> "Problems cannot be solved by the consciousness
> (awareness) that created them."
>
> Einstein

INTRODUCTION

1. It is very difficult to establish that Aboriginal people in Canada continue to enjoy Sovereignty and the right to self-determination in Canada, when laws of Canada are said to have general applicability to Aboriginal people. Many principles rooted in international law, law on genocide, the rule of law and constitutional law all intertwine to establish the tapestry of evaluation of inherent aboriginal right of recognition of sovereignty and self-determination.

2. It is informative to compare the principles enunciated in the "Convention on the Prevention and Punishment of the Crime of Genocide" (Articles I to V), 1948, with the principles enunciated in Section 15 (1) of the Charter of Rights and Freedoms, as the grounds enunciated therein flow from those principles. Section 15 (1) of the Charter sets out that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law. In Aboriginal matters, equal benefit requires reviewing core factors in the development of the relationship between the newcomers and the indigenous people, to determine if indeed they are receiving equal benefits. It is submitted that issues surrounding genocide are critical to examination of core factors, as genocide has

created a consciousness of denial in the North American continent as it relates to equal benefit such as the Royal Proclamation of 1763.

3. Furthermore, it is suggested that severe jurisdictional problems exist for the Canadian courts, when seeking jurisdiction over Aboriginal people, either through the British North America Act 1867, the Criminal Code of Canada, the Indian Act or any provincial rules or regulation which deny aboriginal people the benefit of actual sovereignty and self-determination.

4. Accordingly, the constitutional challenges herein must articulate the lack of jurisdiction as a fundamental underpinning of constitutional challenges based on any provisions of the Charter of Rights and Freedoms, such as Section 15 (1), which causes in the particular facts of the case, intertwining with Section 2 and 7 of the Charter of Rights and Freedoms. Furthermore, the pronouncements in the Royal Proclamation of 1763, guaranteed by Section 25 (a) of the Charter of Rights, and aboriginal rights guaranteed by Section 35 (1), are engaged by virtue of the practices of these individuals prior to the arrival of the newcomers.

5. It is submitted that a proper application of the rule of law would defeat the Crown's Assertion of sovereignty over aboriginal people and assert their right to sovereignty and self-determination. Dr. John Borrows says this:

> "Canada's highest court has interpreted the rule of law as being supreme over officials of the government as well as private individuals, and thereby preclusive of arbitrary power(Manitoba

> Reference Case)… When one examines Canada's assumption of underlying title and sovereignty throughout its claimed territory it is apparent that this presumption violates both fundamental principles of the rule of law. The Crown's claims are arbitrary in that Canada substantially invalidated Aboriginal people's territorial rights without informed consent or persuasive legal explanation. Doctrines of discovery, terra nullius, conquest and adverse possession have all been discredited in the common law and international legal system as legitimate bases to dispossess Aboriginal people of their land. Furthermore, Canada's declaration of sovereignty over Aboriginal Peoples violates the second principle of the rule of law, because in the process of such a declaration the Crown suppressed Aboriginal governance and denied these groups indispensable elements of law and order. The repression of Aboriginal powers of governance in the creation of Canada is therefore contrary to the second principle of the rules of law because it destroys normative order within Aboriginal communities."
>
> Questioning Canada's Title To Land: The Rule of Law, Aboriginal Peoples and Colonialism, Dr. John Borrows

6. Thus, it is through the prism of the Convention on Genocide, United Nations 1948, the principles of sovereignty and self-determination enunciated in international law, the proper understanding of the rule of law, the concept that our system is based on "moral and spiritual vales and rules of law" (Canadian Bill of rights, 1960), the full tapestry of the Charter of Rights and Freedoms, that the constitutional challenges presented herein, challenges the British North America Act, the Indian Act and Criminal Code.

7. Although many are loath to contemplate the fact of genocide on the North America Continent, there is to much evidence that needs to be examined, in order to properly put into perspective any aboriginal constitutional challenge. Professor Ward, in "A Little Matter of Genocide: at page 129, observers as follows:

> "From the time Ponce De Leon arrived in North America in 1513, searching for gold and a mythical fountain of youth in what Spanish called La Florida until the turn twentieth century, up to 99% of the continent's indigenous population was eradicated. As of 1900, the U.S. Bureau of Census report barely over 237,000 native people surviving within the countries claimed boundaries and the Smithsonian Institution report less than a third of a million for all of North American, including Greenland. Although the literature of the day confidently predicted, whether with purported sadness or with open jubilation, that North American Indians would be completely extinct within a generation, two at the most, the true magnitude of underlying demographic catastrophe has always been officially denied in both the United States and Canada".
>
> "A Little Matter of Genocide: Holocaust Denial in the Americas 1492 to present"
> Professor Ward Churchill.

