in *R. v. Adams* explained that:

[T]he fact that a particular practice, custom or tradition continued following the arrival of the Europeans, but in the absence of the formal gloss of legal recognition from the European colonizers, should not undermine the protection accorded to aboriginal peoples. Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal approval of British and French colonizers.¹⁰³

This case was a culmination of the previous case law on Aboriginal rights, which are mostly based on the *Sparrow* case mentioned earlier. Before I address border crossing rights for the Wabanaki Confederacy, it is important to review this key case in Aboriginal rights.

The Supreme Court of Canada in *Sparrow*, *supra* used the previous case law on Aboriginal peoples in the determination of their rights to come up with a test for

¹⁰³ *Adams*, *supra* note 99 at 121-122.

interpreting the rights as protected under section 35(1) of the *Constitution Act*, 1982. The Court started with *Nowegijick*, *supra* which held:

... treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favor of the Indians.¹⁰⁴

Then, they cited an Ontario appeal court case, *R. v. Agawa*¹⁰⁵ which held that this principle in *Nowegijick* should apply to the interpretation of section 35(1). Finally, *Guerin v. The Queen*¹⁰⁶ was referred to, for its principle of interpretation that the Crown owes a fiduciary duty to Aboriginal people and that section 35(1) ought to be defined in light of this historic relationship.

The test as enunciated in *Sparrow* was comprised of four basic questions, which were: (1) Has the applicant demonstrated that he or she was acting pursuant to an Aboriginal right? (2) If so, has that right been extinguished? (3) If not, the court must then decide whether the legislation has the effect of interfering with an existing Aboriginal right, the burden of which lies on the group claiming the right, (4) If yes, then the burden switches to the government to justify the legislation, by answering: (a) Was there a valid legislative objective, like preventing harm to the populace, conservation, or other objectives which are compelling and substantial? Here the court in *Sparrow* considered and accepted the priority as set out in *Jack v. The Queen*, which was:

(i) conservation; (ii) Indian fishery; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.¹⁰⁷

¹⁰⁴ *Nowegijick*, *supra* note 49 at 36.

¹⁰⁵ *R. v. Agawa*, (1988), 28 O.A.C. 201. [hereinafter *Agawa*].

¹⁰⁶ *Guerin v. R.*, [1984] 2 S.C.R. 335. [hereinafter *Guerin*].

¹⁰⁷ *Jack v. R.*, [1980] 1 S.C.R. 294 at 313. [hereinafter *Jack*].

The next question would be (b) Did the Crown reconcile its fiduciary duty to Aboriginal people with the legislation by: (i) ensuring the legislative plans treat Aboriginal people in a such a way as to ensure that their rights were taken seriously? Some of these considerations would include: whether there has been as little infringement as possible in order to effect the desired result, whether in a situation of expropriation compensation is available, and whether the Aboriginal group in question had been consulted.¹⁰⁸

Yet, despite this case being heralded by Aboriginal rights advocates as “THE” case which established a favorable tool for determining section 35(1) rights, there were some inherent problems with the *Sparrow* test. First of all, the lower court decisions which followed adopted various interpretations of what the test entailed. Some decisions vigorously upheld anything which looked like an Aboriginal right to fish and some courts vigorously upheld the legislation which was infringing upon these rights, under the guise of conservation. Despite the hoped for predictability in interpretation *Sparrow* was expected to give, the decisions of the lower courts which ensued were just the opposite. The decisions conflicted with one another over whether the test was intended to uphold Aboriginal rights or to uphold conservation.¹⁰⁹ It also begged the question whether section 35(1) was more important for the recognition of Aboriginal rights, or the recognition of the “asserted” sovereignty over Aboriginal people. Michael Asch and Patrick Macklem in

¹⁰⁸ *Sparrow*, *supra* note 15.

¹⁰⁹ See *R. v. Myshraill* (1993), 146 N.B.R. (2d) 345, *R. v. McCoy* (1992), 127 N.B.R. (2d) 328, *R. v. Denny* (1990), 94 N.S.R. (2d) 253, (1991), 104 N.S.R. (2d) 257, *R. v. Thomas Peter Paul* (1996), 182 N.B.R. (2d) 270, (1998), 196 N.B.R. (2d) 292, [1998] S.C.C.A. No. 298, *R. v. Pelletier* (1996), 175 N.B.R. (2d) 70, *Fowler*, *supra* note 28.

Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow,¹¹⁰ explain this inherent problem with section 35(1) and how the court in *Sparrow* interpreted its meaning:

In sum, although the Court in Sparrow pays attention to an inherent theory of aboriginal right, its reasons ultimately betray a reliance on a contingent rights perspective, which serves to rein in the scope of s.35(1) rights. The assertion of Canadian sovereignty is sufficient to nullify and render non-existent any pre-existing claims of aboriginal sovereignty, which would otherwise constitute an "existing aboriginal right" within the meaning of s.35(1). ...

The Constitution Act, 1867 specifies that Indians and lands reserved for Indians fall under the exclusive legislative authority of Parliament [in section 91(24)]

Yet nowhere in the Constitution Act, 1867 does it actually state that the Canadian State enjoys sovereignty over its indigenous population. ...

Thus, despite initial appearances to the contrary, the justification for the assertion of Canadian Sovereignty, an assertion which underpins the coherence of the contingent theory of aboriginal rights, cannot be located in the text of the Constitution Act, 1867.¹¹¹

There was also a problem with the test itself as laid out in *Sparrow*. Despite the court's emphasis on the Crown's heavy burden of justification stemming from their fiduciary duty to Aboriginal people, the test had the effect of reversing that onus back onto the Aboriginal people in proving their Aboriginal rights. The first step of the test required the Aboriginal people to show that there was an infringement of their rights.

¹¹⁰ M. Asch, P. Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow*, (1991), 29 Alta. L. Rev. 498. [hereinafter *Asch*].

¹¹¹ *Ibid.* at 498-516. (references omitted).

That would be an easy enough task had the court not gone on to define what additional items to consider in order to establish a prima facie infringement. It read:

*To determine whether the fishing rights have been interfered such as to constitute a prima facie infringement of s.35, **certain questions must be asked**. First, is the limitation unreasonable? Second, does the regulation impose **undue** hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation.¹¹² (emphasis added)*

The first consideration is whether the infringement was unreasonable. Since the government must later prove that their infringement on the Aboriginal right was reasonable in terms of its objective and in light of its fiduciary duty, it seems odd that the Aboriginal people must first prove it to be unreasonable. The test was only supposed to be whether there was a prima facie infringement, not the additional burden of reasonableness. The inequitable burden on the Aboriginal people did not stop there. The next question which “must” be answered in order to prove a prima facie infringement of an Aboriginal right is whether the legislation imposed “undue” hardship. Once again, the test is lacking in clarity, since no “hardship” is “due” and it is doubtful that a mere inconvenience would be considered a hardship at all. Thus, the word “undue” is not necessary, unless the court only intended to include the severest of hardships. I would consider that having to wait until a band office opens to register for a license is a hardship, and delaying a traditional or ceremonial trip for hours or even days is a hardship for some elders. The court did not espouse a test or series of questions by which to

¹¹² *Sparrow, supra* note 15 at 1112.

determine if the hardship was “due” or “undue”. Yet, in *Sparrow*, the court held that it could not be a “mere inconvenience”.

Six years later, in *R. v. Nikal*¹¹³, another Aboriginal fishing rights case, the Supreme Court confirmed its position on having to prove “undue” hardship in establishing a prima facie interference with an Aboriginal right. In *Nikal*, the appellant was an Aboriginal person charged with fishing without a license contrary to the British Columbia fishing regulations. Under these regulations, Aboriginal persons were entitled to fish for salmon in the manner that they preferred, but they had to have a license under the fisheries regulations. Although the appellant argued that the license requirement was an infringement of his Aboriginal right to fish, the Supreme Court held it was a necessary part of the identification process which recognizes that right.

*It must also be remembered that aboriginal rights, by definition, can only be exercised by aboriginal people. Moreover, the nature and scope of aboriginal rights will frequently be dependent on upon membership in particular bands who have established particular rights in specific localities. In this context, a license may be the least intrusive way of establishing the existence of the aboriginal right for the aboriginal person as well as preventing those who are not aboriginals from exercising aboriginal rights.*¹¹⁴

While I agree that there must be some sort of identification used to establish Aboriginal people from non-aboriginal people, certainly a license is NOT the least intrusive way of accomplishing this task. A simple form of identification that currently exists are Indian status cards which indicates all the necessary information: a verifiable registration number, a picture and which band the fisher belongs to with regards to

¹¹³ *R. v. Nikal*, [1996] 2 S.C.R. 1013. [hereinafter *Nikal*].

territorial fishing. A license signifies “permission” by the Government to fish, as opposed to an acknowledgement of the Aboriginal right to fish. I think the issue of the cultural and ceremonial aspect of fishing is lost when the issue is made “hardship” as opposed to necessity. At a minimum, the Department of Fisheries and Oceans could have consulted with the band, and perhaps agreed upon the band cards or perhaps a unique card which is used solely to identify Aboriginal rights holders and is culturally sensitive of the nature of the right. Aboriginal people believe that this right came from the Creator, not a government agency. With respect, the court could have been more sensitive to the Aboriginal aspect of our rights. Rather than expand my critique of either *Sparrow* or *Nikal* further, I will now discuss the Supreme Court of Canada’s clarification of the test in the *Van der Peet* trilogy.¹¹⁵

The *Sparrow* case, respectfully, did not turn out to be as promising a tool for Aboriginal people as first hoped, although, it was more progressive than past decisions such as *Calder, supra* for instance. Then came the *Smokehouse, supra, Van der Peet, supra* and *Gladstone, supra* trilogy which reconsidered the whole issue of Aboriginal rights in light of their commercial aspects. Since the issue in *Sparrow* was fishing for food or ceremonial purposes, the Supreme Court had to revisit *Sparrow* and the test it had set out. The 7-2 majority in *Van der Peet* enunciated a more detailed test for defining Aboriginal rights and expanded on the major considerations that the lower courts must be aware of in determining sui generis rights, such as Aboriginal fishing rights. In the end, the accused in *Van der Peet* failed to meet the Aboriginal rights test to uphold a right to

¹¹⁴ *Ibid.* at para 95.

¹¹⁵ *Van der Peet, supra* note 12, *Gladstone, supra* note 59, *Smokehouse, supra*, note 59.

sell the fish she caught under her Indian Food Fish License. While I respectfully believe that this case was wrongly decided, the decision did mark a clearer “legal” method for determining the scope and extent of Aboriginal rights. It is obvious that a more equitable alternative to rights adjudication is needed as the courts decide these issues based on flawed assumptions such as Crown sovereignty over Aboriginal peoples as a given, or the need for Aboriginal people to prove to the Crown their rights as opposed to the Crown having to dispense with the burden of disproving the rights. In actuality, the Crown should be talking with Aboriginal groups and working out viable solutions for Aboriginal peoples as opposed to the constant litigation. In this thesis, I will use the legal tools as given in these cases and try to take advantage of the positive aspects and show how they can be used to expand Aboriginal rights in terms of mobility. This, of course, does not mean that I endorse the rigid legal system as the best route to settling Aboriginal claims.

The Supreme Court explained that in *Sparrow* it was not seriously disputed that the Musqueam Nation had an Aboriginal right to fish for food and thus it was unnecessary for the court to answer how the question of rights under section 35(1) of the *Constitution Act, 1982* are to be defined. Whereas in *Van der Peet*’s case, it was necessary to recognize both the “rights” aspect and “Aboriginal” aspect of Aboriginal rights, which the court thought could best be achieved through a purposive approach to interpreting section 35(1) of the *Constitution Act, 1982*. In that regard, Chief Justice Lamer held:

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 other minority groups in Canadian society and which mandates their special legal, and now constitutional status.*¹¹⁶

The Chief Justice went on to explain that *Calder* recognized Aboriginal rights as part of the common law and that the above basis for Aboriginal rights is consistent with the approach taken in *Calder* which held:

*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 usufructory 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.*¹¹⁷

Section 35(1) now ensures that the Aboriginal rights recognized and affirmed thereunder can not be extinguished.¹¹⁸ After a lengthy consideration of Canadian, American and Australian cases, the Court in *Van der Peet* held that the jurisprudence supports the proposition that Aboriginal rights protected under section 35(1) are best understood as the means by which recognition is given to the fact that distinctive Aboriginal societies occupied North America before the Europeans came, and the means by which to reconcile this prior occupation with Crown sovereignty. Then the court set out the test to identify whether an appellant has established an Aboriginal right protected under that section:

¹¹⁶ *Van der Peet*, *supra* note 12 at 538.

¹¹⁷ *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313. at 328.[hereinafter *Calder*].

¹¹⁸ *Van der Peet*, *supra*, note 12.

*... in order to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.*¹¹⁹

The court then set out ten factors to be considered in the application of the “Integral to a Distinctive Culture” test. The first factor is that the courts must take into account the perspective of the Aboriginal peoples themselves. Yet, at the same time they must be careful to do so in terms which are cognizable to the non-Aboriginal legal system. Secondly, the courts must identify precisely the nature of the claim being made in determining whether an Aboriginal claimant has demonstrated the existence of an Aboriginal right. This identification process would include: (a) the nature of the action done by the Aboriginal person pursuant to an Aboriginal right, (b) the nature of the government regulation, statute or action being impugned, and (c) the tradition, custom or practice being relied upon to establish the right. In regards to this analysis, the court specifically noted:

*Moreover, the court must bear in mind that the activities may be the exercise in a modern form of a practice, tradition or custom that existed prior to contact, and should vary its characterization of the claim accordingly.*¹²⁰

The third factor to consider in the integral test is that in order to be integral, a practice, custom or tradition must be of central significance to the Aboriginal society in question. This means that the Aboriginal person must show that this practice was one of the things which made the culture of the society distinctive. The claimant does not have to prove that the practice was distinct, as in unique, but the practice can not be true of

¹¹⁹ *Ibid.* at 549.

¹²⁰ *Ibid.* at 553.

every society; like eating to survive, for example. The practice also can not be occasional or incidental to another custom. Another way of looking at the assessment would be to ask, whether without this practice, would the culture be fundamentally altered.¹²¹

Continuity of time is the focus of the fourth factor. It states that the practice, custom or tradition which constitute Aboriginal rights are those which have continuity with the traditions, customs and practices that existed prior to contact. In regards to such an apparently onerous evidentiary burden the court clarified that:

*That this is the relevant time should not suggest, however, that the Aboriginal group claiming the right must accomplish the **next to impossible task of producing conclusive evidence** from pre-contact times about the practices, customs and traditions of their community. It would be entirely contrary to the spirit and intent of s.35(1) to define Aboriginal rights in such fashion so as to preclude in practice any successful claim for the existence of such a right. The evidence relied upon by the applicant and the courts may relate to Aboriginal practice, custom or traditions post-contact; it simply needs to be directed at demonstrating which aspects of the Aboriginal community and society have their origins pre-contact.¹²² (emphasis added)*

It is this concept of continuity that avoids the “frozen rights” approach to section 35(1). Thus, the evolution of these practices into modern forms will not prevent their protection as Aboriginal rights under section 35(1) as long as they have this continuity with pre-contact times. The court also stated that the Aboriginal group need not prove an unbroken chain of practice. The activity could have ceased for a time in the past and have since resumed again. Judges were also directed to adopt the same flexible approach with

¹²¹ *Ibid.*

¹²² *Ibid.* at 555.

continuity as they are to adopt in regards to evidence of the right. Continuity in terms of the Metis was an issue to await determination in a future Metis claim.¹²³

The fifth factor requires courts to approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims. In terms of interpreting the evidence and enforcing the rules of evidence, future courts are directed to be conscious of the special nature of Aboriginal claims and of the evidentiary difficulties in proving rights which originate in times when there were no written records of the practices engaged in. This factor ties in with the sixth factor which requires that the claims of Aboriginal rights must be adjudicated on a specific rather than general basis. The court held that Aboriginal rights are not “general and universal”, that their scope and content must be determined on a case by case basis. Similarly, the seventh factor states that for a practice to constitute an Aboriginal right it must be of independent significance to the Aboriginal culture in which it exists. This means that the right can not just be incidental to another practice in that society. In other words:

*Incidental practices, customs and traditions cannot qualify as Aboriginal rights through a process of piggybacking on integral practices, customs and traditions.*¹²⁴

Another factor to consider is that the integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct. This means a practice must make the culture “what it is”, as opposed to the practice being different from the practices of other cultures. The ninth factor states that the influence of European culture will only be relevant to the inquiry if it

¹²³ *Ibid.*

¹²⁴ *Ibid.* at 560.

is demonstrated that the practice, custom or tradition is only integral because of that influence. More specifically, the court held:

If the practice, custom or tradition was an integral part of the Aboriginal community's culture prior to contact with the Europeans, the fact that the tradition continued after the arrival of the Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an Aboriginal group of an otherwise valid claim to an Aboriginal right.¹²⁵

The last factor to consider states that the courts must take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples. This consideration is a recognition that Aboriginal rights arise not only from prior occupation of the land, but also from prior social organization and their distinctive cultures. The dissents in this case were more generous to the interpretation of the scope of Aboriginal rights. In this regard, Justice McLachlin stated:

If the Aboriginal people show that they traditionally sustained themselves from the river or sea, they have a prima facie right to continue to do so, absent a treaty exchanging that right for other consideration. In most cases, one would expect the Aboriginal right to trade to be confined to what is necessary to provide basic housing, transportation, clothing and amenities -- the modern equivalent of what the Aboriginal people in question formerly took from the land or the fishery, over and above what was required for food and ceremonial purposes.¹²⁶

The dissents in *Van der Peet* would have been more generous to the Aboriginal claimants, and reflect the true nature of the rights to which Aboriginal peoples are due. Aboriginal peoples have lived off the land on Turtle Island since time immemorial. They

¹²⁵ *Ibid.* at 561.

¹²⁶ *Van der Peet*, *supra* note 12 at 649.

have supported themselves in the manner in which they chose as most bountiful. This method of living off the land and choosing how to go about doing so would appear to be most integral to a culture that indeed it could not survive without doing so. The court has already paid lip service to what is integral to a culture, and I can think of little which is more integral. It is ironic that it is a foreign court, with foreign laws and a foreign judge with the assistance of foreign anthropologists evidence, who in the end determine what is integral to that particular Nation. Mary-Ellen Turpel in her article *Home/Land* speaks to this foreign legal system:

The complexity stems from what can be called the 'aboriginal dimension' of the legal dispute. This refers to the fact that the disputes that have arisen in these cases stem directly from the legacy of a colonial regime that continues to be imposed on aboriginal people by decontextualizing these conflicts and ignoring the impact of the law on aboriginal peoples' lives. To do otherwise would demand critical reflection on the adequacy and oppressive nature of the colonial regime established by the Constitution Act, 1867 and the Indian Act.¹²⁷

The courts appear to be carrying on the same paternalistic legacy of deciding what is in our best interests, that the Department of the Interior and the *Indian Act* started years ago. While the court, at the same time as it dismisses the frozen rights theory, (whereby the Aboriginal Nation presumably does not have to exercise their rights in the same manner as they were exercised at contact) the court also adopts the theory in reality, by only recognizing practices that were integral to their culture prior to contact. The courts have left little room for the evolution of the Aboriginal cultures to change and adapt to their circumstances. Yet, no one holds the same ancient standard to the European communities. One of the most precious characteristics of Aboriginal people is not that

they provide a sentimental glimmer in the eye of Canadian society of the noble savage, but their ability to withstand the atrocities committed upon them by the Europeans. It is their ability to stand in the face of death and still have the courage and forethought to do what they could to provide for their future generations, like our treaties for example that make them the peoples that they are today.

The Europeans could not trade fast enough with the Aboriginal Nations and take advantage of them, for the sake of profit back in England. On the same note, there exists no reason why Aboriginal people can not sustain themselves today by the very same practices if they so choose. I wish to reiterate that while I will continue with the legal analysis of Aboriginal rights, I do not accept some of the underlying assumptions and principles upon which the courts make their decisions. I am simply trying to take the best parts of the decision and make them work for a right for Aboriginal peoples to exercise their rights, like the right to freely cross the Canada-U.S. border. It is with this understanding that I will proceed with the rest of the *Van der Peet* trilogy.

The *Gladstone* case did pick up on one of the problems with the *Sparrow* case, that being the test for prima facie infringement of an Aboriginal right. The Supreme Court explained:

The Sparrow test for infringement might seem, at first glance, to be internally contradictory. On the one hand, the test states that the appellant need simply show that there has been a prima facie interference with their rights in order to demonstrate that those rights have been infringed, suggesting thereby that any meaningful diminution of the appellant's rights will constitute an infringement for the purpose of this analysis. On the other hand, the questions the test directs courts to answer in determining

¹²⁷ M. Turpel, *Home/Land*, (1991) 10 Can. Jour. Fam. L. 30.

*whether an infringement had taken place incorporate ideas such as unreasonableness and “undue” hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in Sparrow do not define the concept of prima facie infringement; they only point to factors which will indicate that such an infringement has taken place.*¹²⁸

In order for the signatories of the *Treaty of 1725* to establish an Aboriginal right to free passage over the border in a future court challenge, they would have to begin with the four-step *Sparrow* test, which consists of (1) is there an Aboriginal mobility right, (2) If yes, was the right extinguished before 1982, (3) If no, is there a prima facie infringement of the right, (4) If so, was it justified? In order to deal with the first step of the test on establishing the Aboriginal right, *Van der Peet* provides the factors to consider in the integral to the distinctive culture test. The first factor is that the court must take into account the perspective of the Aboriginal peoples themselves. The allied nations of Old Nova Scotia, being the Wabanaki Confederacy, have, from time immemorial, relied on their freedom to hunt and fish, travel, trade, practice their ceremonies and intermarry wherever they chose, within Abenaki territory which includes land in Canada and the United States. They have a very unique alliance which includes many different Nations under the Wabanaki Confederacy. Much anthropological and historical evidence would have to be produced in a court case, but the presentation of this kind and amount of historical and anthropological evidence is beyond the scope of this paper. Some of the sources already cited clearly evidence a reliance on freedom of mobility for every aspect

¹²⁸ Gladstone, *supra*, note 59 at 757.

of their traditional lives and this practice continued after contact and was verified by the various promises made to them in conference minutes, Indian treaties and international treaties. Many of the early Europeans recorded their experiences with these groups and thus, their information provides somewhat of a written record for times when Aboriginal practices were not recorded by the Indians themselves due to their oral traditions. The standard of evidence in regards to proving an Aboriginal mobility right is flexible, as is the interpretation of it, as held by the court in *Van der Peet*.

These Nations can even assert evidence of post-contact practices as long as it is directed at showing its origins in pre-contact times. There are numerous anthropological studies which indicate how most tribes all over North America were either nomadic or semi-nomadic and their very survival depended on this ability to travel as they needed. But this case is distinct in the sense that all these different Nations had allied together for various reasons even before the Wabanaki Confederacy was formally named. In contrast, a group like the Innu had no special connection to lands near the Canada-U.S. border and nothing in their lives depended on free access to this area.

Thus, the ability to have free passage over this area is very specific to these Nations under the alliance and affected every part of their traditional practices from hunting to trading to religious practices. More recent anthropological work analyzing ancient Mi'kmaq and Malecite burial sites in New Brunswick and Nova Scotia show that trade was very important, and probably created tribal allies as a result. The Aboriginal trading system in the area of present day Atlantic provinces connected them to most of the tribes near their traditional territories from present day Nova Scotia to present day Maine and beyond. Anthropological evidence from such sites indicates cultural and

trading ties of the all the Nations in present day Atlantic Canada and Maine.¹²⁹ A distinct system had been set up here and was integral to the cultures of all these eastern Indians. The importance of trade increased with contact and was continued, but this expansion of a pre-existing practice can not by *Van der Peet's* analysis detract from their valid trading, thus mobility right.

In the second factor, the court would have to determine the precise nature of the claim. It is submitted that these Nations have mobility rights which are impervious to the borders that were later imposed. The conferences and international treaties such as the *Jay Treaty* provide very convincing evidence that these Nations were never meant to be included in those persons who had to account for their cross-border travels. The *Jay Treaty* specifically granted them free passage. As well, this evidence would likely support the notion that this right was of central significance to these Aboriginal societies as to make it distinctive of the culture as required by factor three. The question to be asked is whether without this practice of free mobility over the border area, would the culture have been fundamentally altered, and I argue that it would have been. Had there been no free passage, there would not have been the tribal alliances either before contact or after contact. Hunting territories would have been different and familial ties would be drastically altered from the lack of contact, languages, and cultural practices would no doubt have been significantly altered.

Aboriginal mobility across this area is fundamental to these groups' very existence. A specific international treaty, The *Jay Treaty*, which I will deal with in the next Chapter, was considered necessary partly because of Aboriginal concerns over the

¹²⁹ *McMillan, supra* note 7 at 31- 49.

border issue. The Indians were well apprised of the impending division of land between what would later become Canada and the United States. As well, conference minutes and Indian treaties more than adequately document not only the Indian concern over the border, but also confirm their rights to free passage in different clauses of the *Jay Treaty*. These kinds of documents provide evidence of recognition of an Aboriginal right already recognized by all the parties. Again, in the fourth factor, the same evidence would establish the traveling patterns and the practices' continuity from pre-contact times to present day. Even the modern forms of exercising these rights would be protected if the Aboriginal right was established, as judges have been directed to be flexible not only in the rules of evidence, but also the interpretation of the evidence.

Factor five means that the courts would have to realize that the kind of evidence that a Aboriginal elder would contribute orally, cannot be under-valued simply because this kind of evidence does not conform precisely with the rules or standards of evidence. In this case, there are elders from various Nations who attest to the historic free passage in their territories and the subsequent free passage after the borders were created. Also, two more recent Supreme Court cases, *Adams* and *Cote*, lessened slightly the evidentiary requirements to establish pre-contact practices. The court in *Adams* held that no Aboriginal group will ever be able to provide conclusive evidence of what took place prior to contact, and thus:

*... where there is evidence that at the point of contact a practice was a significant part of a group's culture... then the Aboriginal group will have demonstrated that the practice was a significant part of the Aboriginal group's culture prior to contact.*¹³⁰

¹³⁰ *Adams*, *supra* note 99 at 128.

Similarly, *Cote* held that evidence that a practice was significant at contact will be evidence of significance in pre-contact.¹³¹ *Van der Peet* also stands for the proposition in factor six that whatever rights these Nations could establish would apply solely to these particular Nations and not other Aboriginal groups generally. I would argue that the evidence would also show that inter-territorial travel was not occasional or incidental to other practices of the different groups claiming the mobility right. Mobility is a right in and of itself. The relationship Aboriginal peoples have with their traditional territories is a unique aspect of their culture, and the use of these solely for travel is a connection that can not be discounted. The anthropological and archaeological evidence illustrates that mobility was essential to survival, hunting practices, and religious practices such as fasting and other aspects of Aboriginal life. Their special connection or alliance would also be different from other groups in Canada, and their connection and reliance on free passage over the border territory remains today.

I would argue that in terms of factor eight, an Aboriginal right of mobility or free passage over the border would be supported by the evidence. Since factor nine is about European influence only being relevant if the Aboriginal practice of travel or mobility only became integral because of this influence, it would not apply in this case. The anthropological, historical and oral evidence would support the claim of mobility within this territory as integral to these groups particular culture and this did not come about solely because of contact. Finally, the tenth factor regarding Indian relationships with their territorial and other lands is also supported by the evidence. Wabanaki territory has

¹³¹ *Cote*, *supra* note 100.

not changed in any significant amount since before the Europeans arrived, and they have hunted, fished, lived and traveled in the same areas for centuries. On that basis, I would argue that the right of free passage over the border is one of the most important rights these Nations could assert as it affects all the most important cultural aspects of their lives including familial ties. How then could the right be recognized for only Canadian Indians? The central significance of Aboriginal rights would be completely irrelevant if the court were to then read a narrow interpretation of the definition of Aboriginal peoples under section 35. There is a historical context that must be recognized when dealing with references to Aboriginal peoples. Since contact, they were often referred to as Nations, and the cases cited earlier demonstrate that they were also treated as Nations through the Treaty process. They are referred to in section 35 as peoples as they are part of their collective Nation, and not presented in the same context as individual Canadian citizens. These Nations include all those Aboriginal groups whose traditional territories included land in what is now Canada, or those whose traditional practices were exercised on the same lands. Also included in the definition of Aboriginal peoples are those Aboriginal Nations to which Canada made solemn commitments and promises under both international treaties and Indian treaties. In regards to mobility rights, this includes all the member Nations of the Wabanaki Confederacy that may presently be considered American citizens.

Once an Aboriginal right has been established, the next question is whether or not that right has been extinguished. The *Sparrow* case stated that the word “existing” in the *Constitution Act*, meant that section 35(1) applies only to those rights that were in existence in 1982, and did not revive rights that had been extinguished. This does not

mean that the right is exercisable as per a certain time in history. An existing Aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. Most importantly, the court held that these rights must be interpreted flexibly so as to “permit their evolution over time”. Although the respondent Crown in that case tried to use the long history of fisheries regulation to prove that their rights had been extinguished the court was quick in pointing out that the argument confused regulation with extinguishment. The court in *Sparrow* held that:

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.¹³²

The court went on to explain that the extensive history of fishery regulations and the specific mention of Indian fishers was not enough to extinguish their rights. All the legislation did was control the fishery, not define the underlying rights. The court recognized that despite any uncertainties of the *Royal Proclamation*, and its different judicial interpretations, it stands as a basic declaration of the Indians’ substantial interest in the lands. Thus, I would argue that although the Customs and Immigrations Acts were created to control border issues like the monitoring of who goes back and forth over the border, nowhere does it specifically extinguish the right of Aboriginal people to freely pass without being “molested” or “disturbed”.

The *Immigration Act* in particular only legislates in regards to one small group of Aboriginal people, and in no way amounts to an extensive treatment of all Aboriginal people in terms of extinguishing their rights. It merely amounts to regulating an activity for only a small percentage of Aboriginal people. Even if the *Act* were construed as

granting certain rights, certainly the act of granting rights, can not be said to amount to strict proof of extinguishing other rights not even mentioned in the legislation. The relevant part of the legislation states:

4. Where right to come into Canada - (1) A Canadian citizen and *a permanent resident have a right to come into Canada...¹³³

(3) Rights of Indians - A person who is registered as an Indian pursuant to the Indian Act has, whether or not that person is a Canadian citizen, the same rights and obligations under this Act as a Canadian citizen.

5. Where privilege to come into or remain in Canada - (1) No person, other than a person described in section(4), has a right to come into or remain in Canada.¹³⁴

I would conclude that the *Immigration Act* does not have the effect of extinguishing an Aboriginal mobility right for the treaty signer groups, but merely seeks to regulate the border activities of Canadian citizens as a whole. The *Act* mentions Status Indians as registered under the *Indian Act* presumably to make sure that they were included, since they were not considered citizens in either Canada or the United States until this century. Jack Woodward in his text *Native Law*¹³⁵ explains that prior to Indian Affairs coming under the Department of Indian Affairs in 1967 pursuant to the *Department of Indian Affairs and Northern Development Act*¹³⁶, it was under the Department of Citizenship and Immigration in 1951. Most Canadian Indians are citizens

¹³² *Sparrow*, supra note 15 at 1099.

¹³³ *The phrase "subject to section 10.3" is added here to the subsection by S.C. 1992, c. 49, s2.(1) which is in force on proclamation.

¹³⁴ *The Immigration Act and Related Legislation, 1996 Consolidation* (Ontario: Butterworths Canada, 1996). s. 4, 5. [hereinafter *Immigration*].

¹³⁵ J. Woodward, *Native Law* (Toronto: Carswell, 1990) at 145.

¹³⁶ *Department of Indian Affairs and Northern Development Act* R.S.C. 1985, c. I-6.

by operation of the Citizenship Act¹³⁷. The *Act* certainly does not purport to specifically regulate in regards to the rest of Aboriginal people in Canada. Conversely, if the *Act* were accepted as regulating in regards to all Aboriginal people, then I would argue that the legislation is discriminatory in its different treatment of Canada's Aboriginal people who are defined in section 35(1) of the *Constitution Act, 1982*. The *Act* would also be in specific violation of its own legislative objectives, that being section 3(f) of the *Immigration Act*.¹³⁸ That section states:

3. Immigration objectives - It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need

*(f) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the Canadian Charter of Rights and Freedoms;*¹³⁹

Section 15 of the *Canadian Charter of Rights and Freedoms* prohibits discrimination on the basis of race, which I believe this section of the *Immigration Act* does, by addressing the rights of one group of Aboriginal people and failing to give consideration to the other listed groups in section 35 (1), and American Indians to whom Canada still owes a duty to by virtue of the Treaties signed with those groups. I believe that either argument addresses the counter-argument that the legislation extinguishes Aboriginal mobility rights. The court in *Corbiere* stressed the importance of land to the

¹³⁷ *Citizenship Act* R.S.C. 1985, c. C-29.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.* s.3.

culture of Aboriginal peoples and the effect that discrimination based on residency has on such peoples, which I believe is equally applicable to Confederacy members who live on the American side of the border. The court cited an excerpt from the RCAP Report on Aboriginal identity and their lands:

Aboriginal identity lies at the heart of Aboriginal peoples' existence; maintaining that identity is an essential and self-validating pursuit for Aboriginal people in cities...

Cultural identity for urban Aboriginal people is also tied to a land base or ancestral territory. For many, the two concepts are inseparable...

Identification with an ancestral place is important to urban people because of the associated ritual, ceremony and traditions, as well as the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders.¹⁴⁰

Surely, if the Supreme Court in *Corbiere, supra*, would not permit discrimination between groups of Indians based solely on residency off the reserve, it would not support the discrimination between Indian signatories on the basis of residency across the border, both of which are circumstances that were imposed by the Crown. It would be unconscionable to allow the Crown to rely on its failed promises and racist policies to defend rights claimed by Aboriginal people. Certainly, the Aboriginal groups had no control over the policies or laws imposed on them by the British or American Crowns. Therefore, *Corbiere* might be used as an analogous situation to prevent discrimination by the Crown against the exercise of treaty rights by Aboriginal people because of their citizenship.

¹⁴⁰ RCAP vol.1, *supra* note 20 at 521,525.

The next question would be whether there was in fact any infringement of the mobility right. This question would be analyzed by the court based on the specific case brought before it. It can be generally analyzed here using the example of a Wabanaki member who is refused re-entry into Canada to reunite with his wife and children after a visit with his family in the United States. The scenario could be that an American born Indian comes into Canada and marries a Canadian born Indian by traditional marriage and decides to live and work here. Then, some time later the American born Indian travels to the United States to visit with family and friends for some time. Upon seeking re-entry back into Canada he is refused entry and separated from his family for 6 months while he awaits a determination about his re-entry. Meanwhile, his wife and children can not see the man. Assume that the man is neither a Canadian citizen nor has he applied for registration under the *Indian Act*, but he is not a terrorist, but does have a criminal record for drug possession. This would be a similar situation to the case in *Watt*, to shortly go before the Supreme Court of Canada.

The first step would be to prove that he has an Aboriginal right to cross the border freely and remain within the country. The Aboriginal claimant might offer evidence to prove his ancestry with the Penobscots or Passamaquoddies for instance. He might then make the same arguments that I made earlier with regards to the *Treaty of 1725/26* containing a right of free passage. He might also make an Aboriginal rights argument that cross border movement was integral to his culture, and that the Indian treaties provide evidence of this right. He may also use the *Jay Treaty* (which I will discuss in the next chapter) in the same way that he might use the Indian treaties, as evidence of an

Aboriginal right to cross the border. In my opinion, this evidence along with the historical and anthropological review, is more than enough to establish the right.

The Crown might then attempt to prove that the right had been extinguished. For all the reasons noted above, I would argue that the Crown would not be successful in its attempts to show that by virtue of the enactment of the *Immigration Act*, that all border crossing rights were specifically extinguished. Simply providing for rights in legislation is not enough for the courts to infer extinguishment given the strict proof, which is required. James [Sa'ke'J] Youngblood Henderson in his paper *Impact of Delgamuwwk Guidelines in Atlantic Canada*¹⁴¹ explained what *Delgamuwwk* had to say in this regard:

The Court affirmed that provincial or federal acts or regulations could not extinguish constitutional rights of Aboriginal peoples. It held that s.35(1) cannot be read so as to incorporate the specific manner in which constitutional rights were regulated before 1982, and stated that federal-provincial statutory or regulatory control of a constitutional right does not mean that the right is extinguished, even if the control is exercised in "great detail". Finally, the Court stated that the sovereign's intention is controlling and extinguishment of a constitutional right could only be proven if the sovereign's written command is clear and plain. The Court declared that s.35(1) not only creates a constitutional fiduciary duty on the federal government for Aboriginal peoples, but also operates as a "strong" limitation on the legislative powers of the federal Parliament as well as provincial Legislatures. No reason exists why these constitutional principles do not apply in Atlantic Canada to nullify any inconsistent provincial legislation prior to Confederation or federal legislation after Confederation.¹⁴²

¹⁴¹ J.Y. Henderson, "Impact of Delgamuwwk Guidelines in Atlantic Canada" (The Delgamuwwk Case: Aboriginal Land Claims and Canada's Regions, Fraser Institute Conference, May 26-27, 1999). [hereinafter *Henderson*].

¹⁴² *Ibid.* at 24.

Assuming that the Crown could not prove that the right had been extinguished, the Aboriginal claimant would have to address several questions in order to establish a prima facie infringement of the right. The first question would be whether the infringement was unreasonable. In this case, I would submit that forcing an Aboriginal man to stop at the border, detain him for a substantial period of time, deny him entry, and suggest he submit himself to immigration hearings, or go through the application and approval process, is unreasonable when such an important right is at stake. I would argue that total denial of the right to mobility is the most extreme example of unreasonableness. Given that a less intrusive system could be devised to identify the holders of border crossing rights, absolute denial of entry is unjustifiable.

The second question as to whether the infringement causes undue hardship would be best told by the family of the example man, who was denied entry to be reunited with his family. The present immigration laws not only cause undue hardship for the traveler, but also their families and friends. The third question about whether the legislation denies the claimant the preferred means of exercising the right, is not as applicable as it would be in a fishing case where there are dozens of ways to catch fish. There is only one way to get across the border and if you are denied entry, there is no other alternative but to hope and wait for a review. These considerations are more than is necessary to establish prima facie infringement and turn the burden back over to the Crown to justify the legislation.

The first question to be answered by the Crown would be whether there was a valid, legislative objective, like preventing harm to the populace, conservation or other objectives which are compelling and substantial. Until the Supreme Court's ruling in

Delgamuuwk,¹⁴³ the case law had only definitively accepted harm to the populace and conservation as valid objectives in infringing Aboriginal rights. In *Delgamuuwk*, the court held that in the context of Aboriginal title, there are justifiable limits on Aboriginal rights, which is a question of fact that will be determined on a case by case basis, which includes:

*[T]he development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims...*¹⁴⁴

Thus, the Immigration legislation would likely have to be analyzed on this basis. The *Immigration Act* sets out its objectives under *Part I* entitled *Canadian Immigration Policy*. It states their declaration that the policy and rules under the *Act* will be administered to promote a list of objectives which include: (a) demographic goals, (b) enriching the cultural and social fabric of Canada (taking into account its bilingual character), (c) facilitate the reunion of Canadians with their relatives abroad, (d) facilitate adaptation of person granted admission, (e) to facilitate the entry of visitors, (f) that admission standards are not discriminatory, (g) to uphold legal obligation to the refugees and persecuted, (h) foster a strong and viable economy, (I) to maintain and protect health and (h) to promote international order and justice by denying entry to those who are likely to engage in criminal activity.¹⁴⁵

That being so, there would appear to be no particular concern raised by Aboriginal people crossing back and forth to live with and visit families and friends, work, hunt,

¹⁴³ *Delgamuuwk v. B.C.*, [1997] 3 S.C.R. 1010. [hereinafter *Delgamuuwk*].

¹⁴⁴ *Ibid.* at para.165.

¹⁴⁵ *Immigration Act*, *supra* note 134 at s.3.

trade or partake in any other lawful occupation, so compelling that there could be no other way to address the problem than to totally deny some Aboriginal people free passage. The objectives actually portray a more accommodating view of border crossings facilitating visitations, culture, family reunions and non-discrimination. These objectives while reflective of the French and English dual nature of Canada, blatantly ignores the special nature or culture of Canada's First Peoples, which would cast doubt on the "dual" nature of Canada. In addition, the objectives cast a broad stroke over "criminals" and fails, on first glance to take into account the social conditions which may have given rise to a criminal record on the part of Aboriginal peoples. The few existing cases on the border issue have yet to even make this type of analysis; this will be dealt with in more detail later on in my thesis.