8. In an article entitled "Ethnic Cleansing and Genocide in North America and Kosovo" by Dr. Anthony J. Hall, he observed the following:

> "Now lets pull the zoom lens of historical conceptualization back further to reveal the inescapable reality that Canada and especially the United States could not exist in their present form if it wasn't for harshly successful application of some of the most expansive, methodical and enduring operations of ethnic cleansing the world has ever seen. All the North Atlantic Treaty organization countries in Western Europe have participated actively in the formative, phases of a vast, pluralistic Indian country into a European adjunct of so called Western civilization, was realized not only through outright killing or displacing indigenous North America peoples, but also in subjecting their Aboriginal territories to alien laws, alien economics, and alien languages"
>
> "Ethnic Cleansing and Genocide in North America and Kosovo". By Dr. Anthony J. Hall 20/09/00.

9. It is submitted that Canada's Indian Act was used as a model for setting up the apartheid system in South Africa. Reserves, band councils, identification numbers and cards, restricted arcas and diminution of territory, language and culture

deprivation are all contrary to the principle enunciated in Convention on prevention and Punishment of Genocide, United Nation 1948, Dr. Anthony J. Hall observed in above-quoted paper as follows:

> "In Canada, one of the British empire's so called "White Dominions" registered Indians often need government passes to leave their home communities, an innovation that authentically was replicated South Africa, which also identified it's self as a White Dominion, the country's so-called Ministry of Native Affairs long maintained a close and intimate bureaucratic collaboration with the Department of Indian Affairs in our country. What else is a "reserve" which in the provinces of Canada over less than one per cent of the total land mass, their monuments to, and effective facilitator of ethnic cleansing that constitutes the essential geopolitical framework within which Canada and the U.S. has developed".
>
> "Ethnic Cleansing and Genocide in North America and Kosovo", ibib

10. The above observations are remarkably confirmed by Kevin Grover, Assistant Secretary, Indian Affairs, Department of the Interior, U.S.A. when, in a speech entitled "No Cause of Celebration" in a ceremony acknowledging the 175th Anniversary of the establishment of the Bureau of Indians Affairs, on September 8th, 2000, said the following:

> "We must first reconcile ourselves to the fact that the works of this agency have at various times profoundly harmed the communities it was meant to serve. From the very beginning the Office of Indian Affairs was an instrument by which the United States enforced it's ambition against the Indian nations and Indian people that stood in it's path. And so, the first mission of this institution was to execute the removal of the southeastern tribal nations. By threat, deceit, and force, these great tribal nations were made to march 1,000 miles to the West, leaving thousands of their old, their young and their infirm in hasty graves along the the Trial of Tears.

As the nation looked to the West for more land, this agency participated in the ethnic cleansing that befell the western tribes. War necessarily begets tragedy; the war for the west was no exception. Yet in these more enlightened times, it must be acknowledged that the deliberate spread of disease, the decimation of the mighty bison herds, use of the poison alcohol to destroy mind and body, and the cowardly killing of woman and children made for tragedy on a scale so ghastly that cannot be dismissed as merely the inevitable consequence of the clash of competing ways of life. This agency and the good of the people in it failed in the mission to prevent the devastation. And so great nations of patriot warriors all. We will never push aside the memory of unnecessary and violent death at places such as Sand Creek, the banks of Washhita River and Wounded Knee.

Nor did the consequences of war have to include the futile and destructive efforts to annihilate Indian cultures. After the devastation of tribal economics and the deliberate creation of trial dependence on the services provided by this agency, this this agency set out to destroy all things Indian.

This agency forbade the speaking of Indian languages, prohibited the conduct of traditional religious activities, outlawed traditional government, and made Indian people ashamed of who they were. Worst of all, the Bureau of Indian Affairs committed these acts against the children entrusted to it's boarding schools, brutalizing them emotionally, psychologically, physically, and spiritually. Even in the era of self-determination, when the Bureau of Indian Affairs is at a long last serving as an advocate for Indian people in an atmosphere of mutual respect, the legacy of these misdeeds haunts us. The trauma of shame, fear and anger has passed from one generation to the next and manifest itself in the rampant alcoholism, drug abuse, and domestic violence that plague Indian country. Many of our people live lives of unrelenting tragedy as Indians families suffer the ruin of lives by alcoholism, suicides made of shame and despair and violent death at the hands of one another. So many of the maladies suffered today in Indian country results from failures of this agency. Poverty, ignorance, and disease have been the product of this agency's work.

And so today I stand before you as a leader of an institution that in the past has committed acts so terrible that they infect, diminish, and destroy the lives of Indian people decades later, generations later. These things occurred despite the efforts of many good people with good hearts who sought to prevent them.

> These wrongs must be acknowledged if the healing is to begin".

11. Ever since sections 3 and 72 of the Domestic Indian Act, 1880 implemented by Sir John A. MacDonald's deeply harmful policies:

> "The great arm of our legislation has been to do away with the tribal system to assimilate the Indian people in all respects with the other inhabitants of the Dominion, as speedily as they are fit for change."
>
> House of Commons, may 2nd,1880.

has there been forced assimilation of the indigenous people of Canada.

12. The International Military Tribunal, 1947 at Nuremberg, Germany, tried the representatives of German Nation for crimes against peace, by planning, preparation, initiation and waging wars of aggression. Which were wars in violation of International treaties: with war crimes; and with crimes against humanity. The defendants were also charged with participating in the formulation or execution of a common plan or conspiracy to committee all these crimes. From these deliberations, emerged the principles enunciated in the Convention on the Prevention and Punishment of Genocide, 1948, principles which are replicated in Section 15 (1) of the Charter of Rights and Freedoms: and now these principles are applicable to be learned observations on genocide and the rule of law, in the particular facts of this case.