The next consideration on the Crown's part would be whether the Crown reconciled its fiduciary duty to Aboriginal people within the legislation. This would include whether there is as little infringement as possible on their Aboriginal mobility rights, whether the Aboriginal group has been consulted in the drafting of the relevant legislation, and in the event of expropriation of their rights, what compensation was made available to them. The government certainly has the right to protect its borders, but not at the expense of constitutionally protected Aboriginal and Treaty rights. To date, little if any Aboriginal groups or organizations have been consulted in determining the content of immigration laws and thus most groups and individuals continue to rely on historical promises such as those contained in the *Jay Treaty* for their freedom of mobility. There are also many different ways to monitor border traffic, than to deny entry or re-entry to Aboriginal people whether they are American or Canadian. Indeed, refusal of re-entry is

the most drastic method that could be employed to achieve the objective. I would argue that the Immigration Department, being a federal department, and representative of the Crown has failed to consider the mobility of Aboriginal people or the potential harm caused by the enforcement of the legislation drafted without Aboriginal input. The Crown has made no attempt to compensate Aboriginal people for the harm they and their families have suffered from lengthy detainment periods or absolute refusal of entry or re-entry into Canada.

Further, I would argue that were it put to the test set out above, the Aboriginal people affected could establish their mobility right based on Aboriginal or treaty rights. They could establish a prima facie interference and the government would not be successful in establishing a valid concern particular to Aboriginal peoples. Even if the Crown did establish a valid concern, they would fail the justification test due to the more equitable alternatives available, their discriminatory treatment, their failure to abide by their own Immigration objectives, the lack of Aboriginal input and finally due to the irreparable harm suffered by the Aboriginal travelers, their families and communities. In addition, the considerations for Aboriginal people with regard to criminal activity and mobility should be afforded rights comparative of the rights of non-aboriginal people. In non-aboriginal Canadian society, Canadians are free to move about their territories without regard to their criminal records. For example, a person whether convicted of fraud, assault, possession or manslaughter is free to travel the territory of Canada, from province to province without restriction. Aboriginal people should also be free to traverse their traditional territories regardless of their criminal records.

CASE LAW ON ABORIGINAL MOBILITY:

The cases dealing with the specific issue of Aboriginal mobility are very few and are to date only lower court decisions. It is surprising that they have, for the most part, failed to make the appropriate analysis regarding Aboriginal and Treaty rights. The first case directly on point was *Smith v. Canada*¹⁴⁶ where the Aboriginal applicant, an American Indian, made an application for an interlocutory injunction against the Minister of Employment and Immigration to refrain the respondent Minister from proceeding with the Immigration inquiry pending a hearing of the constitutional application. The applicant, Tracey Smith, is a member of the Red Lake Band of Chippewa Indians and holds American citizenship. She has three children who are American citizens and live on a reserve in the United States and two more children, with her common-law spouse, who live on the Stanjikoming reserve in Ontario. These children are registered Indians under the *Indian Act* and Canadian citizens.¹⁴⁷

Smith could only obtain medical benefits from the United States despite her new membership in the Canadian reserve, the reasons for which were not addressed. She thus had to travel to the U.S. for a dental appointment, after which she was refused re-entry on the grounds that she did not have, nor had applied for, a Visa. Only four days later, was she permitted to re-enter Canada and wait for an Immigration Inquiry. She asked for permission to visit her children back and forth until the hearing, but was refused. The court heard evidence of Smith's membership in the Ojibaway/Chippewa Nation who, according to the evidence, have always traversed the lands between Canada and the U.S.,

¹⁴⁶ *Smith v. Canada (Minister of Employment and Immigration)*, [1993] O.J. No. 395, online: QL (O.J.). [hereinafter *Smith*].

and have therefore acquired Aboriginal rights to do so. As well, she argued that the *Jay Treaty* conferred on her the right to traverse the border. The court decided that similar cases relating to the right to be free from the payment of taxes and duty at the border, namely, *Frances*¹⁴⁸ and *Vincent*¹⁴⁹ decided that the *Jay Treaty* was not a valid treaty under section 35(1) of the *Constitution Act*. Yet, the court decided that there remained the Aboriginal rights question which constituted a serious issue to be tried.¹⁵⁰

The court went on to analyze the potential harm to the applicant should the injunction not be granted. As a result, the court decided in favor of Smith, as it felt that Smith's common-law spouse and small children would suffer irreparable harm if she had to live in the United States and her children in Red Lake would suffer equally should Smith be forced to live in Canada. The harm would be minimal to the respondent, as all the Minister would have to do is temporarily exempt Smith from the legislation. A consideration of the public interest established the seriousness of dealing with indigenous North American people. It was ordered that the hearing be suspended until the constitutional application was heard and that Smith have free passage until final disposition.¹⁵¹

It is interesting to note that in this case, the court referred to the applicant as an Indigenous North American as opposed to classifying her as an American Indian, because of her American citizenship. The court did not hesitate in considering the possibility of Aboriginal rights as they have been defined in Canada, as extending to an American

¹⁴⁷ *Ibid.*

¹⁴⁸ *Francis v. The Queen*, [1956] S.C.R. 618. [hereinafter *Francis*].

¹⁴⁹ *R. v. Vincent* (1993), 12 O.R. (3d) 427 (Ont. C.A.), leave to appeal to S.C.C. refused, [1993] 3 S.C.R. ix. [hereinafter *Vincent*].

Indian. As this case was an application for an injunction and the criteria for acceptance of the argument was a serious issue to be tried, it is significant that the applicant got past this stage. The only update to the litigation since that time is an application to the Ontario court for an order with respect to costs. The other case is an appeal from the order for costs. Perhaps the Immigration Tribunal is awaiting a determination in the *Watt v. Canada (Minister of Citizenship and Immigration)*¹⁵² and *Mitchell v. Canada (Minister of National Revenue)*¹⁵³ cases before they make their determination given the Aboriginal rights in issue.

In *Watt, supra*, the Federal Court Trial Division described the applicant as a Native Indian who was also an American citizen who desired to enter and remain in Canada. Watt was seeking judicial review of a decision from the adjudicator who had ordered his departure from Canada. Watt is an American born Indian who had been convicted of growing cannabis in Canada. The motions judge felt that there was only one issue and that was:

... whether an Aboriginal person who was neither a Canadian nor a registered Indian had a right to remain in Canada because he belonged to a tribe whose traditional territory straddled the Canada-United States border.¹⁵⁴

The Trial Division dismissed the application and held that Watt had no right to remain in Canada. The *Immigration Act* provides that Canadian citizens have a right to enter and remain in Canada (section 4) and that registered Indians have the same rights a

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Watt v. Canada (Minister of Citizenship and Immigration)* (1994) 82 F.T.R. 57, (Fed.T.D.), [hereinafter *Watt*], (1998) 169 D.L.R. 4th 336. (Fed.C.A.) [hereinafter *Watt Appeal*].

¹⁵³ *Mitchell v. Canada (Minister of National Revenue)*, [1998] F.C.J. No. 1513, online: Q.L. (Fed.C.A.). [hereinafter *Mitchell Appeal*].

Canadian citizens (section 4(3)), and that no other person has a right to enter and remain in Canada (section 5). The Federal Court of Appeal in *Watt* summarized the Trial decision as follows:

*The motions judge dismissed the application on the basis that, whether such aboriginal rights had existed or not, or whether the appellant was entitled to rely on them, any such rights must have been extinguished by sections 4 and 5 of the Immigration Act as quoted above. These sections, she observed, had been adopted in 1977, five years before the adoption of the Constitution Act, 1982. She noted that section 35 of the latter Act only recognizes and affirms "existing" aboriginal rights. She found the extinguishment of such rights by the Immigration Act before 1982 to be amply clear.*¹⁵⁵

Reed, J. therefore decided that there was no ambiguity in those provisions of the *Immigration Act* and held that the applicant had no right to remain in Canada as an American Indian, but since there was a serious public interest issue, he should have the right to appeal.¹⁵⁶ The Federal Court of Appeal adopted the issue as stated by the motions judge as:

*The issue in this case is whether an aboriginal person who is neither a Canadian citizen nor a registered Indian has a right to remain in Canada because he belongs to a tribe whose traditional territory straddles the Canada-United States border.*¹⁵⁷

The Federal Court held that the motions judge applied the literal meaning of the *Immigration Act*, but had done so in 1994, and since that time the jurisprudence from the Supreme Court of Canada had considerably evolved with regard to Aboriginal rights and

¹⁵⁴ *Watt*, supra note 152.

¹⁵⁵ *Watt Appeal*, supra note 152.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Watt*, supra note 152 at 58.

the test for extinguishment. The Court understood the new jurisprudence to stand for the principles that: (1) Parliament needed a clear and plain intent to extinguish Aboriginal rights, (2) a general regulatory scheme which affects Aboriginal rights does not constitute their extinguishment, and (3) that:

...the failure to recognize an aboriginal right, and a failure to grant special protection to it, do not constitute the clear and plain intention necessary to extinguish the right...

The mere fact that the relevant sovereign power did not recognize the existence of such a right is not enough to negate its existence.¹⁵⁸

As a result of the court's review of the recent jurisprudence, with regard to the motions judge's ruling, the court held:

I believe that in the light of this jurisprudence it is not possible to assume that, regardless of how the right may be defined or established by evidence, it may be taken as extinguished by virtue of a law inconsistent with that right.

...

I am therefore of the view that the motions judge erred in finding extinguishment of the right as claimed. There was neither adequate evidence of the existence and definition of the right nor of a governmental intention to extinguish it.¹⁵⁹

The court went on to state that due to the lack of evidence, they could not make determinations of fact necessary for a determination of the continued existence of an Aboriginal right to remain in Canada. Before they made their final determination, the court did address some of the arguments with regards to the inherent rights of a sovereign state, such as the right to protect its borders. An overview of Strayer, J.'s explanation is as follows:

¹⁵⁸ *Watt Appeal*, supra note 152 at 346 .

Canada has by its Constitution limited the exercise of governmental powers which may be inherent as a sovereign state. ...

As long as the Constitution remains unamended, Canadian authorities are subject to this limitation on what would otherwise be an incident of sovereign power. ...

This does not mean, of course, that proper control of the border may not be a justification for Canada to control or limit in some way the exercise of relevant and unextinguished aboriginal rights. ...

I am therefore of the view that the sovereign nature of Canada is not a legal barrier per se to the existence of the aboriginal rights as claimed, ...¹⁶⁰

The court also found that the adjudicator has the necessary powers under the *Immigration Act* to make such determinations, and therefore allowed the appeal. They also quashed the departure order and referred the matter back to the adjudicator for a determination under the *Immigration Act* of these matters. While the court held that the adjudicator will not be able to declare the invalidity of any of the *Immigration Act* provisions, she will be able to treat the provisions as invalid as applied to the applicant and refuse to make a departure order against him if that would constitute an unconstitutional infringement of his Aboriginal rights. The case is to go before the Supreme Court of Canada shortly.

The issue as framed in the Federal Crown's Submissions to the Supreme Court in this case is the same as stated by the motions judge and adopted by the Court of Appeal

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.* at 348.

as quoted above.¹⁶¹ The Crown hopes to prove that by virtue of Watt not having proved that the Aboriginal group to which he belongs, has no “sister” group in Canada, he can not be considered an “Aboriginal peoples of Canada”. They assert that because of the events of settlement and the movement of Aboriginal peoples, that there is no “organized society” of Arrow Lake peoples in Canada, and therefore a connection with that group would not avail the appellant of any Aboriginal rights. This is a narrow view of the evidence that has been included in the submission.

The Supreme Court of Canada in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*,¹⁶² is a recent decision regarding discrimination under the *Indian Act* of the voting rights of those registered Indians who live on reserve and those who live off reserve, took into account the historical and social reasons for how and why off reserve Indians have come to live off reserve. The court decided not to use the wrongs of history to the disadvantage of this off-reserve group. The Court in *Corbiere* explained:

The enfranchisement provisions of the Indian Act were designed to encourage Aboriginal people to renounce their heritage and identity, and force them to do so if they wished to take a full part in Canadian society. ...

This history shows that Aboriginal policy, in the past, often led to the denial of status and the severing of connections between band members and the band. ...

Finally, the interest affected is also significant because of the ways in which, in the past, ties between band members and the band or reserve have been involuntarily or reluctantly severed. Those affected or their parents may have left the reserve for many reasons that do not signal a lack of interest in the reserve given the various historical

¹⁶¹ *Watt Appeal*, *supra* note 152 : Taken from the Federal Crown’s Submissions in the Matter. [hereinafter *Watt Submissions*].

¹⁶² *Corbiere*, *supra* note 18.

circumstances surrounding reserve communities in Canada such as an often inadequate land base, a serious lack of economic opportunities and housing, and the operation of past Indian status and band membership rules imposed by Parliament. ¹⁶³

So too, should the Crown be mindful of holding the events of history and the negative effects of colonization against the applicant in *Watt*. It can not be said in good faith that the negative actions of the Crown in moving Aboriginal groups or disbanding reserves can now be used to assist the Crown in avoiding the recognition of Aboriginal rights. As noted in *Van der Peet*, supra, Aboriginal rights do not have to have been exercised continuously since contact in an unbroken chain.¹⁶⁴ Certainly interruptions in activity occasioned by the Crown should not be held against the Aboriginal claimant. This kind of action would not be in keeping with the Crown's fiduciary duty towards Aboriginal peoples, nor would it uphold the honor of the Crown.

The Crown also asserts that the activity of crossing the border can not be considered an activity integral to Watt's culture, and therefore not an Aboriginal right, as the movement of people within Canada and over Canada's borders are activities shared by all cultures in Canada. I think that this bold assertion is an extreme overstatement and blatant mischaracterization of the actual situation in Canada. While it is true that Canadians have the right to and some do, freely move about Canada's territory, not all

¹⁶³ *Ibid.* at para 88.

¹⁶⁴ *Van der Peet*, supra note 12 at 557. Lamer C.J. held in regards to continuity of time: "*I would note that concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact. It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom or tradition at a later date. Such an interruption will not preclude the establishment of an aboriginal right. Trial judges should adopt the same flexibility regarding the establishment of continuity that, as is*

Canadians traverse the border, live near the border or have ties to family and friends on the other side. Nor have non-Aboriginal people in Canada lived near the border since time immemorial or have constitutionally protected Aboriginal rights. I think it is obvious that the Crown has attempted to deflect the issue, and detract from the Aboriginality and sui generis nature of the rights in issue by comparing the appellant to non-Aboriginal Canadians. The issue is the right of an **Aboriginal** person to traverse the border based on **Aboriginal** practices stemming from his membership in an **Aboriginal** culture, as a protected **Aboriginal** right under the *Constitution Act, 1982*. It is irrelevant where Canadians as a whole, travel. What is at issue here, is where the appellant travels and whether this travel over the border is integral to his culture. I have little doubt that most Aboriginal groups in Canada would be able to demonstrate that they have Aboriginal rights to hunt in their traditional territories. It can not be said that simply by virtue of other cultures or even many cultures sharing similar rights, that the claimant's culture can not therefore have that right based on his own culture's ancient practices.

The Crown asserts that because there exists evidence that the Arrow Lakes group ceased to exist as a band under the *Indian Act* in 1953, that they can not therefore be considered an Aboriginal group within Canada. I think the cite from *Corbiere* provided above would again show that the Aboriginal claimant should not suffer from the negative effects of history brought on by barriers created by Parliament under the *Indian Act*. In addition, what is required of the claimant is that they establish a substantial connection with the Aboriginal group, not that they or their group have met the administrative

discussed, infra, they are to adopt with regards to the evidence presented to establish the prior-to-contact practices, customs and traditions of the aboriginal group making the claim to an aboriginal right.”

requirements of the *Indian Act*. The court in *R. v. Jacobs*¹⁶⁵, while only a lower court decision regarding Aboriginal rights to cross the border, explained that the *Indian Act* has little to do with establishing Aboriginal rights entitlement:

There is no suggestion that the determination of membership depends, as a matter of law, on registration as an Indian, or as a member of a band, pursuant to the Indian Act. ...

*Evidence of registration or membership in a band may, at most, help demonstrate the connection of an aboriginal person to a particular aboriginal community. ...*¹⁶⁶

The Crown proceeds from this argument to provide some historical background on the *Jay Treaty* and how international treaties can be “...*instructive as historical documents in construing aboriginal rights...*”¹⁶⁷ While I will be dealing with the *Jay Treaty* in detail in the next chapter, it is interesting to note that the Crown felt that the *Jay Treaty* was of little use in the *Watt* case, as it involved only the Indians of Eastern Canada. This, of course is the very group upon which I have focused my thesis. The Crown argues that there can be no Aboriginal right to come into or remain in Canada as this right would be “...*fundamentally inconsistent with the purpose of the s.35(1) of the Constitution Act, 1982, to reconcile aboriginal practices with sovereignty.*”¹⁶⁸ In this regard the Crown argues that:

At the core of the concept of sovereignty is the interest of the state in self-preservation. As reflected in both international and domestic law, one of the primary ways in which a state protects this interest is by maintaining control of its borders. Self-preservation requires that the

¹⁶⁵ *R. v. Jacobs* [1998] B.C.J. No. 3144, online: Q.L. (B.C.J.). [hereinafter *Jacobs*].

¹⁶⁶ *Ibid.* at para 118.

¹⁶⁷ *Watt Submissions*, *supra* note 161 at para. 44.

¹⁶⁸ *Ibid.* at para 45.

state control the admission of persons onto its territory. The Supreme Court of Canada has recognised that the state has a “compelling interest” in protecting its borders in the immigration context.¹⁶⁹

What the Crown is missing is that the defence of Aboriginal mobility rights is not about Immigration, it is about the free movement of Aboriginal peoples within their own traditional territories, as they have done since time immemorial. The Crown insults the Indigenous populations of North America by citing American case law which holds that sovereign nations have the right to “...*forbid the entrance of foreigners within its dominions...*”.¹⁷⁰ The status of Aboriginal peoples in Canada is that of the First Nations of this land, and their special status is recognized in our *Constitution Act, 1982*. The Supreme Court of Canada has already emphasized this special status, first in *Sparrow*, and confirmed it in later decisions as discussed above. The court in *Sparrow, supra* held:

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 other minority groups in Canadian society and which mandates their special legal, and now constitutional status.¹⁷¹

It is unbelievable that we as Aboriginal peoples could be compared to “foreigners” from other countries in the world. I would hope that this line of reasoning would be quickly dismissed at the Supreme Court level. The court in *Jacobs, supra*, considered the Supreme Court of Canada’s decision in *Delgamuukw, supra* and the

¹⁶⁹ *Ibid.* at para 46.

¹⁷⁰ *Ibid.* at para 50.

Crown's sovereignty argument, and held that the Crown's position in this regard was fatally flawed. Macaulay, J. explained:

In my view, the Crown's argument is fatally flawed. The sovereign power enacted laws to assert its sovereignty; in this case the Customs Act and Excise Act, and predecessors. ...

Although I accept that the state, generally speaking, has a compelling or pressing interest in protecting its borders, I do not accept that a right of passage by aboriginal persons for purposes integral to their distinctive culture is irreconcilable with that interest.

*I reject the Crown's assertion that the aboriginal right established is fundamentally irreconcilable with the assertion of sovereignty. In reaching my conclusion, I found it helpful to consider the observations of Lambert, J.A. in *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.), at pp. 361-362, respecting aboriginal rights that would have been implicitly extinguished by the assertion of British Sovereignty and never absorbed as part of the common law, including "[t]hose rights which were so entirely repugnant to natural justice, equity, and good conscience that they could not, without modification, ever be a part of the common law..." The rights established here do not fit within this category.¹⁷²*

The right to cross the border by border tribes is not irreconcilable with any of the concerns Canada may have with "foreigners" from other countries. The Crown also asserts that if the right exists, that the prohibition on entry to those Aboriginal peoples with criminal convictions is a reasonable limit on the exercise of that right, and seeks to justify any possible infringement in this case on that basis. The Crown cites case law to support their contention that the Government has the right and the duty to keep out and to

¹⁷¹ *Van der Peet*, *supra* note 12 at 538.

¹⁷² *Jacobs*, *supra* note 154 at 72.

expel “aliens” from this country if it considers it advisable to do so. Once again, I do not think it accurate or culturally appropriate to compare or label the Indigenous peoples of this continent as “aliens”, as if they have no better claim to this land than an immigrant from China, or Iraq or Nigeria, whose rights post-date the settling of Canada’s international boundaries. This misleading characterization of Aboriginal peoples resident in what is now Canada and the United States, once again ignores their *sui generis* status in this country and specifically that the origin of their rights pre-dates the settling of Canada’s international boundaries.

With regards to the issue of criminal convictions, as stated above, it should not prevent Aboriginal peoples from exercising their rights, no more so than it would apply to non-aboriginal peoples in their own political Canadian territory. While I consider that all the territory in what is now Canada, is rightfully Aboriginal land, and that our rights to the use and occupation of this land should be paramount to the claims of all others, I will use the current political situation as an example. Presently, if a non-aboriginal person has a criminal record they are still free to travel within the territory that is considered theirs; i.e. Canadian territory. There is no restriction of movement from province to province based on criminal convictions. It should follow then, that Aboriginal peoples with Aboriginal or Treaty rights to traverse their territory which just happens to cross the Canada-U.S. border, should be allowed to do just that without regard to their criminal records. In addition, I will argue that the Confederacy Nations have a right of free passage based not only on their traditional Aboriginal and treaty rights, but that these rights were recognized in an international treaty known as the *Jay Treaty*. It is my position that the promises made under the *Jay Treaty* should be treated as an Indian treaty and protected

under section 35(1) of the *Constitution Act, 1982*, and at a minimum, it should provide ample evidence of the existence of the right of free passage for the purposes of Aboriginal rights litigation. It is to the *Jay Treaty* that the analysis now turns.

CHAPTER THREE:
IN THE SPIRIT OF JAY:
MORE BROKEN PROMISES OR CAN JAY SAVE US
TWO HUNDRED YEARS LATER?

“But Brothers, this line, which the King marked out between him and the States even supposed the Treaty had taken effect, could never have prejudiced your rights.”¹⁷³

THE JAY TREATY OF 1794:

INTRODUCTION:

The *Jay Treaty*, concluded on November 19, 1794, called the *Treaty of Amity Commerce and Navigation*¹⁷⁴ was made between the United States of America and His Majesty of Great Britain. The Treaty was named after John Jay who was Chief Justice of the United States at the time, who negotiated the articles of peace. The main goal was to establish a permanent peace between Great Britain and the United States. The U.S. Senate advised that the Treaty should be ratified, and was amended by the U.S. Senate on June 24, 1795. Then, on October 28, 1795 there was an exchange of ratifications, and it was ratified by the President of the United States. The Treaty was finally proclaimed on February 29, 1796.¹⁷⁵

With regards to how the *Jay Treaty* was treated here in Canada, there was legislation implementing Article III (the mobility clause) of the Treaty. This legislation was passed in 1801, but repealed in Upper Canada in 1824. It was passed in 1796 and allowed to lapse in Lower Canada in 1813.¹⁷⁶ The Treaty was concluded in order to settle the differences between the two imperial powers with regards to trade and commerce, the

¹⁷³ *Mitchell trial, supra* note 13 at para 190. The court was quoting a speech given by Lord Dorchester in 1791 to various Indian Nations explaining the *Jay Treaty*.

¹⁷⁴ *Jay Treaty, supra* note 6.

¹⁷⁵ *Ibid.*

¹⁷⁶ *S. Upper C. 1801, c.5; S. Upper C. 1824, c.40; S. Lower C. 1796, c.7; S. Lower C. 1812, c.5.*

passage of their sea-going vessels, and the extent of their territories for these purposes. Article III also addressed Indian concerns over Indian land and their rights of both free passage and the carriage of their goods within their territories without being taxed.

This Treaty was necessary, for although there had been the *Treaty of Paris* in 1783 which recognized the independence of the United States and fixed boundaries between the two, it has left the “Indian question” unanswered.

No clear political conception had been formulated of the relationship of the Indians either to the old or the new government especially in respect of rights in the lands over which the natives had formerly roamed at will; and their protest was that the British had purported to transfer to the United States, a title which they did not possess. As a measure of mitigation, the British conceived the idea of setting apart a neutral zone between the two countries for Indian settlement, but this did not develop to the point of definite proposal.¹⁷⁷

It was the Indian concern, along with some other border frictions between the United States and Great Britain, that eventually lead to the *Jay Treaty* and the inclusion of Article 3 dealing with the free mobility of the Indian tribes. While the Treaty dealt with various other issues, it is the part specifically devoted to the concerns of the Indians that is of importance to the issue of border-crossing rights today. The relevant portions read:

It is agreed that it shall at all times be free to His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America, (the country within the limits of the Hudson's Bay Company excepted.) and to

¹⁷⁷ Francis, *supra* note 148 at 624-625.

*navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other.*¹⁷⁸

*No duty of entry shall ever be levied by either party on peltries brought by land or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper good and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians.*¹⁷⁹

This Article specifically provided that the Indians who dwell on either side of the boundary had the right to pass freely over the border as well as carry on trade. This Article also provided that the Indians who cross the border with goods would not be taxed or have duty imposed upon them. If there was ever any doubt as to whether this Article conveyed any rights or was meant to binding into the future, an *Explanatory Article to the Third Article of the Treaty of November 19, 1794, Respecting the Liberty to Pass and Repass the Borders and to Carry on Trade and Commerce* was concluded to address that very concern. This article was concluded on May 4, 1796 and signed by both commissioners of His Majesty of Great Britain and the United States of America. This Explanatory Article provided additional assurances that the rights contained in the *Jay Treaty* would not only be recognized, but could not be derogated from in any future agreements and provided in part as follows:

Whereas by the third article of the treaty of amity, commerce and navigation,...

...it was agreed that it should at all times be free to His Majesty's subjects and to the citizens of the United States,

¹⁷⁸ *Jay Treaty*, *supra* note 6.

¹⁷⁹ *Ibid.* at 4.

and also to the Indians dwelling on either side of the boundary line, assigned by the treaty of peace to the United States, freely to pass and repass, by land or inland navigation, into the respective territories and countries of the two contracting parties, on the continent of America, (the country within the limits of the Hudson's Bay Company only excepted,) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other, subject to the provisions and limitations contained in the said article: ...

And it being the sincere desire of His Britannic Majesty and of the United States that this point should be so explained as to remove all doubts and promote mutual satisfaction and friendship: ...

...and do by these presents explicitly agree and declare, that no stipulations in any treaty subsequently concluded by either of the contracting parties with any other State or nation, or with any Indian tribe, can be understood to derogate in any manner from the rights of free intercourse and commerce, secured by the aforesaid third article...

...and to the Indians dwelling on either side of the boundary line aforesaid; but that all the said persons shall remain at full liberty freely to pass and repass, by land or inland navigation, into the respective territories and countries of the contracting parties, on either side of the said boundary line, and freely to carry on trade and commerce with each other, according to the stipulations of the said third article of the treaty of amity, commerce and navigation.¹⁸⁰

Although it would appear by the above explanation of the third article, that there is a definitive right for Aboriginal peoples to freely cross the border, the courts in Canada have not been willing to accept the Treaty as holding any enforceable rights for Aboriginal peoples. The focus has been in discounting the *Jay Treaty* as an enforceable

international treaty in Canada, and in disqualifying it as an Indian Treaty with constitutional protection under section 35(1). What is missing in these cases is an appreciation of the sui generis nature of Aboriginal treaty rights and an openness to include the specific provisions of the *Jay Treaty* relating to Indians, as either an Indian treaty, or at least as a unique treaty that can also be protected as the other treaties protected to date. At a minimum, the promises that were made under this Treaty to appease the concerns of the Indians should be upheld as part of the honor of the Crown in fulfilling its fiduciary duty towards Aboriginal peoples. I will review the case law with regards to the *Jay Treaty* and offer an analysis of how each case compares with modern interpretive principles in treaty interpretation.

CASE LAW:

FRANCIS v. THE QUEEN:

The first Supreme Court of Canada decision to deal with the *Jay Treaty* and Indian mobility was *Francis v. Canada* in 1956.¹⁸¹ This case involved a Canadian Indian who was registered under the *Indian Act*, and lived on the St. Regis Indian reserve in Quebec, adjoining an Indian reserve in New York, U.S.A. The members of both reserves are all from the same tribe. The appellant brought articles into Canada from the United States as a test case on whether or not he had to pay duty on these articles. He based his claim in part on the *Jay Treaty of 1794*, Article 3, particularly the second part which states that Indians passing and repassing over the border will not pay any duty on their

¹⁸⁰ *Explanatory Article to the Third Article of the Treaty of November 19, 1794, Respecting the Liberty to Pass and Repass the Borders and to Carry on Trade and Commerce. Concluded May 4, 1796; Ratification advised by Senate May 9, 1796. [hereinafter Explanatory Article].*

goods. The contention was that Article 3 of the *Jay Treaty* effected the enactment of substantive law and did not need statutory enactment because it was a provision of a treaty of peace. It was argued that the treaty was an exercise of the prerogative, including a legislative function. Chief Justice Kerwin's response for the majority was that since:

*The Jay Treaty was not a Treaty of Peace and it is clear that in Canada such rights and privileges as are here advanced of subjects of a contracting party to a treaty are enforceable by the courts only where the treaty has been implemented or sanctioned by legislation.*¹⁸²

Thus, Chief Justice Kerwin decided that any relevant rights of the appellant in the *Jay Treaty* were not justiciable in the courts of this country. The appellant's argument went on to state that the treaty of peace was now law and was not affected by the war of 1812, and even if it were, the 9th Article of the *Treaty of Ghent*¹⁸³ in 1814 between the same states, restored the rights under Article 3 of the *Jay Treaty*.¹⁸⁴ Article 9 of the *Treaty of Ghent* states:

*And His Britannic Majesty engages, on his part, to put an end, immediately after the ratification of the present Treaty to hostilities with all the tribes or Nations of Indians with whom he may be at war at the time of such ratification; and forthwith to restore such Tribes or Nations, respectively, all the Possessions, Rights and Privileges, which they may have enjoyed or be entitled to in 1811, previous to such hostilities Provided always, that such tribes or Nations shall agree to desist from all hostilities against His Britannic Majesty, and His Subjects, upon the Ratification of the Present Treaty being notified to such Tribes or Nations, and shall so desist accordingly.*¹⁸⁵

¹⁸¹ *Francis*, *supra* note 148.

¹⁸² *Ibid.* at 621.

¹⁸³ *Treaty of Ghent, 1814*. From *Treaties and Agreements Affecting Canada in Force Between His Majesty and the United States of America with Subsidiary Documents 1814 - 1925*. (Ottawa: Department of External Affairs, 1927). [hereinafter *Treaty of Ghent*].

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

Justice Rand went on to explain that a peace treaty is defined as a treaty which concludes a war, and the *Treaty of Paris of 1783* was such a treaty. In contrast, the court felt that the *Jay Treaty* was only a treaty to work out some problems with regards trade and Indian concerns. Rand, J. stated that a treaty is an executive act between independent states acting in sovereign capacities, but its implementation may still need legislative action. The difference is that strictly sovereign matters such as establishing borders are deemed executed, whereas provisions for future social or commercial relations are those within the scope of municipal law. That being so, without a constitutional provision declaring the Treaty to be law, it must be supplemented by statutory action. Thus, financial provisions such as duties must be legislated. In terms of the *Treaty of Ghent*, Rand, J. relied on a United States case which held that the parties to the *Treaty of Ghent* merely “engaged” themselves to restore the rights of Indians by legislation, but never did.¹⁸⁶ Finally, Justice Kellock dealt with section 87 of the *Indian Act* dealing with Indian treaties and merely stated that the *Jay Treaty* did not fall within that definition.¹⁸⁷ So, the Supreme Court of Canada decided that the *Customs Act* was in force in regards to Indians, and thus, there was no right by the Indians to bring goods over the border duty free.¹⁸⁸

One of the problems with this case is that it was decided in 1956, long before the new Constitutional provisions for Aboriginal people and long before courts had

¹⁸⁶ *United States v. Garrow* (1937) 88 Fed. R. (2d) 318 at 321.

¹⁸⁷ Section 87 (now sec. 88) of the *Indian Act*, *supra* note 21: “88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the Province, except to the extent that those laws make provision for any matter for which provision is made by or under this Act.”

¹⁸⁸ *Francis*, *supra* note 148.

developed the policies behind Aboriginal claims and the basis of their rights. This is all too evident in the passage of Justice Rand, who looks back nostalgically on the struggles between the Indians and the Newcomers and comments:

*There followed the slow but inevitable march of events paralleled by that in this country; and today there remain along the border only fragmentary reminders of the past. The strife had waged over the free and ancient hunting grounds and their fruits, lands which were divided between two powers, but that life in its original mode and scope has long since disappeared.*¹⁸⁹

Justice Rand continues on to say, in regards to the *Indian Act*, that it is these considerations that:

*... justify the conclusion that both the Crown and Parliament of this country have treated the provisional accommodation as having been replaced by an exclusive code of new and special rights and privileges.*¹⁹⁰

Yet, it is the very fact that the traditional life, culture and practices of various Aboriginal groups have *not* disappeared, that these ways *are* still practiced and that these struggles for their traditional hunting grounds have *not* been forgotten or given up on in any way by Aboriginal groups. It is for all these reasons that they *continue* to assert their rights and take them to court to have them validated, and why these rights are now protected in our *Constitution Act, 1982*. I would argue that in light of the Constitutional protections of Aboriginal rights and as a result of the Crown's fiduciary duty to Aboriginal peoples, that this case ought to be reconsidered in light of these more recent judicial standards.

¹⁸⁹ *Ibid.* at 628.

¹⁹⁰ *Ibid.*

The case of *Mitchell v. Canada*, *supra*¹⁹¹ will soon be argued in the Supreme Court of Canada, also deals with the validity of border-crossing rights under the *Jay Treaty*. This case will be discussed in more detail below. One of the issues that the Crown is addressing is the effect of the *Francis* case. The Crown is arguing that the *Francis* case is determinative of the issue of *Jay Treaty* rights as it was a Supreme Court of Canada case. Counsel for Kanantakeron argues that the *Francis* case does not stand for extinguishment and states in their submission:

The judgement in Francis v. the Queen, [1956] S.C.R. 618 stands at most for the proposition that in 1956, the treaty guarantees in Art.III of the Jay Treaty could not be enforced by the courts of Canada as there was no domestic legislation implementing those treaty guarantees. The essential holding of the Supreme Court of Canada in Francis was that the rights guaranteed in Art.III of the Jay Treaty could not be enforced by the courts of Canada since there was "no legislation in force implementing the stipulation". (per Rand J. at 629)

Rand J. explicitly declined to consider the question of whether the treaty rights had been extinguished, stating that "[w]hether, then, the time of its expiration has been reached or not it is not necessary to decide" (at 629).¹⁹²

With regard to the recent evolution of the law dealing with the rights of Aboriginal people, counsel in the *Mitchell* case also argues that *Sparrow*, *supra*, and the other cases affect the analysis of the *Jay Treaty* that mandates a reconsideration of the issue since *Francis*. They explain at paragraph 116 of their submission:

The law of Canada has evolved. Francis articulates a conception of parliamentary sovereignty before the coming

¹⁹¹ *Mitchell Appeal*, *supra* note 153.

¹⁹² *Memorandum of Fact and Law of Appellant on the Cross-Appeal – Volume 2 – Counsel for the Respondent – Mitchell Appeal*, *supra* note 153 at para 109-110. [hereinafter *Mitchell Submissions*].

into force of the Constitution Act, 1982. The principle thrust of the Supreme Court's judgement in Sparrow was that after 1982 there existed a remedy for Aboriginal peoples not available to them before 1982. That remedy consisted of being able to successfully assert Aboriginal and treaty rights against the actions of the legislatures which curtail those rights, or inaction by the legislatures protecting those rights. Rights that prior to 1982 were not judicable, became judicable after 1982.¹⁹³

The Appellant in *Mitchell* argued that the *Treaty of Utrecht* and the *Treaty of Ghent* were really peace treaties and were thus self-executing and needed no domestic legislation in order to be implemented. These treaties provided rights for the Indian Nations and confirm the rights under the *Jay Treaty*. They at least provide evidence to support Article III of the *Jay Treaty* as a treaty in the sense of binding obligations on behalf of the Crown. It is my position that the *Francis* case ought to be reconsidered in light of the most recent case law on Aboriginal and treaty rights. Even if the *Francis* case was rightly decided in its time, and the rights under the *Jay Treaty* were not justiciable prior to 1982, section 35 of the *Constitution Act* now makes these rights judicable. A more recent case from the Ontario Court of Appeal attempted to deal with the modern case law and failed to make the appropriate analysis. What follows is my criticism of the case in *Regina v. Vincent*¹⁹⁴, and why I believe that, despite having the case law before it, failed to make the appropriate analysis.

REGINA v. VINCENT:

In *Regina v. Vincent* a member of the Laureate-Huron band, Elizabeth Vincent unlawfully imported tobacco into Canada from the United States and was found guilty at

¹⁹³ *Ibid.* at para 116.

trial, as she had not established a lawful excuse as per the *Customs Act*. She appealed the decision on the basis that her lawful excuse was that Article 3 of the *Jay Treaty*, confirmed by later treaties and promises of the time period conferred upon her an exemption from custom duties, rights which are now protected under s. 35 of the *Constitution Act*. The first item to note is that the court initially dealt with the *Jay Treaty* as if it were valid today. Lacourciere, J.A. stated that because the tobacco imported by the appellant was contained in seven large cardboard boxes, it could not be considered exempt from duty as the Article specifically prohibited exemptions on “... *goods in bales or other large packages unusual among Indians*.”. As well, he outright rejected the appellant’s contention that the expression: “... *their own goods and effects*...” excluded only those goods not belonging to Indians.¹⁹⁵

Although Lacourciere, J.A. held that this was sufficient to dispense with the appeal, he went on to deal with the issue of whether or not the *Jay Treaty* was a treaty within the meaning of s. 35 of the *Constitution Act* which states:

*35. (1) The existing Aboriginal and treaty rights of the
Aboriginal peoples of Canada are hereby
recognized and affirmed.*¹⁹⁶

In considering this question, they reviewed the authorities on the subject and came to the conclusion that the framers of section 35 intended the word “treaty” to have the meaning already recognized in Canadian courts, that being Indian Treaties, or they would have chosen another word. They also decided that since court decisions prior to 1982

¹⁹⁴ *Vincent, supra* note 149.

¹⁹⁵ *Jay Treaty, supra* note 6.

¹⁹⁶ *Constitution Act 1982, s. 35.*

stated that the term “treaty” in section 87 (now 88) of the *Indian Act* did not refer to international treaties, that this makes it clear that:

... ‘treaty’ in this section does not extend to an international treaty such as the Jay Treaty but only to treaties with Indians which are mentioned throughout the statute. ¹⁹⁷

Finally, the court ended by stating the unwelcome results should the court accept the appellant’s arguments, namely that:

...each time that Canada signed an international treaty which might produce effects for Indians and their bands:

(a) Canada would lose its sovereign rights to amend, extend, terminate or denounce a treaty without the consent of the Indians and their respective bands;...

(b) the Parliament of Canada would be obliged to maintain the treaty in force, even if the other contracting country refused to respect it or unilaterally renounced it, unless the Aboriginals consented to the abrogation of the Law; and

(c) the Government of Canada would be obliged to continue to confer on the Indians of Canada the benefits they would have been able to draw from it, regardless of the fate of the treaty. ¹⁹⁸

Although the *Francis* case was somewhat problematic, it was somewhat explained by the fact that the case was decided in 1956, before the benefit of the *Constitution Act, 1982* and the recent cases which explain Aboriginal policy issues in interpreting the rights they claim. The same can not be said for the *Vincent* case, which had all the benefits of recent Supreme Court decisions as well as the interpretive principles for adjudicating Aboriginal rights. Respectfully, I would argue that this case is wrongly decided in its

¹⁹⁷ *Francis*, *supra* note 148 at 631.

conclusions and its methodology in adjudicating the issues. The problem is exacerbated by the fact that leave to the Supreme Court of Canada was refused.

The Ontario Court of Appeal interpreted Article 3 to mean that since the appellant transported the tobacco in seven large boxes, they are not exempt from duties, without explanation as to how they made this interpretation, other than literally. It is submitted that the court failed to use the principle as enunciated in *Nowegijick v. The Queen* before making their holding. The principle stated that:

*... treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favor of the Indians.*¹⁹⁹

In addition, they neglected to read on further in the passage where the qualifier is added: “...not usual among Indians...”, which could also imply that large bales or packages which are usual among Indians would still be exempt from duties. This is a treaty which relates to Indians and should be construed accordingly. Thus, if the court had any problems with interpretation or there was any ambiguity as to what the words meant, they should have resolved that problem in favor of the Indians. Yet, the court did not mention the consideration of any evidence as to what is “usual” among Indians then or now. In the absence of such evidence, they should have given the benefit of the doubt to the appellant and at least directed that the matter be referred back so that evidence could be provided to address these gaps.