> International Military Tribunal, 1947 Nuremberg, Germany, Judgement Convention on the Prevention and Punishment of Genocide, United Nations, 1948.

13. There are international laws, treaties and conventions open to the aboriginal people, however theses are the only places of recognition and redress: domestic courts seem unwilling to admit or address the issue of genocide.

Awas Tingni v. Republic of Nicaragua, August 31, 2001
Pitawanakwat v. U.S.A. – District Court of Oregon, November 15th, 2000

14. The Genocide is real and provable, commencing with "Indian wars" in the U.S.A, the U.S. calvary chasing nations into Canada and the North West Mounted Police taking up the job of the U.S. calvary to subjugate the Native population. The massacre at Frog Lake, Saskatchewan, the hanging of Louis Riel, acts presaging the acts of genocide evidenced in the OKA crisis, the standoff at Lake Gustafsen, the shooting of Dudley George at Ipperwash Park, Ontario, bringing forth the presence of a consciousness of genocide in Canada.

"A Little Matter of Genocide", ibid
"Ethnic Cleansing and Genocide in North America and Kosovo", ibid

15. It is within this combination of many purposeful events between 1492 to the present which is the commencement point of any constitutional challenges in this particular case. Charter claims must be analyzed in the larger social and political context in which they arise. The issues in this case must therefore be examined in the context of Canadian society, history and tradition, which has not been kind to the aboriginal people. The problems regarding the many impasses of the present reside in the lack of acknowledgment of the past.

UFCW, Local 1518 v. K Mart Canada [1998] 2 S.C.R. 1083

16. Dr. Bruce Clark has been vilified and character assassinated for attempting to bring to the attention of the Canadian Courts these deeply important issues: his "forensic excesses ", as noted by Upper Canada Law Society is what handicapped his past presentations. However, in reviewing these "forensic

excesses” in November, 1995, Convocation of the upper Canada Law Society, said:

> “It would be difficult to disagree with Mr. Clarke’ assertion that the issue his argument raises is “constitutionally critical”. Again, the discipline hearing panel found that Mr. Clark honestly believes that the comments and conduct particularized in the complaint which are an outgrowth to his argument – were intended to advance the cause of justice and the rule of law.
>
> The “genocide of which Mr. Clark speaks is real, and has very nearly succeeded in destroying the Native Canadian Community that flourished here when European settlers arrived. No one who has seen many of our modern First Nations communities can remain untouched by this reality.
>
> Mr. Clark is not making the kind of arguments that fall to most of us daily in our courts; much of the ordinary work of the lawyers relates to the interpretation of a will, the proper understanding of contracts, the ownership of a piece of land, or individual culpability for crime. The issue that Mr. Clark raises is one of great significance for an entire people and for all of us. His commitment to the argument and his conviction respecting its its correctness cannot be questioned.”
>
> The Law Society of Upper Canada, re Bruce Allan Clark, November 23, 1995, Reason of Convocation

17. Dr. Bruce Clark’s “forensic excesses” escalated to convictions for contempt of court and assault, resulting in his disbarment by the Upper Canada Law Society in further disciplinary hearings. Despite these difficulties, the initial observation by the Upper Canada Law Society remain accurate. There is one curious observation pertinent to these proceedings – Dr. Bruce Clark made his argument without first establishing and evidentiary basis for the argument. This fatal flaw deprived Dr. Clark of establishing an objective basis for his argument and only deepened his own personal arrogance as to what he knew and supposedly no one else knew and lead to his increased “forensic excesses.” As our education system lacks insight

into the real relationship between the indigenous people and the dominant society, the mistake is not establishing an evidentiary record should not be repeated.

18 Dr. Bruce Clark is not the only legal scholar to deal with the relationship between the aboriginal people and the dominant society. Throughout this factum counsel will refer to many legal academics, including Dr. John Borrows (PH.D. University of Victoria – Aboriginal Governance Chair), Dr. Sidney Harring a proposed expert witness in this case (PH.D Law professor New York City University, curriculum vitae attached) Professor Kent McNeil, Osgoode Hall Law School, Dr Anthony Hall (PH.D University of Lethbridge , Native Studies) Dr. Ward Churchill (PH.D University of Colorado Native Studies), Michael Asch & Patrick Macklem (Article from the Alberta Law Review), Kelly Yukich (Article in the University of British Columbia Law Review) and observations from Brian Shattery on aboriginal constitutional law. It is submitted that the constitutional question herein is novel and complex and requires that an evidentiary base is established through expert witnesses and traditional indigenous Elders in order for the question to be properly understood. The mass of academic observation on issues such as genocide, rule of law proclamation of 1763, Section 15 (1) and particularly Section 35 (1) of the Constitution Act 1982 would support the concept of the urgency of the question being properly tried and defeat the facile observation that this constitutional question is frivolous and vexatious.