Similarly, with the second phrase regarding ownership of the goods, the court did not provide a basis upon which they rejected the appellant’s interpretation that it only applied to goods that were not those of the Indians. The principle in *Nowegijick* would

¹⁹⁸ *Vincent, supra* note [49 at 441].

apply here as well, had the court had any question about it. On its face, it is submitted that the court erred in its interpretation of the first two parts of the appellant's contention based on the interpretive principles that have been established for these issues. If it is the case that was little evidence before the court, the matter could have been referred back to consider new evidence.

In regards to the question of whether the *Jay Treaty* is of the kind which is included in section 35 of the *Constitution Act, 1982*, the court takes a position which is not in line with the balance of the authorities cited on point in that case. Specifically, the court cited Brian Slattery who stated that the expression treaty rights *is* sufficiently broad enough to include treaties between the Crown and other sovereign States when such treaties include stipulations in favor of Aboriginal people.²⁰⁰ The court also quoted Professor Hogg in support of Slattery's position with regard to international treaties holding rights for Aboriginal peoples.

These authorities coupled with the broad interpretive principle were enough to convince the trial judge of the inclusion of the *Jay Treaty* in section 35, yet, when faced with the choice, the court of appeal went the other way. They focused on the fact that the writers all mentioned that there is some doubt as to whether the treaty could be included, based on the lack of case law on the point. Yet, Judge Lysyk expressed his opinion that a liberal interpretation of the text of the *Charter* would not necessarily give the same meaning to the word treaty as would the *Indian Act*.²⁰¹ It is submitted that the Court of

¹⁹⁹ *Nowegijick*, *supra* note 49 at 36.

²⁰⁰ B. Slattery, *The Constitutional Guarantees of Aboriginal and Treaty Rights* (1983) 8 Queen's L.J. 232, at 243. [hereinafter *Slattery*].

²⁰¹ *Vincent*, *supra* note 149.

Appeal erred in not properly considering the broad interpretive principle in *Nowegijick* and should have resolved the doubt as to whether the treaty was included in section 35 in favor of the appellant.

Similarly, the court states that because pre-1982 cases said that the term treaty in the *Indian Act* did not include international treaties, that the same should be true now. Yet the court failed to establish upon what line of reasoning that holding is based. The judicial principles and interpretive policies have changed since 1982 precisely due to the inclusion of section 35 in the *Constitution*, and more equitable views of Aboriginal rights, thus the pre-1982 cases should be re-examined in light of such changes. To simply dismiss the possibility ignores the major changes Aboriginal law has gone through in the last decade or so. Lacourciere J.A. concluded that the *Indian Act* was a complete code which governs the “rights and privileges” of Indians.²⁰²

The *Indian Act* determines *some* of the rights of registered Indians who live on a reserve and most of the provisions are in relation to band members. It does not answer the questions of Aboriginal hunting and fishing rights, self-government rights, land claims, the rights of Metis or the off-reserve Aboriginal people and thus is obviously not ‘*the*’ source to look to in attempting to define Aboriginal mobility rights, especially those that may be found in an international treaty such as the *Jay Treaty*. It is submitted that the *Indian Act* and its provisions should be looked at with the fiduciary duty of the Crown in mind as enunciated in *Guerin v. The Queen*²⁰³ and a broad liberal interpretation of the word “treaty” within the *Indian Act* should be adopted. Regardless of the definition of the

²⁰² *Ibid.*

²⁰³ *Guerin, supra* note 106.

word “treaty” as found in the *Indian Act*, the court could incorporate this unique form of “promise” into the word “treaty” as used in the *Constitution Act, 1982*, so as to protect the honor of the Crown in making such promises.

As explained in the previous Chapter, the courts have held that it is to be assumed that the Crown intended to honor its promises to the Indians, and the *Jay Treaty* should be no exception. The very purpose of section 35(1) is to reconcile Crown sovereignty with the fact that Aboriginal peoples were already living here in organized societies. The cases from *Sparrow* to *Van der Peet* to *Delgamuukw*, all stress that Crown sovereignty must be reconciled with rights of Aboriginal peoples. This purpose was partially fulfilled in 1794 when the European powers worked out how they were going to divide their political lines as between themselves, but assured the Indian Nations that this border was never intended to affect them. The inclusion of protections for the Indian Nations in the *Jay Treaty* was a solemn promise by both European powers that the border was irrelevant to the Indian Nations as far as free passage was concerned. How could the Crown now argue in good faith that they no longer have to reconcile their assertion of sovereignty over Indian Lands with the Aboriginal and treaty rights of those Nations to free passage over the border?

The final error on the part of the Appeal Court was to use possibilities and hypothetical situations to help determine the issue, which only served to distort the issues. The court stated that each time that Canada signed a treaty “... *which might produce effects for Indians...*”, they would lose their right to amend or terminate the treaty without the consent of the Indians. The court was not dealing with possible future treaties, they were dealing specifically with the *Jay Treaty*, which had already been

signed by the British and American parties. Thus, this was *not* an issue of an imaginary treaty which *may* have produced effects for Indians. The *Jay Treaty* specifically mentions Indians and was partially brought into existence to quell Indian concerns about border travel. The *Jay Treaty* was read aloud and explained to the Indians for a purpose, and one can only liberally construe that it was to ensure they understood the benefits, rights or recognition of rights that was embedded in the *Jay Treaty*.

The first concern was that Canada would lose its sovereign right to amend or denounce treaties without the consent of Indians. My question is how the court came to this conclusion. Aboriginal people are seeking to have the rights that were promised them in the *Jay Treaty* recognized once again and affirmed. They are not seeking to have all the provisions of the treaty upheld. Certain rights were promised to the Indians and the Crown's honor being at stake, together with its fiduciary duty demand that these rights be recognized as promised years ago. It is not my understanding that all Canadian Indians have asked for a veto on all Canadian treaty making powers. To suggest such an absurd result takes away the focus of what the case was about: a promise made to be upheld.

The same can be said of the courts second concern relating to the hypothetical fear that Canada would have to maintain the treaty in force even if the other country renounced it without Indian consent. The focus of the claim is to recognize the right of free passage of Indians, not to usurp Canada's treaty making powers or political powers with international community. Again, such far-fetched claims are not what is being adjudicated. The right advanced is the right to pass freely over the border as promised in the *Jay Treaty* pursuant to only one Article of the *Jay Treaty*. Some flexibility remains with the courts of this country and with the legislature in order to accommodate pre-

existing commitments to the Indians. It is not so far fetched to imagine that Canada could incorporate the rights into the Immigration Act, or choose to uphold the promises it made without declaring the treaty as a whole must be upheld.

The third concern was that Canada would be obliged to uphold the benefits conferred on the Indians despite the fate of the Treaty. Why wouldn't they uphold promises made to the Indians, given that that would be in keeping with the honor of the Crown and the fiduciary relationship it has towards to the Aboriginal people of this country? How the court could classify this part as "absurd", is absurd in itself. Because the court imagined these imaginary absurd consequences, they held that the *Jay Treaty* could not be considered an Indian Treaty. I believe the analysis should be the other way around, in establishing the existence of a treaty and then review the benefits conferred within. No where in the *Jay Treaty* did the text express the intention to confer such far-fetched rights on the Aboriginal people as suggested above. The court did not uphold the honor of the Crown by deflecting the issue from what was before it, to imaginary results not sought by the Indians. It is well-settled law that the Crown owes Aboriginal people a fiduciary duty to protect their interests and has recognized and affirmed their Aboriginal and Treaty rights in the *Constitution* as discussed in the previous Chapter. Thus, to ignore the promises and assurances given to the Indians so many years ago given to procure their peace and friendship would be acting below the high standard that has been set by the courts. In this regard, counsel for Kanantakeron at the Court of Appeal in the *Mitchell* case, stated:

At the Fort Eerie Conference in August 1795, over 200 years ago, Lt. Gov. Simcoe referred to Article III, Jay Treaty and the Treaty of Utrecht stating: "Brothers: By the

Present Treaty your rights are guarded, and specifically placed on their ancient footing." ...

The Constitution of Canada, through the promise of s.35, now ensures that the word of the white man can be kept.²⁰⁴

It is my position that since there has been no definitive ruling from the Supreme Court of Canada on the utility of the *Jay Treaty*, that at least legally, the possibility remains that a proper analysis can be completed to give recognition to the promises of the Crown. As stated above, the court in *Smith* dismissed the applicant's arguments that the *Jay Treaty* conferred on her the right to traverse the border. The court decided that previous cases, namely *Francis* and *Vincent*, decided that the *Jay Treaty* was not a valid treaty under section 35(1) of the *Constitution Act*. As such, while there remained the Aboriginal rights question which constituted a serious issue to be tried, there would be no relief based on the *Jay Treaty*.²⁰⁵ The *Jay Treaty* was immediately dismissed without consideration of modern interpretive principles, so that the case became one of Aboriginal rights and not the *Jay Treaty*.²⁰⁶

Similarly in *Watt*, as stated in the previous chapter, the Court of Appeal upheld the application for judicial review of the adjudicator's decision to deport Watt and held that there was no evidence that Watt's Aboriginal rights had been extinguished and sent it back for review. This case was also treated as mainly an Aboriginal rights case, and made no definitive statement on the *Jay Treaty*.

²⁰⁴ *Mitchell Submissions*, *supra* note 192 at 39.

²⁰⁵ *Ibid.*

²⁰⁶ *Smith*, *supra* note 146.

The next case that I will deal with, *Mitchell v. Canada (Minister of National Revenue – M.N.R.)*²⁰⁷ is a case that relates to the imposition of duty on goods brought across the border by an Aboriginal person. While primarily a duty case, *Mitchell, supra* also addresses the *Jay Treaty* and Indian rights which may flow from this treaty as well as the other international treaties, namely the *Treaty of Ghent*²⁰⁸ and the *Treaty of Utrecht*.²⁰⁹ This case is of particular significance, as it will soon be argued in the Supreme Court of Canada.

M.N.R. v. MITCHELL:

In the *Mitchell* case, the Aboriginal respondent has met with his Council of Mohawks and decided that since the federal government refused to negotiate their border rights, he would cross the border, and bring goods back over to Canada after first declaring his goods and asserting his Aboriginal rights. The Federal Court of Appeal upheld the trial court's decision in *Mitchell*²¹⁰ that the Aboriginal respondent, Grand Chief Michael Mitchell, also known as Kanantakeron, did indeed have an Aboriginal right to carry goods across the border for non-commercial scale trade without having to pay duty at the border. The Court of Appeal restricted the trial judge's declaration, to trade only with other First Nation communities in the geographic area of Quebec or Ontario, with goods bought in New York State. The Court held that the use must also be for personal or community use. On the issue of the *Jay Treaty* the appeal court felt that their finding of an Aboriginal right was not based on the *Jay Treaty*. While at the same

²⁰⁷ *Mitchell Appeal, supra* note 153.

²⁰⁸ *Treaty of Ghent, supra* note 183.

²⁰⁹ *Treaty of Utrecht* 1713 [hereinafter *Utrecht*].

²¹⁰ *Mitchell Appeal, supra* note 153.

time, they held that the *Jay Treaty* could not be used to limit the scope of an Aboriginal right either.

The trial judge had also declared a right for the Mohawks to pass and repass freely over the Canada-U.S. border. The amended declaration by the Federal Court of Appeal reads as follows:

...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 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.²¹¹

The Federal Court of Appeal held that while they were amending the trial judge's declaration, they wanted to make it clear that they were also endorsing his numerous factual and legal findings. It is for this reason that I will turn to the trial decision to review the *Jay Treaty* and its status at international law as this case is soon to be argued at the Supreme Court of Canada level. I will use both the Trial level and Court of Appeal level of *Mitchell*, for my treaty analysis of the *Jay Treaty* and why it should be considered a treaty, or at least a source that evidences the Crown's obligations towards the border Nations with regards to free passage.

²¹¹ *Ibid.* at 21.

INFORMING AN ANALYSIS OF THE JAY TREATY:

DOMESTIC TREATY PRINCIPLES:

Most of the cases dealing with treaty interpretation from the Supreme Court of Canada and courts at the appeal level, have dealt primarily with treaties that were negotiated directly between the Indians and Canada. It is submitted that the policies behind adopting such favorable interpretive tools in regards to Indian rights pursuant to these treaties ought to apply with equal force to treaties, clauses, promises or declarations that are made to Indians on behalf of the Crown, both American, Canadian and British. The fact that Aboriginal people all over this continent have relied on these treaties to ensure their survival, and that of future generations, signifies that when the question of treaty arises, it should be considered very carefully. These issues require some understanding of the unique and sacred aspect of these documents. In *R. v. White and Bob*, the Supreme Court of Canada held :

... 'Treaty' is not a word of art and ... it embraces all such engagements made with persons in authority as any be brought within 'the word of the white man' the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied.²¹²

It is only with a clear understanding of this imbalance of power that the courts should attempt to interpret these sacred treaties. As I stated earlier, I do not believe that the courts are the best way for the Crown to deal with our treaties. Given the honor of the Crown that is at stake, and the fiduciary duty that they have with regards to our interests,

I believe that they should acknowledge the validity of each of our treaties, and begin discussions as to their scope and how to protect our rights, as opposed to constantly denying them. This is no less appropriate for the *Jay Treaty* and the promises contained therein. For the purposes of my thesis, I will analyze the rights under the *Jay Treaty* according to the legal principles as discussed in the previous Chapter.

In order for any of the western powers to secure any presence in North America, they needed the alliance of the then powerful Aboriginal Nations. The agreements which resulted from such alliances should be upheld without regard to superficial formalities as form, precedent or otherwise. The *Simon* case stated that in interpreting treaties it must be remembered that Indians were not “on par” with sovereign states and thus fewer formalities were required.²¹³ Also, the Supreme Court in *Sioui*²¹⁴ cited a passage from an American case, *Jones v. Meehan* which enunciated the policy behind construing the Indian rights contained in treaties liberally. A liberal construction serves as recognition of the fact that the bargaining powers of the parties were very unequal; the court states in part:

In construing any treaty between the United States and an Indian tribe, it must always... be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians on the other hand, are a weak and dependent people, who have no written language and are wholly

²¹² *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.) at 649. [hereinafter *White and Bob*].

²¹³ *Simon*, *supra* note 46.

²¹⁴ *Sioui*, *supra* note 51.

*unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.*²¹⁵

It is important to note that while I have relied on this passage for the legal principles it espouses, I am very much aware that it also speaks of the Indian Nations as weak and dependent people. The Indian Nations of this continent have asserted their independence and strength since the very first contact with the European Nations. Were it not for the military and political strength of the Indian Nations, there would have been no need for the British and Americans to work so desperately to secure alliances with the various Nations through the treaty process. Although this passage is problematic, the ultimate point is an important one – that since the treaties were written in the language of, and pursuant to the legal system of one party, all doubts respecting implementation should be construed in favour of the other party. This reasoning is in line with recent case law mentioned earlier, that states that treaties should be liberally construed and ambiguities resolved in favour of the Indians.

The courts to date have rejected the idea that the *Jay Treaty* as an international treaty to be considered a treaty akin to those protected under section 35 of the *Constitution*. Surely the reasoning in the most recent cases to deny the treaty because there is no decision saying that the *Jay Treaty* is an Indian treaty, is a circular argument,

²¹⁵ *Jones v. Meehan* (1899) 175 U.S. 1 at 10-11[hereinafter *Jones*].

given the modern day principles regarding treaty interpretation. In the Ontario Court of Appeal in *Vincent, supra*, Lacouciere J.A. at 436-437 stated:

It is obvious that according to Canadian court decisions the word "treaty", when it deals with Aboriginals, has always had the meaning of a treaty between the Crown and the Indians. There is no court decision which gives it the meaning of an international treaty.

I disagree that it is so obvious that by virtue of our courts having only been faced with "Indian" treaties as they are so-called, that the ratio to take from that, is that a treaty which may not fit a previously considered format, must therefore be exempt from consideration. The court in *Sioui*, seemed open to the possibility of treaties being other than the standard surrender of land type and held that it could also include treaties which only dealt with social or political rights:

*There is no reason why an agreement concerning something other than a territory, such as an agreement about political or social rights, cannot be a treaty within the meaning of s. 88 of the Indian Act.*²¹⁶

It would appear to me that when faced with such a document, as the *Jay Treaty*, one would keep the principles of liberal interpretations and the resolution of ambiguity in favor of the Indians in the forefront. I believe that given these principles and the recent court decisions regarding evidence and interpretation, that Article III of the *Jay Treaty* could very well be considered a treaty deserved of protection under the *Constitution Act of 1982*. Understanding that the *Jay Treaty* also dealt with other non-Aboriginal issues, surely the above principles afford the interpretation of these promises some measure of recognition. I see nothing in the case law to date that would prohibit a liberal

²¹⁶ *Sioui, supra* note 51 at 1043.

interpretation that would make the Crown responsible to fulfill its obligations as they relate to the Aboriginal beneficiaries.

As discussed in the previous Chapter, the Supreme Court in *Simon* set out a method by which the lower courts must interpret treaties. The following is an analysis of these interpretive principles and how they relate to the *Jay Treaty*. The first question relates to the validity of the *Jay Treaty*. In relation to Indian treaties, the Supreme Court in *Sioui* explained the *Simon* case:

*In Simon this court noted that a treaty with the Indians is unique, that it is an agreement sui generis which is neither created nor terminated according to the rules of international law.*²¹⁷

In *Simon*, the court spoke of the way in which treaties were made:

*The treaty was an exchange of solemn promise between the Micmacs and the King's representative entered into to achieve and guarantee peace. It is an enforceable obligation between the Indians and the white man and, as such, falls within the meaning of the word "treaty" in s.88 of the Indian Act.*²¹⁸

I have noted that the court in *Mitchell* summed up the characteristics of treaty making fairly well:

From these extracts it is clear that what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.

The Supreme Court has held that formalities are of secondary importance in deciding on the nature of the document containing an agreement with the Indians. Lamer J. in Sioui, supra at 1045 stated that the factors in determining the existence of a treaty are the same ones that

²¹⁷ *Ibid.* at 1043.

²¹⁸ *Simon, supra* note 46 at 410.

assist in determining the intent of the parties to enter into a treaty. He stated:

...Among these factors are:

- (1) continuous exercise of a right in the past and at present,*
- (2) the reasons why the Crown made the commitment,*
- (3) the situation prevailing at the time the document was signed,*
- (4) evidence of relations of mutual respect and esteem between the negotiates, and*
- (5) the subsequent conduct of the parties.²¹⁹*

As stated above, I think there would be sufficient evidence to show that after the *Jay Treaty* was read to the Indian Nations, that both the Crown and the Indians treated it as though the rights were in effect. The subsequent conduct would include the action taken by both the Americans and the British which incorporated those treaty rights into their legislation. The factors listed in *Sioui* would all be met in this instance. Certainly, after *Simon*, it is settled law that extrinsic evidence may be used in the determination of uncertainties or ambiguities that are often found in treaties. The *Jay Treaty* was negotiated between Lord Grenville, the British Foreign Minister and American Chief Justice John Jay. The trial court's decision in *Mitchell*, is a good example of how these issues are dealt with and the kind of evidence that is needed to address them. As the Court of Appeal in *Mitchell* adopted the facts as determined by the trial judge in that case, their remarks are useful in this analysis of how to go through the *Simon* test.

²¹⁹ *Mitchell Trial*, *supra* note 13 at para 176.

The court in *Mitchell*, accepted that had this been a treaty-making mission, that all the parties had the required authority to bind themselves in the *Jay Treaty of 1794*. The court stated in part:

...The Crown representatives would have been viewed by the First Nations present at these meetings as authorized to speak for the Crown and the First Nations had the capacity to enter into treaties...²²⁰

The court even went so far as to accept the evidence that the same protocol was used at the various meetings where the officials went to the Indians and confirmed the protections of the *Jay Treaty* for the Indians, and stated in part:

...I accept the Plaintiffs evidence describing the protocol followed at these meetings and accept that this protocol is consistent with that used by First Nations in treaty councils...²²¹

The Crown in the Court of Appeal in *Mitchell* argued that by virtue of the fact that the Indians did not sign any documents relating to the rights under *Jay Treaty*, that despite the similar protocol which was followed, that the *Jay Treaty* could therefore not be considered a treaty. This issue has already been addressed in *Sioui*, where the Hurons had neither signed their treaty nor was their evidence of the usual solemnity that accompanied the conclusion of a treaty. The Supreme Court held that a treaty had in fact been concluded, and that unless the treaty document itself specifically lays out all the circumstances surrounding the conclusion of the treaty, the absence of Indian signatures or wampum belts is not determinative of whether a treaty actually exists and extrinsic evidence may be used to support its validity:

²²⁰ *Ibid.* at para 272.

²²¹ *Ibid.* at para 271.

*The appellant argues that **the Hurons did not formalize the document either by their signature (which would not be absolutely necessary to make it a treaty)** or by the use of necklaces or belts of shells which were the traditional method used by Hurons to formalize agreements at the time. Clearly, this argument has weight only if the document accurately indicates all the events surrounding the signature. Otherwise, extrinsic proof of solemnities could help to show that the intended to enter into a formal agreement and that they manifested this intent in one way or another.²²² (emphasis added)*

The court in *Mitchell* also relied on the testimony of many experts, one of which was Dr. Robert Venables, a cultural historian who explained that the background to the *Jay Treaty* of the situation prevailing at the time and the reason it was concluded with provision relating to the Indians. Its inclusion was due to the grave concern by the British and Americans to avoid further conflict on the frontier with the Indian Nations.²²³ One document, which helped put the *Jay Treaty* in context, was the following speech given by Lord Dorchester to various Indian Nations in 1791. Lord Dorchester was answering questions from the Indian Nations and stated in part:

You have told me, there were people who say; that the King your Father when he made peace with the United States, gave away your lands to them.

I cannot think that the government of the United Sates would hold that language, it must come from ill-informed individuals.

You well know that no man can give, what is not his own.

When the King made peace and gave independence to the United Sates, he made a Treaty in which he marked out a line between them and him; this implies no more than that beyond this line he would not extend his interference....

²²² *Sioui*, *supra* note 51 at 1048.

²²³ *Mitchell trial*, *supra* note 13 at para 187- 190.

But Brothers, this line, which the King marked out between him and the States even supposed the Treaty had taken effect, could never have prejudiced your rights.

The King's rights with respect to your territory were against the Nations of Europe; these he resigned to the States. But the King never had any rights against you but to such parts of the Country as had been fairly ceded by yourselves with our own free consent by Public convention and sale. How then can it be said that he gave away your lands?²²⁴

Professor Charles Johnston was qualified at trial as an expert historian and explained that Lord Dorchester was acknowledging the creation of the boundary in 1783, but that the border did not apply to Indians. Professor Johnston testified that the British were faced with the serious risk of war with the powerful Indian Nations, should the right to pass and trade over the border area, not be promised. This view was corroborated by Dr. Venables, who stated in part:

For the British and their Indian allies, the Jay Treaty would assert through international law what had before been asserted by the presence of British troops in posts such as Oswego and Niagara. For its part, the United States gained the concession of the fort. For both Britain and the United States, the absence of a guarantee of Indian free trade across the borders would have meant resuming a war not unlike the war launched by Pontiac and his followers in 1763 - - that war having been caused by a British strangulation of Indian trading rights.²²⁵

The court in *Sioui* addressed the general situation that existed as between the European powers and the Indian Nations with regard to the capacity to treat and indeed

²²⁴ *Ibid.* at para 190.

²²⁵ *Ibid.* at para 203.

the necessity of concluding peace treaties if the European powers had any hope of settling here safely:

*The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.*²²⁶

Both the British and the Americans treated with the Indian Nations as Nations and their inclusion in the *Jay Treaty* is evidence of that treatment. The Treaty contained very important rights for those Indians who lived near the border regarding free passage and duty free importation of goods. This treaty dealt with political and social rights as contemplated in *Sioui*. Finally, while the Indian Nations were not signatories to this Article of the *Jay Treaty*, the case law holds that this is not a necessary part of establishing a treaty. Given that the conferences focused on the border rights of the Indians, and that the *Jay Treaty* fully acknowledged the Indian presence and the risk of war; a situation of both give and take for the Western powers and the Indians, the Treaty should therefore be considered a treaty under section 35(1) of the *Constitution Act, 1982*. Certainly any ambiguity or uncertainty in doing so, would be resolved in favor of the Indians.

The Supreme Court of Canada was able to recognize a “legally” new form of land holding known as Aboriginal title in *Delgamuukw*. Their reasoning explained that Aboriginal rights are unique and sui generis and the court proceeded to develop a test for

²²⁶ *Sioui*, *supra* note 51 at 1053.

the establishment of Aboriginal title. By comparison, the courts could find a way to incorporate this type of treaty, the *Jay Treaty*, into the Constitutional meaning of “treaty” in section 35(1) based on the *sui generis* nature of such rights. The relevant provisions of the *Jay Treaty* could be classified as an Indian Treaty without having to incorporate the provisions which do not relate to Indians.

The next issue to consider is whether or not the *Jay Treaty* contains direct mobility rights or rights incidental to the exercise of the primary rights which would include a mobility right, and the scope of those rights. The court accepted that the case law has demonstrated that a fair, large and liberal interpretation of treaties is necessary. It is to be noted that the treaty is to be read as understood by the Indians not that of the Crown’s lawyers. Again, the scope or extent of the rights should be considered from the perspective of the “natural understanding of the Indians”. In this case, the tribes throughout history stressed repeatedly the importance of their ability to pass freely within their territory which was not fashioned around the political borders of the English. In the later *Jay Treaty*, the Indians were given an exemption from border duties to compliment their right of free passage.

As stated previously, the *Jay Treaty* specifically addressed the right of free passage in Article III which provided for: “...*the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America.*”.

There is no ambiguity in the words stating that the Indians on both sides of the border have the right to pass and repass freely. Even had there been ambiguity, the honor of the Crown, and the liberal interpretation principles would demand that this section be read in

favor of the Indians for the rite of free passage. Given the important rights that are recognized within the *Jay Treaty*, the presumption should be that this Article should be considered a treaty under section 35(1). The court in *Sioui* held that given the important clauses provided in the treaty at issue in that case, that the presumption is that the document was indeed a treaty:

While the analysis thus far seems to suggest that the document of September 5 is not a treaty, the presence of a clause guaranteeing the free exercise of religion, customs and trade with the English cannot but raise serious doubts about this proposition. It seems extremely strange to me that a document which is supposedly only a temporary, unilateral and informal safe conduct should contain a clause guaranteeing rights of such importance. As Bisson J.A. noted in the Court of Appeal judgment, there would have been no necessity to mention the free exercise of religion and customs in a document the effects of which were only to last for a few days. Such a guarantee would definitely have been more natural in a treaty where "the word of the white man" is given.²²⁷

Given the above analysis of domestic treaty principles and the historical evidence around the *Jay Treaty* and its importance to both the Europeans and the Indians, there remains no doubt that the *Jay Treaty* ought to be protected under s. 35(1) as other Indian treaties. It is submitted that the conference minutes, meetings and promises made therein are enough to constitute a treaty on their own should the *Jay Treaty* document itself, fail as one protected in section 35(1). Aside from the actual reading and explanations of the *Jay Treaty* to the Indians by British officials, I note the following promises, made to the Indians contemporaneous to the signing of the *Jay Treaty* with the United States.

²²⁷ *Sioui*, *supra* note 51 at 1048.

Lieutenant Governor John Graves Simcoe addressed the Indians and made a link between the *Treaty of Utrecht* and Article III of the *Jay Treaty*:

Brothers: By the present treaty your rights are guarded, and specifically placed on their ancient footing....

Upon these principles the present treaty is established, you have a right to go to the British settlements, or those of the United States as shall suit your convenience, nor shall your passing or repassing with your own proper goods and effects of whatever nature, pay for the same any impost or duty whatever.

Brothers: You see therefore that by the Treaty a perpetual and constant communication is secured between you and the King's subjects and our future Trade and intercourse, is guaranteed on the most unrestrained and General footing.²²⁸

In the minutes of yet another meeting of British officials and the Indians, Colonel McKee, the Deputy Superintendent General of Indian Affairs, referred to the *Jay Treaty* and explained:

Taken the greatest care of the rights and independence of all Indian nations who by the last treaty with America, are to be perfectly free and unmolested in their trade and hunting grounds to trade with whom they please.

While these meetings were often held with different groups of Indian Nations at different times, the minutes show the intention of the Crown to ensure that the border was between the Western powers only, and would not in any way affect the rights of the Indians. In the Council of August 1796, between McKee and the Chiefs of the Ottawas and the Chippewas, reference was again made to the *Jay Treaty*:

²²⁸ *Mitchell Submissions, supra* note 192 at 3-4.

Children, ...but has notwithstanding taken the greatest care of the rights and independence of all the Indian Nations who by the last Treaty with America, are to be perfectly free and unmolested in their Trade and hunting grounds to trade with whom they please.²²⁹
(emphasis added)

With regard to the language of Article III of the *Jay Treaty*, it is true that the article also promises similar border crossing rights to American and British citizens. While the language is superficially the same, the context of the Article means something much broader for the Indians. It is significant that the Indians were singled out in the article as to who had border crossing rights, and further duty free rights were recognized for them that were not for the British and American citizens. This implies that the Indian Nations, as beneficiaries, stood on a very different footing and needed to be provided for specifically so as to satisfy their concerns. This is further evidenced by the fact that their rights included more than those of the British and American citizens. The conferences settle any doubt as to what was intended, even if the words of the Article do sound similar as those for the non-Indian citizens.

Even between the officials writing back and forth, they all acknowledge the necessity of satisfying the Indians and promising them their right to free passage so as to avoid war. Thus the avoidance of war was the Aboriginal side of the bargain. The language in the above documents and meetings are not ambiguous. They expressly provide that the Indians would refrain from hostilities so long as their rights with regard to the border were protected. These discussions

²²⁹ *Ibid.* at 5.

were held with the Indians at the time the treaty was made. These meetings were held with capable parties who would be considered parties of authority and the protocol used at these meetings, followed that of treaty-making forums. The Indian Nations upheld their end of the deal, yet the Crown has failed to honor its promises by letting the implementing legislation lapse. The Ontario Court of Appeal in *R. v. Taylor and Williams* had this to say about the reliance by Indians on certain rights over time:

The accepted evidence was that this understanding of the treaty has been accepted and acted on for some 160 years without interruption. In my view, it is too late now to deprive these Indians of their historic aboriginal rights: R. v. White and Bob at p.p. 648-49 D.L.R.²³⁰

Again the Supreme Court in *R. v. Adams* has held that the Crown's refusal to give legal effect to Aboriginal or treaty rights can not be used to deny those rights. The Court stated at paragraph 33:

The fact that a particular practice, custom or tradition continued following the arrival of Europeans, but in the absence of the formal gloss of legal recognition from the European colonizers, should not undermine the protection accorded to aboriginal peoples. Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features...which received the legal approval of British and French colonizers.

It is my position that whether the actual *Jay Treaty* itself can be considered a treaty, at a minimum, the minutes and/or promises are enough to constitute a binding obligation, if not a treaty under section 35(1), of a sui generis nature. The case law to date has provided the courts with a means by which to interpret

treaties. The process is unique and should therefore remain open to other kinds of treaties or obligations that will be given the force of treaties. The general nature of treaties and the lack of specific requirements to establish such was addressed by Lamer J. in *Sioui*, who explained:

In White and Bob, supra, Norris J.A. also discussed the nature of a treaty under the Indian Act. As he mentioned in the passage I have already quoted, the word "treaty" is not a term of art. It merely identifies agreements in which the "word of the white man" is given and by which the latter made certain of the Indians' co-operation. Norris J.A. also wrote at p.649:

In view of the argument before us, it is necessary to point out that on numerous occasion in modern days, rights under what were entered into with Indians as solemn engagements, although completed with what would now be considered informality, have been whittled away on the excuse that they do not comply with present day formal requirements and with rules of interpretation applicable to transactions between people who must be taken in light of advanced civilization to be of equal status. Reliance on instances where this has been done is merely to compound injustice without real justification at law. (emphasis added).²³¹

The third issue in the interpretation of this *Jay Treaty* is whether or not the Treaty, in form, the *Jay Treaty* or the promises as treaty, has been terminated or limited.²³² In *Simon, supra*, the court dealt with termination by hostilities and termination by extinguishment and held that once it has been established that a valid treaty has been entered into, the party arguing for its termination bears the burden of proving the

²³⁰ *Taylor and Williams, supra* note 76 at 368.

²³¹ *Sioui, supra* note 51 at 1044; *Delgamuukw, supra* note 143 at para 106.

²³² *Simon, supra* note 46.

circumstances and events justifying the termination. Thus, in regards to a claim for the right to free passage, it would be up to the Crown to identify any specific hostilities and prove that these hostilities if any, had the effect of terminating the Treaty. The burden is the same should the government allege extinguishment. I believe that the Crown would have no more evidence in a claim today to establish termination or extinguishment, than they did in *Simon*, and thus the *Jay Treaty*, solely in respect of the Indians and specifically their rights of free passage across the border, is of as much force and effect today as a sui generis treaty, it was at the time it was concluded.

The fourth issue is whether those who submit a claim are covered by the *Jay Treaty*. I would argue that the Aboriginal Nations of the Confederacy, be they now Canadian or American, have a complete right to free passage based on their *Treaty of 1725*. The specific Aboriginal people who would be entitled include the ‘status’ “Indians” as defined in the *Indian Act*, as well as the treaty signers’ descendants. I would argue that based on the case law and the liberal interpretive principles regarding treaties that all the Wabanaki members would be beneficiaries of the treaty rights be they Canadian or American, based on their substantial connection to the treaties as descendants of the signatories.

The commitments made at the council meetings discussed above, were communicated to other Indian Nations in 1815 by relating the contents of a previous

letter²³³ for the Chiefs of Caughnawaga (Kahnawake) to at least the Passamaquoddies of Maine, who are members of the Wabanaki Confederacy:

*In answer also the Wampum which you have sent to us in return therefore we send to you ours, specifying our treaty which took place A.D. 1810 [sic likely 1815]. Therefore, all nations and tribes of Indians from the East and West and for the North and South wherein our Chiefs from every nation and tribe were present, therefore we should bind the good doing of our ancestors in this treaty of peace. The English and American generals were present having freed all the Indians of Wars incurring between them, and no boundary line should exist between us and the Indian brethren, not any duties, taxes or customs should be levied on us.*²³⁴

The Passamaquoddies, as members of the Confederacy would have no doubt communicated this message even if representatives for other Wabanaki tribes were not there. I believe there is room for more substantial research into this area, but is beyond the scope of this thesis, other than to mention that along with the Mohawk, Iroquois, Ottawas, Chippewas, and numerous other Indian Nations, the Wabanaki were likely included in the passing of this message about the *Jay Treaty* and its rights.

MOBILITY IN THE UNITED STATES:

The United States is presently wrestling with the same issues, although to a lesser extent than Canada. Megan Austin's article: *A Culture Divided by the United States Mexico Border*²³⁵, compares the plight of the Mexican Indians with that of the Canadian

²³³ The judgement in the *Mitchell Appeal*, *supra note 153*, states that the previous letter which was read to the Passamaquoddies of Maine in 1815 but was dated 1870, which obviously can not be the case. It was likely a letter dated shortly before 1815 with regards to the *Jay Treaty*.

²³⁴ *Mitchell Submissions*, *supra note 192* at para 251.

²³⁵ M.S. Austin, *A Culture Divided by The United States – Mexico Border: The Tohono O'Odham Claim for Border Crossing Rights* (1991) 8:2 *Ariz. J. of Int'l & Comp. L.* 97.

Indians on the American border. Austin explains that this issue of *the Jay Treaty* was raised in an American case in *McCandless v. United States ex rel. Diablo*.²³⁶ This was a decision which favored the Mohawk accused and his rights to cross the border freely. They held that the Aboriginal person had an inherent right Aboriginal right to cross the border. After that decision, the United States amended their *Immigration Act of 1924* to reflect the rights of Canadian-born, American Indians to enter and remain and the United States so long as they met a certain blood requirement.²³⁷ Austin then pointed to a more recent case; *Atkins v. Saxbe*²³⁸ which held that Indians have the right of free passage. The court held that there was an “...aboriginal right... to move freely within their own territory without regard to the International Boundary and free of the restrictions imposed by the immigration laws.”²³⁹ The situation appears to be different with regards to the issue of paying duty on goods brought over the border. Austin’s solution to the problem of the inconsistent application of the *Jay Treaty* rights regarding border crossing is comprehensive border legislation which would uphold the passage rights of border tribes.²⁴⁰

In Denise Evan’s article: *The Jay Treaty and Aboriginal Rights*²⁴¹, she explains that the courts in the United States have been reluctant to recognize the right for Aboriginal people not to pay duty on the goods they bring over the border. She cited two

²³⁶ *McCandless v. United States ex rel. Diablo*, 25 F. 2d 71 (3d Cir. 1928).

²³⁷ *Immigration Act of 1924*, April 2, 1928, ch. 308, 45 Stat. 401, replaced by 8 U.S.C. 1359 (1982) which provided in part: “Nothing in this subchapter shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per cent quantum of blood of the American Indian race.”

²³⁸ *Atkins v. Saxbe* 380 F. Supp. 1210 (D. Me 1974).

²³⁹ *Ibid.* at 1220.

²⁴⁰ *Austin, supra* note 235.

²⁴¹ D. Evans, *The Jay Treaty and Aboriginal Rights* (1995), 3 Dal J. Legal Studies 215. [hereinafter *Evans*].

cases which essentially held that Article III of the *Jay Treaty* could not be considered to have granted rights in perpetuity.²⁴² Evans points out that while the courts in these cases held against the right of duty-free passage, that neither court considered the issue of inherent Aboriginal rights. Evans states that the case law has created two very different policies with regards to border rights; one recognizing free passage, and the other failing to recognize any duty-free rights.²⁴³

Another American article, *The Medicine Line*²⁴⁴, written by Sharon O'Brien, details the American treatment of the *Jay Treaty* as it relates to Indians living close to the Canadian-American border. O'Brien's opening paragraph puts the border in an Aboriginal perspective:

*Again and again Blackfeet warriors fleeing northward after raiding attack watched with growing amazement as the pursuing troops of the United States Army came to a sudden, almost magical stop. Again and again, fleeing southward, they saw the same thing happen as the Canadian Mounties reined to an abrupt halt. The tribes of the Blackfeet Confederacy living along what is now the United States-Canada border came to refer to that potent but invisible demarcation as the "Medicine line". It seemed to them almost a supernatural manifestation. The Confederacy members had hunted, roamed, prayed and allied with tribes from northern Alberta and Saskatchewan all the way down to Yellowstone. For these Indian Nations, the "Medicine Line" was nearly impossible to comprehend: Man did not divide a land; rather, rivers and mountains interrupted the lands unity.*²⁴⁵

²⁴² *Karnuth v. United States ex rel. Albro* 279 U.S. 231 (1929). See also *Garrow*, *supra* note 186.

²⁴³ *Evans*, *supra* note 241 at 223.

²⁴⁴ S. O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families* (1984) 53:3 *Fordham L. Rev.* 315. [hereinafter *O'Brien*].

²⁴⁵ *Ibid.*

O'Brien argued that even if the rights and the positions of the parties to the *Jay Treaty* were unsure as to what exactly these rights meant, the rights of free passage for the Indians were reaffirmed two years later when Britain and the United States concluded an Explanatory Article which repeated the stipulations of Article III of the *Jay Treaty*.²⁴⁶ (This explanatory article was discussed earlier in this chapter) O'Brien then focuses on an issue which results in limited border movements within the America and Canadian tribes, especially those tribes of the Wabanaki Confederacy. O'Brien notes that according to the U.S. Department of State's publication: *Treaties in Force Jan. 1, 1984*, that Article III of the *Jay Treaty*, in so far as it relates to the Indian right to pass across the border appear to be in force.²⁴⁷ Again, regardless of whether the rights under the *Jay Treaty* have been given the "formal gloss" of legal recognition, the rights remain and such legislation could be used to support the Crown's original intention.

INTERNATIONAL TREATY LAW:

To date, the Canadian courts have rejected the idea that the *Jay Treaty* and the other supporting international treaties, namely the *Treaty of Utrecht* and the *Treaty of Ghent*, have justiciable rights for Aboriginal Nations. It is nevertheless my submission that there remains possibilities at the international level to argue that the provisions of the

²⁴⁶ Explanatory Article, *supra* note 180: "That no stipulations in any treaty subsequently concluded by either of the contracting parties with any other state or nation, or with any Indian tribe, can be understood to derogate in any manner from the rights of free intercourse and commerce, secured by the aforesaid Third Article of the Treaty of Amity, Commerce and Navigation, to the subjects of His Majesty and to the citizens of the United States, and to the Indians dwelling on either side of the boundary line aforesaid; but that all the said person shall remain at full liberty freely to pass and repass by land or inland navigation, into the respective territories and countries of the contracting parties, on either side of the said boundary line, and freely to carry on trade and commerce with each other, according to the stipulations of the third article of the treaty of amity, commerce and navigation.