Overview

19. The Crown does not appear to understand the constitutional question as advanced;

This is another indication of why it is so important to establish an evidentiary base, through expert testimony that will establish the framework for a proper argument of the constitutional question. These issues raised by the constitutional, requiring an evidentiary base as follows:

1. Genocide – that by virtue of act of genocide in the past, present and going unaddressed, in the future, that the dominant society has compromised its alleged and assumed authority over Native people. This necessarily engages Section 91 (24) of the constitutional Act 1867 – 1982 as evidence can be established which would operate for the proposition that Section 91 (24) of the British North America Act is ultra vires the British Parliament as it relates to indigenous people.
2. The idea that indigenous people are entitled to independent third party adjudication by virtue of the order-in-counsel of Queen Ann, March 9th,1704; the sensitivity to the ides that indigenous are to be treated as a sovereign nation lies behind the Crown ordering third party adjudication between the Mohegans and the Colony of Connecticut;
3. The proper interpretation of the rule of law as a principle in constitutional law will be examined in a proper evidentiary base, giving the court the opportunity to contemplate the meaning behind:

> "Whereas Canada is founded upon principles
> that recognize the supremacy of God and the rule of law;"

expressed in the Constitution Act,1982;

4. The relationship between the evidence established on the principles of genocide, the various acts of genocide as it relates to indigenous people in the territory known as Canada and the principles enunciated in Section 15 (1) of the Charter and evidence established to demonstrate violations of Section 15 (1) between indigenous people and authority.

5. All of the principles established through evidence which would give deeper meaning and understanding to the Proclamation of 1763, enshrined in Section 25 0f the Constitution Act, 1982,and how this impacts the jurisdictional relationship between the Mohawk Nation and authority on Cornwall Island.

6. The evidentiary base establishing this basis for the argument that Section 91 (24) is ultra vires the British parliament, depriving any government authority over indigenous people in territory known as Canada;

7. That pursuant to Section 35 (1) that:

> “The existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed”.

Stands for the proposition that aboriginal people of Canada have an aboriginal right of sovereignty and self-determination, which amounts to self-government and this court must recognize and affirm it. Counsel intends to establish an evidentiary basis for this proposition.

20. The Applicant disputes that it is plainly obvious that the application cannot succeed and disputes the following:

a) It is not firmly established in Canadian law that

aboriginal people of Canada exist within Canadian constitutional and legal framework and are not subject to crown authority and within the jurisdiction of the Canadian courts. A proper evaluation of the historical relationship between the Crown and indigenous people will show otherwise. The question before the court has only proceeded once since 1999, Before Mr. Justice O'Neil in North Bay (R v. Fournier) and after twenty days of direct expert testimony of the defence on this question, the crown entered a stay of proceedings. The Crown can only be referring to the manner in which some of these issues were addressed by Dr. Bruce Clark and not the present question. This counsel's experience with this question is a consistent stay of proceedings by the Crown when the constitutional evidence is about to be present or finalized (R v. Whiteduck – Hull, Quebec, R v. Fournier – North Bay, Ontario).

21. The Applicant disputes the contention by the Crown that this application appears to be "directly connected to other proceedings brought by other litigants before different courts and tribunals in Canada in which "the same arguments" and allegations have been raised without success." This is inaccurate.

This question was raised in 2000 in Hull Quebec on criminal charges involving Algonquins setting up a blockade LaVerendrye Park in Quebec. After many different approaches taken to challenge the question and seek greater clarification from the defence on the question, on the day set to set the constitutional question down for hearing evidence, the Crown enterer a stay of proceedings (R v.Whiteduck).

In North Bay, Ontario, before Mr. Justice Stephen O'Neill, the court heard twenty one days of direct examinations of Dr. Anthony Hall on the constitutional question and before Dr. Sidney Harring, PH.D and

Elder William Commanda of the Algonquin Nation could testify. The crown entered a stay of proceedings (R v. Fournier).

In Lethbridge, Alberta, the only application before the court on a summary conviction appeal, was an application to fund the presentation of the constitutional question, which was denied by Mr. Justice Langston and as counsel was not eligible to be funded by Legal Aid Alberta the presentation of the constitutional question had to be abandoned (R v. Yellowhorn).

Counsel has presented the question before the Ontario Municipal Board, however funding was denied for it's presentation and the constitutional question was abandoned (OMBV v. Francoscenie) It was also recently presented in St-Joseph-de-Beauce, in a logging dispute between Abenaki-Metis and Quebec authorities, however the case was settled the first week of January, 2007, foreclosing the necessity of presenting the constitutional question.

The constitutional Question was also presented in Pembroke, Ontario in 2001, resulting in a favorable decision for Algonquin moose hunters (R v. Sarazin). This is now being appealed by the Crown for the Ministry of Natural Resources and it is to be heard in Provincial Court of Ontario. The question was resolved purely on principles enunciated in R v Cöté and thus no presentation of the full question was required.

The constitutional question is now before this court. Counsel has always attempted to have the constitutional question heard once, with the

participation of the Attorney Generals of Canada and Ontario; however the challenge is never taken up. The AG of Canada participated in Hull, Quebec, along with the AG of Quebec. In North Bay, the AG of Ontario participated and the AG of Canada declined. In St-Joseph-de Beauce, the AG of Quebec participated and the AG of Canada declined. Today, the AG of Ontario and the AG of Canada are not in this case, however they are well aware of the question and appear to have an overarching position on this constitutional question.