²⁴⁷ O'Brien, *supra* note 244 at 335.

Jay Treaty at least in respect of the Indian Nations whose traditional territory straddles the border, remain in force. The word of the white man was all that the Aboriginal Nations of this country had to rely on when considering the future of their children. When the Aboriginal Nations concluded Treaties or agreements or held meetings with the western officials, they no doubt assumed that whatever the officials promised in exchange for their alliances would be honored. It is my position that the very essence of international treaty law: *pacta sunt servanda*, meaning an agreement to be honored, applies to the *Jay Treaty*. The *Vienna Convention* does not preclude the pursuit of treaty rights by First Nations of the *Jay Treaty* even if they are unable to reach the status of a state. Certainly, international law has a role to play in interpreting the *Jay Treaty* domestically for the benefit of Indian Nations in Canada. On the subject of domestic courts taking judicial notice of international law in their cases, Professor Macdonald states:

In Canada, also, the standard practice has been to notice judicially International law, although as in England, the Canadian courts have not usually seen fit to comment on this point directly. There have, however, been several judicial comments which make clear that international law is judicially noticed in the same way that domestic law is. In The North, Davies, J. in upholding the lower court finding, said that the hot pursuit doctrine "being part of the law of nations was properly judicially taken notice of and acted upon." This statement can only mean that customary rules which are part on international law are to be judicially noticed. In the Armed Forces reference, Taschereau J. saw his task as, first, "to seek if there exists" the customary rule in question. The implication in this statement is that it is the judge who must do the seeking, just as he does in domestic law; in fact, in domestic law, the task could be described using exactly the same words; to seek if there exists the domestic rule in question. The

*conclusion that international law is being treated as part of domestic law in this regard is inescapable.*²⁴⁸

While Johnston is referring to customary law, it is submitted that the principle of *pacta sunt servanda* from customary law should apply to the domestic interpretation of the Jay Treaty. The maxim *pacta sunt servanda* is a general principle of law which means an agreement to be honored.²⁴⁹ This concept was part of international customary law at the time contact was made in this continent and so widely accepted that it found its way into *the Vienna Convention on the Law of Treaties*. Article 26 of the *Convention* provides as follows:

*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*²⁵⁰

The requirement for an international treaty is that the parties are subjects of international law, they must intend to create binding obligations and the agreement must be governed by international law. In regards to the *Jay Treaty*, I don't think there is any doubt that both Britain and the United States would have then and still are viewed as International parties. It has also been argued that the Indian Nations, were a sovereign independent people who were Nations, or at least treated as Nations, that need to be treated with. At the very least, Lamer, J. in *Sioui* held:

I consider that, instead, we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be

²⁴⁸ R. St. J. Macdonald, D.M. Johnston eds., *The Structure and Process of International Law* (1983). at 111.

²⁴⁹ *Ibid.*

²⁵⁰ *Vienna Convention on the Law of Treaties* (1969) 1155 U.N.T.S. 331, in force 1980. [hereinafter *Vienna*].

*good policy to maintain relations with them very close to those maintained between sovereign nations.*²⁵¹

The Court in *Sioui* went on to explain:

*The colonial powers recognized that the Indians had the capacity to sign treaties directly with the European nations occupying North American territory. The sui generis situation in which the Indians were placed had forced the European mother countries to acknowledge that they had sufficient autonomy for the valid creation of solemn agreements which were called "treaties", regardless of the strict meaning given to that word then and now by international law.*²⁵²

The historical evidence illustrates that the British depended a great deal on these Indian Nations for their successes in the New World and very much needed their alliances. Professor Johnson testifying in *Mitchell, supra* stated:

*Whatever the Indians' commitment and role, it is evident that without their physical or moral support the British cause early in the war would have been in serious trouble, that is, at a time when the British forces were comparatively thin on the ground.*²⁵³

Chief Justice Marshall of United States Supreme Court in *Worcester v. Georgia* commented on the recognition of sovereignty of the Indian Nations when concluding treaties:

*The words "treaty" and "nation," are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each definite and well-understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth; they are applied to all in the same sense.*²⁵⁴

²⁵¹ *Sioui, supra* note 51 at 1052.

²⁵² *Ibid.* at 1056.

²⁵³ *Mitchell trial, supra* note 13 at para 226.

²⁵⁴ *Worcester v. Georgia* (1832) 31 U.S. (6 Pet.) 515.

Ms. Holmes, an expert in *Mitchell*, explained that during the negotiations of *the Treaty of Ghent* which confirmed the previous rights granted to the Indians in the *Jay Treaty*, the British Minister asserted the right to include their Indian allies in the treaty. Even at that time, the British were more than aware of the legal implications of including the Indian Nations in the treaty, as evidenced in diplomatic correspondence of the time of negotiations:

...It is with equal astonishment and regret the undersigned (British Ministers) find that the American Plenipotentiaries have not only declined signing any provisional Article by which the Indian Nations who have taken part with Great Britain in the present Contest, may be included in the Peace...

The British Plenipotentiaries have yet to learn that it is contrary to the acknowledged principle of public law to include Allies in a negotiation for Peace, or that it is contrary to the practice of all civilized Nations to propose that a provision should be made for their future security...

²⁵⁵

The Indian Nations were a force to be dealt with if friendly relations could not be maintained and this was done by acknowledging in meetings, that the Indian Nations were independent and certain promises were made. The fact that these promises were between two Nations, elevated the Treaty to an international treaty, despite the form these promises took; that being either oral promises or written promises incorporated in a different document; *The Jay Treaty*. The interpretation of a treaty, even an international treaty, should be made with the view of the parties at the time. Coupling this with the

²⁵⁵ Letter from three British Ministers to the United States Ministers dated September 4 1814 published in *W.R. Manning, ed. Diplomatic Correspondence of the United States, Canadian Relations, 1784 – 1860* (Carnegie Endowment for International Peace, 1940) at 641-646.

liberal interpretive principles in regards to Indians, would certainly lead to the conclusion that while the form may have been different, the Indians no doubt considered these very strong promises a treaty made with the British as they had exchanged promises as well.

William Claus, the Deputy Superintendent General of Indian Affairs addressed the Indians on April 24, 1815 and stated:

I am further instructed to inform you that in making Peace with the Government of the United States of America, your interest were not neglected, nor would peace have been made with them had they not consented to include you in the treaty. ...

Nothing is required in return for your Father's benevolence towards you, but a renewal of the Engagements made by your ancestors and yourselves.²⁵⁶

In *Mitchell*, Professor Johnston testified that this meeting alone was sufficient to amount to a treaty as the parties had exchanged obligations. The British offered protection and in return the Indians would offer support in times of need as their ancestors had done. Thus far, we have international players signing a treaty between Nations, exchanging promises regarding the border in the *Jay Treaty*, later confirmed by the *Treaty of Ghent*. By virtue of the very subject matter of the *Jay Treaty*, peace and borders, it is goes without saying the international law was at the foremost of the negotiators minds as evidenced in the excerpt cited above.

The Court of Appeal in *Vincent* held that since the *Jay Treaty* was an international treaty it did not fall under the protection of section 35(1) of the Constitution Act, 1982. They went on to hold that since the treaty was not implemented by legislation, that therefore precluded the Indians from seeking to have their border crossing rights

enforced. Yet, the admission is made that the treaty was implemented by national legislation in the United Kingdom, The United States and Upper and Lower Canada, but was allowed to expire in the first decade of the 19th century in Canada. Surely, the Indians relying on the honor and good faith of the Crown, could rely on its implementation in domestic law, as a recognition of these treaty rights. By this legislative action, the Crown evidences its intention to recognize these border rights. The Indian Nations of the Wabanaki Confederacy as well as other border Nations in Canada and the United States still hold the *Jay Treaty* as a valid and binding agreement that is as sacred as the other treaties signed so long ago.

Regardless of this legislation, this international treaty is one which was made and there remains an obligation to uphold the promises, despite the legal implications of when and how long the treaty was implemented under domestic legislation. Article 27 of the *Vienna Convention* provides in part:

*A party may not invoke the provision of its internal law as justification for its failure to perform a treaty.*²⁵⁷

The Nation to Nation dealings between the British Crown and Aboriginal peoples, coupled with the constitutional recognition of Aboriginal treaties, puts international treaties specifically dealing with Aboriginal peoples in a special position. Even if international treaties are not generally considered executed in Canada without domestic legislation, in deference to the principle of Parliamentary sovereignty, that the principle of Parliamentary sovereignty is itself subject to the principle of constitutional supremacy. In light of section 35(1) of the *Constitution Act, 1982*, the absence of domestic

²⁵⁶ *Mitchell trial, supra* at note 13 at para 241.

implementation of the *Jay Treaty* can not be a valid answer given the purpose of s.35(1) to reconcile prior Aboriginal presence with the assertion of crown sovereignty and to uphold the honor of the crown. Even if the domestic courts could not accept that the *Vienna Convention* applies to this Treaty, they could at least inform their interpretation of the Treaty by international law principles for the benefit of the Indian Nations. I would argue that to do any less would fly in the face of all the case law which supports large and liberal interpretations in favor of the Indians and the principle of reconciling the Crown's honor and duty to act in good faith with these very real promises made to the Indians.

Assuming for a moment that an Aboriginal group was unsuccessful in arguing that this international Treaty, the *Jay Treaty*, is either a section 35(1) treaty, or the promises made thereunder could be treated as an Indian treaty, then what of their rights as third party beneficiaries? The meetings, letters and the Treaty itself is evidence of the grave importance to the security of the colonies in including the Indians in the Treaty. The very purpose of Article III was to grant them border crossing rights so as to avoid certain war with the Indians. Not only were the Indians mentioned in the *Jay Treaty*, they were apprised of the negotiations as they went along and promised inclusion and were well informed of the content of the rights contained therein by virtue of many meetings and the spread of information. Even stronger was the knowledge that the British claimed they would not have even made the treaty with the United States unless that included rights for the Indians.

Section 4 of the *Vienna Convention* provides that rights may be created for third states so long as the parties to the treaty intended rights be granted for them. The third

²⁵⁷ *Vienna*, *supra* note 250, Article 27.

party's assent is presumed so long as the contrary is not indicated. Once this right has been created, the resulting obligation may only be revoked or modified with the consent of the parties including the third state.²⁵⁸ This was certainly one of the arguments put forth in *Mitchell*, and it was argued that the promises in the *Jay Treaty* were intended to be permanent and that it was a “*stipulation pour autrui*” at international law. In regards to the assertion that the third party must be a state, at that time, the formal requirements of statehood were not a necessary requirement of British Treaty making in the mid-18th and 19th centuries. The historical evidence reviewed earlier provides evidence that the Indian Nations were treated as Nations. The Crown consistently relied on the Nations as allies and often addressed them as Nations or independent peoples and made treaties with them as though they were Nations. What other party has been afforded such treatment other than Nations or states? If they're not Nations or states, by international standards today, they were as close as one could get, and were at least a sui generis body who were afforded the same treatment and should therefore be afforded similar rights today.

The appellant in *Mitchell* argued that the status of the Indian Nations at the time of the *Jay Treaty* must be understood in light of the rules which prevailed in that time period.²⁵⁹ The provisions of the *Jay Treaty* and the other contemporary treaties distinguished between Indian Nations and the subjects of American or European nations. The *Sioui* case reviewed the history and found that the Indian Nations were treated as “Nations”:

²⁵⁸ *Ibid.* Articles 34-37.

²⁵⁹ *Case Concerning the Right of Passage over Indian Territory*, Merits, I.C.J. rep. 1960, p.6, at 44; See also D.P. O'Connell, *International Law*, vol. 1 (London: Stevens & Sons, 1965) at 303-304. [hereinafter *Indian Territory*].

*The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.*²⁶⁰

This capacity to treat with the Crown is not a power that British or American citizens had with the colonial powers. Even if they could not be considered as independent states, there is no such requirement to be considered beneficiaries of *stipulations pour autrui*. As the Indian Nations were not direct signatories to the *Jay Treaty*, Article III of the Treaty could be viewed as a *stipulation pour autrui*.²⁶¹ In the *Case of the Free Zones of Upper Savoy and the District of Gex*,²⁶² the Permanent Court of International Justice held that the essential criteria for determining the existence of a *stipulation pour autrui* is the intention to create a right. There is no doubt in the case of the *Jay Treaty*, as evidenced by all the historical records, that the Crown intended to create a right for the border Nations. Once these rights were created, as stated above, they could not be extinguished without the consent of the Indian Nations.

The appellant in the *Mitchell* case made a good point about the character of what is protected under section 35(1). They argued that the emphasis of the constitutional protection is on “treaty rights” and not the treaty itself.²⁶³ Therefore the protection is of

²⁶⁰ *Sioui*, *supra* note 51 at 1053.

²⁶¹ *Indian Territory*, *supra*, note 259 at para 51.

²⁶² *Case of the Free Zones of Upper Savoy and the District of Gex*, (1932) P.C.I.J. Series A No.32, p.96 at 148.

²⁶³ *Mitchell Submissions*, *supra* note 192.

the right and not the instrument evidencing the right. In *Sioui*, the Supreme Court explained:

*On the one hand, we have before us a document the form of which and some of whose subject-matter suggest that it is not a treaty, and on the other, we find it to contain protection of fundamental rights which supports the opposite conclusion...*²⁶⁴

Those Indian Nations that attended the meetings and conferences which explained the protections afforded them under the *Jay Treaty* have the benefit of its provisions, but so too would the other neighboring border tribes. Aside from the historical excerpts provided earlier, there is additional evidence that the Crown intended that these treaty rights apply to all the Indian Nations. At one particular Council held in present day Ontario, in 1815, William Claus, the Deputy Superintendent General of Indian Affairs read Article III of the *Jay Treaty* to all the Chiefs present. What is interesting is the fact that Claus requested that the Indian Nations in attendance present the news of the Treaty to ALL the Indian Nations by way of the Wampum Belt in accordance with all their customs.²⁶⁵ As a result, all of the neighboring border Nations should have the right to pass and repass freely over the Canada-U.S. border by virtue of their association with the Passamaquoddy, through the political and social links of the Wabanaki Confederacy.

The *Jay Treaty* is considered a sacred document for the its promises that the border would have no affect on the border Nations and they should pay no heed to it. The Aboriginal Nations were free to travel the lands which crossed the newly imposed border without interruption. This promise was one that made by both European powers in

²⁶⁴ *Sioui*, *supra* note 51 at 1049.

²⁶⁵ Transcript: *Mohawk*, vol.17, at 3135-3137.

exchange for peace from the border Nations. Given the *sui generis* nature of Indian Treaties, and the liberal interpretive principles from the case law, there stands little reason why this treaty can not be treated as an Indian treaty under s.35(1) at least in so far as Article III is concerned. The *Explanatory Article* eliminates any problems in determining the scope of the right, which is simply free passage. The historical record clearly shows that what was intended was exactly what was promised to the Indians: that the border would not affect them and nevertheless, their rights were guarded under the *Jay Treaty*. Canada can not now say that by virtue of their indifference with regards to the implementing legislation that they can now avoid their commitments to the Indians given the honor of the Crown which is at stake. The honor of the Crown demands that the rights of the member Nations of the Wabanaki Confederacy, being border Nations, be recognized and protected under s.35(1).

CHAPTER FOUR:
SAVING THE HONOUR OF THE CROWN:
SOLUTIONS FOR THE FUTURE

“Our history has shown, unfortunately, all too well, that Canada’s Aboriginal peoples are justified in worrying about government objectives...”²⁶⁶

SOLUTIONS FOR THE FUTURE:

FIDUCIARY DUTY:

The best solution right now would be to immediately start dialogue between the Aboriginal groups affected by restrictions on mobility and come up with some ways to deal with the worst cases immediately. These would include those persons who need to travel back and forth over the border to see or be with their families. This would have to include Indians with American citizenship as well as Canadian citizenship. What is needed is consultation with all the border Aboriginal Nations in order to properly assess their concerns and work out a mutually satisfactory way of incorporating their rights into the way Immigration officials carry out their mandates. The government has a fiduciary obligation to actively consult with Aboriginal peoples with regard to law or policy that may affect their Aboriginal rights. This is the minimum standard that will satisfy the fiduciary duty that is owed to Aboriginal peoples. Often, it will take more than consultations to meet this duty.²⁶⁷

The very concept of fiduciary duty as it relates to Canada’s Aboriginal peoples was first enunciated in *Guerin v. R.*²⁶⁸, a judgement from the Supreme Court of Canada which took the duty which was owed from a political and moral level to that of a legal one. In that case, the Department of Indian Affairs and Northern Development

²⁶⁶ *Sparrow*, *supra* note 15 at 1110.

²⁶⁷ *Delgamuukw*, *supra* note 143 at para 168-169.

(D.I.A.N.D.) had agreed to lease terms over surrendered Indian land that were different from what the First Nation had agreed to, and they were much less favorable terms. With regard to these facts, the court held:

In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown as equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.

The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in land does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.²⁶⁹

While this case is seen as important one in the protection of Aboriginal peoples in the assertion of their rights, it is also problematic. Some have asserted that the above case limited the fiduciary duty of the Crown to merely reserve land transactions. Had there been any doubt that this was not the intention of the Supreme Court, Chief Justice Dickson and La Forest J. in *Sparrow* held:

In our opinion, Guerin, together with R. v. Taylor and Williams... ground a general guiding principle for s.35(1). That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary

²⁶⁸ *Guerin*, supra note 106.

²⁶⁹ *Ibid.* at 376.

*recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.*²⁷⁰

Also, Leonard Rotman in: *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*²⁷¹ explains that the precise nature of the fiduciary obligation has yet to be expanded upon by the courts. In regard to *Guerin*, which came out in 1984, Rotman states:

Yet, more than ten years later, the Canadian judiciary remains poised at the perimeter of the Crown's duty, refusing to venture into its core.

*The implementation of fiduciary doctrine to simultaneously describe and monitor the Crown-Native relationship has created difficulties both for the judiciary and legal scholars. Unlike many other areas of the law, such as contracts, the fiduciary relation – and its concomitant duties, obligations, rights, and benefits – is not very well understood.*²⁷²

Rotman then goes on to explain exactly what the fiduciary duty entails with respect to Aboriginal people and states in part:

*The Crown-Native fiduciary relationship, in actuality, is comprised of two distinct types, or genres, of fiduciary relationships. The Crown owes a general, overarching fiduciary duty to aboriginal peoples as result of the historical relationship between the parties dating back to the time of contact. In addition, the Crown also owes specific fiduciary duties or obligations to particular Native groups stemming from its relationships with those groups or from specific treaties, agreements, or alliances that it entered into.*²⁷³

²⁷⁰ *Sparrow*, *supra* note 15 at 1108.

²⁷¹ L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996).

²⁷² *Ibid.* at 3-4, 11-18.

²⁷³ *Ibid.* at 11-18.

The importance of negotiations to Aboriginal peoples and their inclusion in decision-making by government is evidenced in the more recent court cases dealing with the fiduciary duty of the Crown to Aboriginal peoples. The court in *Perry v. Ontario*²⁷⁴, was faced with the *Ontario Game and Fish Act* which provided that only “status Indians” would have the benefit of Aboriginal hunting and fishing rights. The court granted the order for a declaration that until the issue had been superseded through negotiations between the province and the Aboriginal groups, the legislation would be read as though the word “status Indian “ was replaced with the word “Aboriginal person.” The court stressed that ALL Aboriginal rights are protected under s.35(1). They also held that the government has a fiduciary duty to ensure that ALL Aboriginal groups are included in negotiations, consultations and the benefits of programs aimed at promoting the exercise of Aboriginal rights. Justice Cosgrove particularly stressed the messages previously stated in *Sparrow*:

*Our history has shown, unfortunately, all too well, that Canada's **Aboriginal peoples are justified in worrying about government objectives** that may be superficially neutral, but which constitute de facto threats to the existence of Aboriginal rights and interests.*²⁷⁵

He went on to cite *R. v. Jones and Nadjiwon*²⁷⁶, with regards to the actions of government Ministers in their dealings with Aboriginal groups looking for input into how their rights will be affected by legislation or policy:

*What should be stated, however, is that a **high-handed and***

²⁷⁴ *R. v. Perry* [1996] 2 C.N.L.R. 161.(Ont. T.D.), [hereinafter *Perry*] [1997] 148 D.L.R. (4th) 96.(Ont. C.A.).

²⁷⁵ *Sparrow*, *supra* note 15 at 1110.

²⁷⁶ *R. v. Jones & Nadjiwon*, (1993) 3 C.N.L.R. 182.

adversarial stance on the part of the Ministry will neither meet the constitutional requirements with which, one would expect, it would consider itself duty bound to comply, nor will it provide an enforceable regulatory scheme capable of achieving the conservation goals which it seeks. ... (emphasis added)

*I do not think it was ever suggested that there would necessarily be no adjustments required or no costs involved.*²⁷⁷

Government politics aimed at excluding particular Aboriginal groups as in the *Immigration Act* as discussed earlier, or those failing to provide adequate time or money for consultation, negotiations and information dissemination will result in unenforceable legislation against the Aboriginal groups, based on the *Sparrow* test. The *Immigration Act* may prove to be one of those acts which exclude a portion of Aboriginal people, an action which should not be accepted by the courts after the constitutional protections afforded to Aboriginal rights in 1982. I would argue that the burden on the government is a heavy one which involves more than mere “token” meetings or meaningless after-the-fact consultations. The recent case of the *Union of Nova Scotia Indians v. Canada (Minister of Fisheries)*²⁷⁸ is illustrative of the “high-handedness” of the government and a failure on the part of the Minister to act on this fiduciary duty towards the Aboriginal Nation. This case is just one example of what Aboriginal groups have to deal with on a daily basis when trying to protect their rights. These groups often have trouble even getting various government departments to the table to discuss their rights.

The situation in the U.N.S.I. case involved the approval of a project that had the potential to be extremely harmful to the Mi’kmaq fishery. The Mi’kmaq understood that

²⁷⁷ Perry, *supra* note 277.

the process would involve consultation with the Mi'kmaq before any decisions were made that could affect their fishery. The Minister proceeded without regard for the Crown's fiduciary duty to these Mi'kmaq and the project was approved without informing the Mi'kmaq. With regard to this action on behalf of the Minister, the court held:

It is not surprising that the decision making process is perceived as unfair by the applicants, for the UNSI had received funding from DIAND to undertake an independent review with the assistance of consultants, it had received encouraging responses from the Ministers of DFO and of EC, and general assurances of the importance of UNSI involvement in the assessment process. Yet the decision was made before the meeting, arranged at the UNSI's request, with DFO scientists to discuss the applicant's concerns...

The Crown's fiduciary duty to the applicants as representing Aboriginal people continued throughout the assessment process and thereafter...

I am persuaded that by their failure to consider the fiduciary duty here owed to the applicants, when the decision was made on behalf of the Ministers, those acting on behalf of the Ministers did breach that duty.²⁷⁹

These are the kinds of issues that Aboriginal people must deal with on a daily basis. Despite rulings by even the highest court in our country with regard to the fiduciary duty owed by the government to Aboriginal peoples, governmental actions often fall far short of meeting this duty. Generally, the Aboriginal groups are often left to prove their rights in court as opposed to having the opportunity to work out viable solutions with the various government agencies. It is hoped that with the guidance provided by the Supreme

²⁷⁸ *Union of Nova Scotia Indians v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 F.C. 325.

²⁷⁹ *Ibid.* at 334-342.

Court of Canada in *Delgamuukw*, that this situation may improve. The Court attempted to elaborate on what this fiduciary duty entails:

There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: Guerin. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require full consent of an aboriginal nation, particularly when the provinces enact hunting and fishing regulations in relation to aboriginal lands.

*Second, aboriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put. The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in *Sparrow* and which I repeated in *Gladstone*. Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights: *Guerin*. In keeping with the duty of honor and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed.²⁸⁰ (emphasis added)*

There remains the fact that with the cases on fiduciary duty, it is now obviously clear that the Department of Immigration must take steps to meet with Aboriginal people

and at least begin discussions on the existence of a right to cross the border freely, the scope of that right, and its implementation. As can be seen in the *Watt* and *Mitchell* cases that are soon to be argued in the Supreme Court of Canada, this is not the course they have chosen to take. Once again, the Crown has decided to deny the rights of Aboriginal peoples at all costs, without taking the preliminary steps of consulting with the border Nations. There remains one other very important aspect of border crossing rights that has yet to be explored in this thesis. A claim by the Aboriginal Nations in the Wabanaki Confederacy for Aboriginal title in their traditional lands might also address border issues, given that their traditional lands include lands on both sides of the border.

ABORIGINAL TITLE:

A fair assessment of Aboriginal title in this area, as a result of a land claim, would involve an in-depth review of historical and anthropological information which is beyond the scope of this thesis on border crossing rights. It is a very important aspect of Aboriginal rights which would more properly be the subject of its own thesis.

A successful land claim based on Aboriginal title provides for more than just a distribution of land to that claimant Aboriginal Nation(s), and opens the door to a wider mandate for negotiations. These topics include governmental powers and responsibility within a territory and could include negotiations with both Canada and the United States over how to resolve the border issue. A land claim in the Atlantic provinces would be submitted on the basis that an Aboriginal Nation or Nations have valid Aboriginal title claims to a comprehensive area, like New Brunswick, for instance. This is done through

²⁸⁰ *Delgamuukw*, *supra* note 143 at para 168-169.

specific claims, for smaller, determinable land pieces, such as an expansion to a reserve area, or a comprehensive claim to all of New Brunswick, which involves larger, undefined land areas of New Brunswick. Land claims based on Aboriginal title can: expand reserves, provide new land bases off reserves, provide compensation for past use and exploitation by the Crown and other entities, create a different tax system for Aboriginal lands, provide the Aboriginal Nation(s) with a percentage of revenues from natural resources used by the provinces, capital for economic development, funding for self-government initiatives and other arrangements for the Aboriginal group(s) to give effect to their rights. Land claims require years of research, and negotiations with the federal and provincial governments. It is an alternative to taking a claim to court an asking for a court to declare that the particular Aboriginal group has Aboriginal title to an area, although this remains an option should land claim negotiations fail.²⁸¹

There has been some question over the last few decades as to whether or not Aboriginal rights such as fishing rights depend on the establishment of Aboriginal title to the land where they propose to exercise their rights. Recently, two Supreme Court of Canada cases, *Adams* and *Cote* have settled the question. In *Adams*, a Mohawk was charged with fishing without a license within the historical boundaries of New France on land that had been ceded in 1888. The court cited *Van der Peet* and held that Aboriginal title was just one manifestation of Aboriginal rights and that Aboriginal rights do not have to be based on a claim of Aboriginal title to an area, although the exercise of a particular right may be site specific. As for the land cession in 1888, the court held that

²⁸¹ Indian and Northern Affairs Canada, *Comprehensive Land Claims Policy*. (Ottawa, 1986).

while the land cession may possibly preclude a claim to Aboriginal title, it in no way was a clear and plain intention to extinguish fishing rights in the area.²⁸²

Similarly in *Cote*, an Algonkian was charged for failure to have a license to fish and without paying a fee to enter the fishing area. The court upheld the fee as it did not hinder the right to fish, it aided it in providing funding for roads, etc. The license was declared void as an Aboriginal person could only obtain one by special discretion of the Minister. This blanket prohibition against fishing can not be justified as there were no criteria or guidelines for the Minister to exercise his discretion. Like *Adams*, *Cote* stressed that Aboriginal title did not have to be established to claim fishing rights.²⁸³ As well, the absence of French recognition of Aboriginal rights did not affect their protection under s. 35(1).²⁸⁴

Thus, I would argue that the mobility rights of Wabanaki Nations contained specifically in the *Jay Treaty* did not need the “formal gloss of legal recognition” demanded in the pre-1982 *Francis* case, and this absence of formal legislative inclusion of the treaty into domestic law should not affect the Aboriginal rights contained within. As well, should a land claim fail in the area, this should not be an end for the assertion of mobility rights as Aboriginal rights do not depend on Aboriginal title to an area. One could still argue a mobility right based not only on the Indian treaties, but also as an Aboriginal right integral to the society, regardless of a proven land claim.

As seeking a court declaration of Aboriginal title to an area is a lengthy way to

²⁸² *Adams*, *supra* note 99.

²⁸³ *Cote*, *supra* note 100.

²⁸⁴ *Adams*, *supra* note 99.

assert mobility rights, and land claims can take decades, it is important to look to interim solutions until the larger issues can be properly dealt with. Negotiation is always encouraged by the courts as opposed to litigating these issues. Yet, litigation is the direction that many Aboriginal groups will be forced to take to determine once and for all their relationship with the rest of Canada in relation to their valid claims, if the Crown continually fails to live up to its fiduciary duty to consult. Aboriginal mobility rights are of an immediate importance, so there need to be some interim solutions.²⁸⁵

INTERIM IMMIGRATION MEASURES:

The present requirements under the Immigration legislation represents an unnecessary burden on Aboriginal mobility rights with regard to the border. *Immigration Act* challenges, through the courts may seem to be the quickest route to force negotiation of cross-border passage for Aboriginal people, but it is the least desirable option, given the direction given by the courts towards consultation and negotiation. As emphasized in *Sparrow*, there is a strong move towards negotiations between the Aboriginal groups and the governments to establish the beneficiaries of the rights and the scope of the rights themselves. This duty by the Government to consult includes all Aboriginal peoples within a specified territory, and not just band members. The idea is to work out a process to incorporate the Aboriginal mobility right into Immigration law and policy, in order to avoid future conflicts between Aboriginal people and Immigration officials. More importantly, we must seek immediate interim solutions to prevent irreparable harm done

²⁸⁵ Ibid.

to Aboriginal families caused by the absence of a family member that is detained at the border or refused admission.

The courts have recognized Aboriginal and Treaty rights, and now the federal and provincial governments will have to be more active in negotiations and consultations with the Aboriginal people in order to facilitate the full exercise of their rights, as part of their fiduciary duty. It is my position that since this is clearly Aboriginal territory which includes Canadian and American land, then special provisions ought to be made for those mobility issues that were guaranteed would be protected both prior to the establishment of the border and after. After all, the Aboriginal groups have been traversing that area for a substantial period of time prior to contact before borders existed, and have continually traversed the border area since contact, without interruption or having to pay duty on their personal goods, until recent restrictions.

I suggested earlier that the best way to start the process is to have representatives of the Immigration Department and the affected Aboriginal Nations get together and raise the issues around border-crossing. While this thesis has focused on the right of passage, other issues would include the right to import goods duty-free and the commercial implications of those rights. This is a political process which demands good faith on both sides and a true commitment to work out a mutually satisfactory solution to address the issues at least on an interim basis. With regards to the specific issue of free passage, leaving duty for another day, the simplest way to permit free passage without opening up the border to a free-for-all, would be to agree to a form of identification that will let the Immigration officials know who has a right to pass freely. A similar identification

process was worked out after *Sparrow* in terms of identifying the Aboriginal peoples who were validly exercising their Aboriginal right to fish.

In the Atlantic provinces, the Department of Fisheries and Oceans (D.F.O.), have met with the current structure of Aboriginal groups, being the Bands, the Unions which represent the Bands, and the Aboriginal organizations that represent the interests of the status and non-status and Metis Indians that do not reside on a reserve. What has come of these meetings are the Aboriginal Fisheries Strategy (AFS) agreements with each Aboriginal organization. There is currently a division in the community as to whether these agreements are more harmful to our fishing rights than they are beneficial. Again, this is another issue which is deserved of its own attention in a future paper, but for now, I will use it as a precedent for an interim solution to the border crossing issue.

As the precise scope of the fishing rights in this area has yet to be determined, on an interim basis, the groups have agreed that for the purposes of the AFS Agreements that these rights whatever they are, will not be prejudiced by the Agreement. An agreement that was in force between DFO and the New Brunswick Aboriginal Peoples Council (N.B.A.P.C.) in 1997, provided in part:

Purposes:

1.(1) The purpose of this Agreement is to provide for the management of the fishery and the involvement of the Aboriginal organization in the management, protection and enhancement of fisheries resources and fish habitat area....

1.(3) The Parties agree that this Agreement shall not serve to define or to limit aboriginal or treaty rights and is not intended to be, and shall not be interpreted to be, and agreement or a treaty within the meaning of section 35 of the Constitution Act, 1982.

1.(4) The Parties recognize that this agreement is the result of discussions conducted within the context of current legislation, jurisprudence and government policy and, as such, does not constitute, and shall not be interpreted as, evidence of the nature or extent of aboriginal treaty fishing rights and made without prejudice to the positions taken by either Party with respect to aboriginal or treaty rights or title.

1.(5) Nothing in this Agreement is intended to, nor shall be interpreted to, affect any aboriginal or treaty rights of any other aboriginal group.

1.(6) The Parties intend that this Agreement will establish the relationship between the Parties with respect to all matters and issues that this Agreement addresses and will supersede and replace all other arrangements and agreements between the Parties with respect to those matters and issues, without prejudice however to any Treaties in place affecting the Parties.²⁸⁶

Given the political nature of Aboriginal rights, an interim border crossing agreement could echo some of the same purposes at the outset. Their Whereas clauses could detail the history and note that the agreement is made in the spirit of partnership with Aboriginal peoples and that it is an interim step in the process to come to a final solution. With regard to identification of those Aboriginal people who by Nation or territory have a right to freely cross the border, Immigration and the Aboriginal group could agree to a unique card that would be issued by either party which is specific to only border crossing that could be both traced and verified through documentation filed in support of the card. This information could be held by both parties or solely by the Aboriginal organization, so long as the card number could be matched with the name of

²⁸⁶ *Agreement between DFO and NBAPC with Respect to Fisheries – 1997-CA-0017. Dated 1997.*

an Aboriginal person with border crossing rights. The issue of proof was addressed under the example AFS agreement as follows:

Proof of Designation to Fish Under License

5.(1) The fishing described in this Schedule will be carried out by persons who are designated in accordance with this Schedule to fish.

5.(2) subject to this subsection, all members of the Aboriginal Organization who have a membership card are designated to fish. The Aboriginal Organization may designate additional persons as set out in subsection 7(1) of this Schedule. The Aboriginal Organization may prepare a list of members of the Aboriginal Organization who have a membership card but who nevertheless are not designated to fish. Once the list is provided to DFO pursuant to subsection 7(3) of this Schedule, the members of the First Nations whose names are on the list are not designated to fish.

5.(3) A person fishing as set out in this Schedule will carry a NBAPC membership card or a designation card at all times while engaged in fishing or any other activity referred to in this Schedule, including the harvesting, transporting and landing of fish and will present the NBAPC card or designation card to a DFO fishery officer, a DFO fishery guardian or an Aboriginal Fisheries Guardian on request.

7.(1) The Aboriginal Organization will designate persons to fish by issuing designation cards. Each card will be personal and non-transferable and will bear a unique card number and the name of the person designated.

7.(3) Before the fishing described in this Schedule commences, the Aboriginal Organization will provide to DFO a list of names of the members of the NBAPC who have NBAPC membership cards but who nevertheless are not designated to fish and a list of names of all persons designated to fish pursuant to subsection (1) together with their designation card number.

7.(4) The Aboriginal Organization may amend the names and designation card numbers in the lists referred to in subsection (3).²⁸⁷

The above represents an example of how some of the rights issues could be dealt with on an interim basis. The second part provides an option for dealing with identification issues at the border. The key to the interim resolution of the border crossing issue, is not so much how the identification will look, but that a process is set up to deal with the issue. Given that most passing problems have been with Canadian Immigration authorities, an interim solution involving the Canadian government is most pressing. But given that the issue concerns the Canada - United States border, tri-partite arrangements among Canada, United States and the Aboriginal Nations would be preferable. Thus would also be appropriate as a modern day updating of the *Jay Treaty* process. Aboriginal Nations should be full signatories to whatever interim measures are made.

CONCLUSION:

I have concluded that there exists a strong argument for an Aboriginal mobility right for the members of the Wabanaki Confederacy to pass freely over the Canada and United States border. The *Jay Treaty of 1794* is a source for the explicit recognition of such a right as contained in Article III. Although some lower court decisions have decided against this treaty conferring any rights, the courts in all those cases failed to do the proper analysis as mandated by the tests set out by the Supreme Court of Canada in *Sparrow* and *Van der Peet* and *Simon*. As well, the protections afforded under section 35(1) of the *Constitution Act, 1982*, mandates a reconsideration of the pre-1982 cases

²⁸⁷ *Ibid.*

which dismissed the *Jay Treaty* as a valid Indian treaty. At a minimum, the promises made in the *Jay Treaty* and in the subsequent *Explanation Article* should be protected in the same light as other Indian treaties in section 35(1). The courts have stressed repeatedly the principles for large and liberal interpretations in favor of the Indians in the case of ambiguities or doubts. The fiduciary duty owed to the Aboriginal Nations of this country by the Crown, demands that these issues be dealt with so as to prevent any more harm to Aboriginal families and communities.

The Aboriginal Nations which comprise the Eastern Indians, the Abenaki, the Wabanaki Confederacy or the Treaty signers of the 1700's have lived, hunted and traveled the area of Old Nova Scotia since time immemorial. It is their status as the First Peoples of Turtle Island (this continent), which entitles them to special protections under Canada's Constitution and the highest court in the country has recognized this fact. Nearly all the Aboriginal Nations of this country are survivors of the devastating effects of contact; plaques, oppression, genocide, discrimination, abuse and a host of other tragedies. The dark winter which once covered Aboriginal people in their traditional territories has been lifted and the fight for recognition of their Aboriginal and Treaty rights continues with a view to protecting the rights of their children, seven generations into the future. The family is central to Aboriginal life and all the Nations of Turtle Island or North America are family and as such often work together to effect their mutual rights. The Canada-U.S. border is symbolic of the division which have been imposed on all North America indigenous groups. It is the line which divides our people at the heart of our culture; our families. Whether the right of free passage to travel the border is upheld as an international treaty right, and Aboriginal Treaty right, an Aboriginal right or as part

of negotiated powers under Aboriginal title and land claims, it must be done now. This right must be protected in order that Aboriginal families no longer have to suffer as they have to date. The year 2000 should mean a new beginning for Aboriginal people and the governments of Canada owe a duty to Aboriginal people to facilitate this process legally and morally.

These treaty signers of the Wabanaki Confederacy have lived off the lands and the seas of this area from time immemorial. They have a basic Aboriginal right to survive and adequately sustain themselves from their traditional occupations and go on thriving for generations to come. They have sustained themselves from the land and seas within their territories for thousands of years and the courts have held that Aboriginal rights are not frozen in time and permit their evolution over time. Therefore, it is only natural that they should recognize that the Wabanaki culture has evolved to such a stage where Canadian and American travel is a way to sustain themselves and their families spiritually emotionally and culturally and economically. This group has an Aboriginal right to cross the border freely. This right can easily be reconciled with sovereignty and the Crown's right to protect its borders by implementing a system of identification. This is the easiest way to both identify rights holders while interfering with the exercise of the right as little as possible. These rights should be guaranteed to members of the Confederacy regardless of their citizenship as Americans or Canadians given their special relationship with the Crown, which is the same either way.

These groups also have Indian treaty rights which implicitly guarantee free passage over the border in pursuit of their traditional activities as provided for in *the Treaty of 1752* and the *Treaty of 1725/26*. These treaties rights are protected under

section 35(1) of the *Constitution Act, 1982*. The difference between these rights and Aboriginal rights, is that treaty rights should not have to go through the process of reconciliation, as the rights contained in the treaty are in themselves the result of the Crown reconciling their interests with the rights of Aboriginal people. Therefore, the rights should stand as they presently read in the treaty. This would also apply to the *Jay Treaty* should it finally be interpreted as an Indian Treaty deserved of protection under section 35(1).

Thus, not only should all the Aboriginal groups be included in any benefits received from treaties or rights adjudication, legislative participation or negotiations, but this should happen immediately. There is certainly no worry of a “flood gates” effect should a temporary exclusion be made for Aboriginal people in the immigration legislation, or a border agreement is negotiated and signed. The Aboriginal people in Canada comprise less than 3% of the population and those specific Aboriginal people in this area around the Wabanaki Confederacy here, would comprise even less of that population. The administration of such border crossing activities would be no more difficult than the AFS agreements. A form of identification that would be mutually acceptable to both parties could alleviate concerns on both sides of the border. Regardless of the effort that will be required to work out a solution, or the degree of difficulty or expense that it will entail, the honor of the Crown demands that they live up to their fiduciary duty to the Aboriginal Nations of the Wabanaki Confederacy and work out a solution to assist these groups in their right to free passage as promised so long ago.

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