22. Counsel in this factum intends to comment on the factum presented the Crown and then set out observations on the constitutional question advanced in order to establish that this constitutional question is not frivolous and vexatious, nor an abuse of process and demonstrate why the court should hear evidence from expert witnesses before adjudicating on the merits of the constitutional challenge

PART I – THE FACTS

23. The Applicant is presumed innocent until proven guilty beyond a reasonable doubt. The Applicant disputes the facts as set out by the Crown; for the purpose of this preliminary application the applicant understands that the fact situation described in the Crowns factum are facts alleged against the Applicant resulting in charges under the Criminal Code.

24. The Applicant is a full-blooded sovereign Mohawk person who resides on sovereign Mohawk territory.

25. The Applicant intends to call Dr. Sidney Harring PH.D (curriculum vitae attached) to testify and establish an evidentiary basis to the constitutional question and a Mohawk Elder to establish an evidentiary base to elements of the constitutional question.

PART II – THE ISSUES

26. There is only one issue to be determined:

That this constitutional question is not frivolous and vexatious.

The Applicant will address the authority of this court to determine the question.

PART III – LAW AND ARGUMENT:

A) The authority of the court to determine the application:

27. The Applicant has no issue with Rule 6.11 (2) of the Criminal Proceeding Rules.

B) No substantial ground and is therefore is frivolous and vexatious or an abuse of the process:

28. In both David and RO: WI: IO, neither court had an evidentiary record before them. This will be a recurring theme in all cases relied upon by the Crown; courts can only adjudicate on what is before them. When adjudication occurs on facts before the court, this result is the principles of "stare decisis", and the balance of commentary becomes "obiter". However, there is a significant paper on this issue which will greatly assist the court in this point raised by the crown. The document is entitled: Aboriginal Rights in the Constitution and International Law", published in the University of British Columbia Law Review by Kelly C. Yukich (cited 1996 30 U.B.C.L.Rev.235-278).

29. The article in its entirety is reproduced for the purpose of demonstrating that the Crown's position is untenable and that indigenous people really have no place to go for redress but the courts – they have no representation in Parliament, the executive or in the Assembly of First Nations (government funded and controlled) and thus are reliant on the courts to assist in the raising of consciousness of the people to assist then in their plight. The author says this at the beginning of her article:

> "……many solid arguments – arguments grounded in principal values that Canadians cling to, such as democracy multiculturalism and the rule of the law – support the use of international law in determining the place of Aboriginal people in Canada's legal and political order as well as in international community. Furthermore, the use of international law to decide Aboriginal issues is consistent with Canada's vast collection of human rights jurisprudence. This is true even though its use in the specific context of Aboriginal rights may be novel and may threaten some equally important features of the Canadian status quo, such as notions about ownership of land and government decisions making on behalf of Aboriginal people living in Canada."
>
> Aboriginal Rights in the Constitution and International Law, page 1 of 36 at Tab 9.

30. the author outlines fine distinct applications to the invoking of international law in aboriginal constitutional law matters and this can be found at page 8 of 36 at paragraphs 13 through to and including 28 at Tab 9.

31. Furthermore, as to the use of international law in the domestic courts, the author observes as follows:

> "Precedents abound for the use of international law – including documents, customary law and case law of domestic and international adjudicators – as an interpretive aid in construing vague Charter provisions. Anne Bayefsky list 205 Canadian cases that cited international human rights law from the time that the Charter was adopted until 1992. the fact that 21 decisions referred to international law to which Canada is not a party is helpful in arguing that international indigenous law should be used to interpret S 35 (1).
>
> > A Bayefsky, International Human Rights Law (Toronto Butterworths, 1992) at 709
> >
> > Quoted in Aboriginal Rights in the Constitutional and International Law at page 10 of 36 at Tab 9.

32. The author quotes Mr. Justice Dickson, dissenting in reference Re Public Service Employee Relations, in the Supreme Court of Canada, deciding as follows:

> “a body of treaties………and customary norms now constitutes an international law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The Charter conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law…..must…..be relevant and persuasive sources for interpretation of the Charters’ provisions.”
>
> Reference Re Public Services Employee Relations [1987] 1 S.C.R. 313 at 348.
> Quoted in Aboriginal Rights in the Constitution and International Law at page 10 of 36 at Tab 9.

33. Subsequently, writing for the majority in Slaight Communications Inc v. Davidson, Mr. Justice Dickson stated:

> “Canada’s human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the Charter but also the interpretation of what can constitute pressing substantial S 1 objectives – that fact that a value has status of an international human rights, either in customary international law or under a treaty…….should generally be indicative of a high degree of importance attached to the objective
>
> Slaight Communications Inc. v. Davidson [1989] 1 S.C.R. 1038 at 1056.57.
>
> quoted in Aboriginal Rights, ibid at page 11 of 36.

34. The author then deals with the concept that there are numerous cases where our Courts have applied Dickson C.J.C.’s reasoning. She states:

> “Apart from these broad assertions that international law is relevant. Charter interpretation there exist numerous cases in which our courts have applied Dickson, C.J.C.’s reasoning in context more clearly similar to that of S 35 (1). First lengthy and complete provision in international convention often inform the context of corresponding Charter provisions, particularly where they are brief. This use of international provisions is often seen in connection with the Fundamental Freedoms of religion, expressions, assembly and associated, as enshrined in S 2. of the

Charter."

Aboriginal Rights, ibid at page 11 of 36.

35. Justice Wilson of the Supreme Court of Canada did so in R v. Jones:

> " A specific example of this use is found in R v. Jones. In that case, Wilson J…….. turned to article 8 of the European convention and article 2 of it's First Protocol in coming to the conclusion that the right to educate children according to one's own religious convictions is protected by the Charter. Although this conclusion cannot be clearly drawn from the text of our Charter of our Charter, which simply guarantees "freedom of conscience and religion", Wilson J. reasoned that the wide acceptance of the principle in international law justified its inclusion in the Charter."

R v. Jones [1986] 2 S.C.R. 284 at 319-2.

Quoted in Aboriginal Rights, ibid at page 11 of 36

36. In R v. Video flicks, s Sunday-closing case, Tarnopolsky J. turned to the International Covenant on Civil Political Rights to elaborate on the reach of S 2 of the Charter. He stated that treaties to which Canada is a party must be implemented in order to become part of Canadian domestic law but where they are not implemented:

> "….unless the domestic law is clearly to the contrary, it should be interpreted in conformity with our international obligations ….. therefore Article 8 of the covenant is pertinent to our consideration of the definition of freedom of conscience and religion under the Charter.

R v. Video flicks [1984] 14 D.L.R. (4th) 10 at 36

Quoted in Aboriginal Rights, ibid at page 12 of 36.

37. Similarly, the author observed that the courts have referred to international tribunals, whose decision are not binding on this jurisdiction quoted favorably by our courts:

> "The scope of freedom of expression has also been expanded through the use of International law. In Ford v. Quebec (AG) Boudreault J.A. of the Quebec Superior Court used European Commission jurisprudence to conclude that S 2 (6) of Charter covers commercial speech. In giving S 2 (6) this expansive meaning Boudreault J.A. said:
>
> > "The courts especially foreign one have not found it illogical to accord commercial speech a protection flowing from the fundamental freedom of expression. In Europe, the human rights commission decided that art. 10 of the Convention applied to commercial advertising although to be a lesser extent than the expression of political ideas"
>
> European Commission jurisprudence, along with extensive U.S. case law, was used in order to justify according charter protection to commercial speech. Significantly, neither source of law is binding in Canadian courts.
>
> > Ford v. Quebec [1984] 18 D.L.R. (4th) 711 at 727
> >
> > Quoted in Aboriginal Rights, ibid at page 12 of 36.

38. The author goes on to state:

> "The previous examples show how international law has been used to interpret charter rights that have a clear equivalent in international law. However, Canadian courts have also used international law to define charter sections with no clear counterpart in international law. While the courts have in general, been more reluctant to turn to international law to expand the scope of S 7, in reference re Criminal Code S 193 and 195.1 (1) (1), Lamer J. referred to article 7 of the European Convention in order to determine that S 7 of the charter contains a "void for vagueness" doctrine. The fact that S 7 has no direct international parallel is an important point when arguing that S 35 (1) should be informed by international indigenous law. While S 35 (1) guarantees "aboriginal and treaty rights" international instruments generally refers to rights to carry out specific aspects of indigenous life. They stipulate only government-indigenous cooperation and agreement, and full participation of indigenous people in carrying out the provisions."
>
> > Reference re Criminal Code [1990] 4 W.W.R.481
> >
> > quoted in Aboriginal Rights, at page 13 of 36.

39. There are many other examples offered in the article concerning the use of international law interpreting the Charter. The author then goes into a disertating of international law relevant to aboriginal rights (see pages 14 through to 20 inclusive) and a discussion on international law on the acquisition of Territory and related British constitutional principles relevant to the correct application of S 35 (1) (see pages 20 to 36 inclusive), to which counsel will refer later on in this factum dealing with S 35 (1).

40. Suffice to say that the applicant submits that the propositions advanced by Rutherford J. in David are not well researched nor relevant to disposing of this constitutional question.

ii) Claim legally sound and not consistently rejected by the courts.

41. The Crown cannot identify one case where the right to sovereignty for indigenous People pursuant to Section 35 (1) of the charter, has been declined by the courts. Accordingly, all statements made by the courts regarding sovereignty are unilateral, bold assertions, one way assumptions and without indigenous input to the proposition that these expressions of sovereignty imbue the dominant society with "dominion over" aboriginal people or the removal of their own inherent right to sovereignty. Sparrow and Van der Peet did not deal with the issue of Crown sovereignty or aboriginal sovereignty and these issues were not the subject matter of litigation. Accordingly, all these statements are obiter and not conclusive of the issues advanced in this constitutional challenge.

42. Counsel has prepared a document attached in the book of Authorities' which

Outlines all statements made by the Supreme Court of Canada on sovereignty from Calder in 1973 to Haida Nation in 2004. Among all of these decisions, there will not founded sovereignty as the "issue" before the court and certainly no a claim to sovereignty pursuant to Section 35 (1) of the charter by an aboriginal person.

See Supreme Court of Canada case – Sovereignty at TAB

43. The concept that the "government retained the jurisdiction to limit aboriginal rights for justifiable reason" is not the constitutional question in this case. There is plethora of comment on the idea that aboriginal rights to sovereignty and self-government are issues yet to be decided by the courts.

44. Professor John Borrows, in his article "Questioning Canada's Title to Land: The Rule of Law, Aboriginal Peoples and Colonialism" puts the proposition as follows:

> "This paper examines how the rule of law as articulated by Canadian courts could be used to question Canada's claim to underlying title and sovereignty in Canada. Furthermore, it suggests that such a process is necessary for Canada to abide by its most valued precepts as a "free and democratic society." 17. This would also enable the country to overcome its colonial treatment of Aboriginal people in contemporary Canada, and would be consistent with Aboriginal perspectives skeptical of Crown assertions. One cannot found a truly just country on stolen land and repressive government. Most people might think that there is some persuasive jurisdiction for the displacement of Aboriginal people that can be articulated in law. This is not the case. Aboriginal peoples have by and large been illegally and illegitimately forced to diminish their claim to land and government because of arbitrary actions of non-Aboriginal governments 18. This is an issue of justice that directly implicates the rule of law."

See Law Commission of Canada: Questioning Canada's Title to Land: The Rule of Law, Aboriginal Peoples and Colonialism, at page 3, see Tab 31

45. Professor Borrows goes further in the discussion of the assertion of Crown sovereignty over indigenous people and states the following:

> "Failure to question the Crowns assertions of underlying title and sovereignty (while strictly scrutinizing Aboriginal assertions) appears to create a bias in the law in favour of non-Aboriginal groups who rely on crown assertions in Canada. This approach is not consistent with the rule of law. It upholds personal rule to the detriment of Aboriginal people and to the advantage of non-Aboriginal people. The courts failure to investigate Crown sovereignty does not therefore distribute legal customs in a legal manner. This perverts Canada's Constitution that proclaims "Canada is founded upon principles that recognize the supremacy of God and the rule of lae"29. Failure to question personal rule is not consistent with Section 52 (1) of the Constitution that states that it is "the supreme law of Canada"
>
> Courts in Canada do not respect the supremacy of the rule of law in the constitution when they unquestioningly support notions of underlying Crown title and sovereignty. This is not the courts approach in other circumstance. In the Manitoba Language Reference case, a case involving the constitutionality of the laws throughout the province of Manitoba, the Supreme Court of Canada questioned the actions of the Manitoba Crown and the legislature. The court used this opportunity to affirm the supremacy of law over the government and wrote:
>
> "The rule of law, a fundamental principle of our constitution, must mean at the least two things. First, that the law is supreme over officials of the government as well as private individuals and there by preclusive of arbitrary power. Indeed it is because the supremacy of law over the government, as established in S 52 of the Constitution Act, 1982, that this court must find the unconstitutional laws of Manitoba to be invalid and of no force or effect."30.
>
> Reference Re Language Rights [1985[19 D.L.R 1
>
> Quoted in Questioning Canada's Title, ibid at page 5

46. Professor Borrows goes on to characterize the result of that decision as having direct impact on the question of the Crown's assertion of sovereignty. He states the following:

“It (Supreme Court) therefore drew upon the paramountcy of law to declare the province’s entire statutory code invalid because of its failure to incorporate a fundamental respect for the rule of law in the laws’ passage. This result demonstrates that the “rule of law” constitutes an implied limit on the legislative jurisdiction of parliament and provincial legislature, and that legislation inconsistent with the rule of law will therefore be held to be ultra vires. It shows that the courts will not sanction an exercise of arbitrary power that does not conform to the principles consistent with the rule of law. Aboriginal perspectives hold that the Crown’s assertion of sovereignty depriving aboriginal people of underlying title and overriding self government is also a blunt exercise of arbitrary power. It is arbitrary because democratic principles of consultation and consent were not followed. It is arbitrary in the sense that this power has been exercised at the sole discretion of non-aboriginal government without the participation or agreement of the land’s original inhabitants, and has resulted in the virtual devastation of their territories and communities.

The very essence of arbitrariness is to have one’s status redefined by the state without an adequate explanation of its reasons for doing so. 35. Aboriginal peoples have had their status redefined by Canada without sound juridical reasons. There is little that could be more arbitrary than one nation substantially invalidating politically distinct peoples’ rights merely because that nation says it is so- all without an elementally persuasive legal explanation. The court has not effectively articulated how (and by what legal right) assertions of Crown sovereignty grant underlying title to the Crown or displace Aboriginal governance. The Crown’s claim to possess land not their own is wholly unsubstantiated by the physical reality at the time of their so called assertions of sovereignty. It’s supposed right to exercise dominion over indigenous peoples does not accord with the factual circumstances at the time of contact. These “vague” and “unintelligible” propositions “do not make sense” under the rule of law because they are factually untrue, and lack of legal cohesion. The Crown’s assertion of sovereignty diminishing Aboriginal entitlements is therefore arbitrary in the sense that at its core it has been done without coherent reasons. As a result, the assertion of Crown sovereignty over Aboriginal peoples in Canada violates the first principle of the rule of law and is unconstitutional.”

See Questioning Canada’s Title, ibid at pages 5 & 6 at Tab 31.

47. At paragraph 19 of the Crown's factum, the Crown asserts that arguments smilar to this constitutional question have been consistently rejected by the courts. This assertion by the Crown is abjectly wrong, on many counts such as:

(1) This question does not resemble any of the issues raised in those cases;
(2) No evidentiary base was ever put forward in those cases and certainly none that resemble this question;
(3) There is no "stare decisis" in any of those cases which is applicable in this case;
(4) All of the cases involving Dr Clark are arguments from the bar to the bench with no evidentiary base to support the arguments.

R v. Yellowhorn and R v. Fournier

48. At paragraph 20, the Crown deals with R v. Yellowhorn, a case this counsel appeared on in Lethbridge, Alberta. The application before Judge Langston was and application for funding to present the evidentiary basis for the constitutional question. Before Mr. Justice Langston on September 3rd 2005, was the decision of Mr. Justice O'Neil, on funding dated March 12th 2004 and reproduced here in the Book of Authorities at Tab18. Mr. Justice Langston reserved on the application for funding from September 3rd 2005, until April 13th 2006, awaiting the outcome of the matter before Mr. Justice O'Neill. When a stay of proceedings was entered in the North Bay case, Justice Langston then rendered a decision on the funding application.

See R v. Yellowhorn- Crown Book of Authorities at TAB 18

See R v. Fournier- Applicants Book of Authorities at TAB 18

49. It is interesting that Mr. Justice O'Neill commented that:

> "In my view the constitutional questions to be raised at the proposed hearing, by way of a defense to the criminal charges, are clearly novel and complex"
>
> and further
>
> "The issues raised in the Notice of Constitutional question are of sufficient merit that it would be contrary to the interests of justice for the opportunity to pursue these questions and these issues in this case to be forfeited if legal funding is not provided. It is to be remembered that the legal community in Canada is only beginning to come to grips with issues involving Aboriginal title rights. Indeed in R v. Sparrow, Dickson and LaForest stated at P.283 as follows:
>
> "For many years, the rights of Indians to their Aboriginal lands- certainly as legal rights- were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments and even those cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For 50 years after the publication of Clements's The law of the Canadian Constitution, 3rd (1916) there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960's Aboriginal claims were not even recognized by the federal government as having any legal status."
>
> Later at P.285, they stated:
>
> It is clear then, that S 35 (1) of the Constitution Act, 1982, represents the culmination of a long and difficult struggle in both the political forum and the courts for constitutional recognition of aboriginal rights…..
>
> In our opinion, the significance of S 35 (1) extends beyond these fundamental effects professor Lyon in "An Essay on Constitutional Interpretation (1988) 26 Osgoode Hall L.J 95, says the following about S 35 (1) at P.100
>
> "….. the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied

> those courts the authority to question sovereign claims made by the Crown"

See R v. Fournier, at TAB 18.

50. In R v. Yellowhorn, although all submissions made by counsel were on the issues of funding, counsel was not invited to address the merits of the Constitutional question, not the appeal. As Mr. Justice Langston phrases it at page 7 paragraph 21 between September 3rd 2005 and April 13th 2006. Accordingly all Mr. Justice Langston's comments are without representation by counsel on the merits of the constitutional question and are certainly without a record. On the issue of Genocide, Mr. Justice Langston states: "The appellant has provided no evidence of the alleged complicity (in genocide). "The appellant was making an application for funding to present the evidence on genocide. On the issue of sovereignty, counsel was not invited to make any submissions on the issue and certainly would have advanced as much as is now being advanced in this case. Furthermore, in all of the cases quoted by Mr. Justice Langston, not one had as the issue in litigation, the constitutional question as it is presently outlined. Those cases did not decide this question because this question was not before them.

51. As to the Ontario Court of Appeal's decision in R v. Fournier (TAB 19- Crown Book of Authorities), they would not deal with the merits of the constitutional question and it is of no assistance to the court in its evaluation of the merits of this constitutional question in this case.

52. In all the cases referred to by Mr. Justice Langston, there is not one example where the

constitutional question as presently drafted, has ever been litigated. Unilateral pronouncements regarding sovereignty and genocide, without an evidentiary records to provide the tapestry for the proper argument, is to offend the legal maxim “Audi alteram partem (or audiatar et altera partem)”, a Latin phrase, that means “hear the other side” and can be interpreted as “hear both sides.” Unfortunately for indigenous people in this territory known as Canada, the lack of proper representation for indigenous rights likely has its roots in Calvin’s case, 1608 and is sown into the fabric of judicial decision from St Catherine’s Milling Case right through the jurisprudence of today. The courts are continuously only hearing one side.

> Attached outline on Audi alteram partem.
> Calvin’s case 7 COKE Report ER377 (1608)
> St. Catherine’s Milling V R. [1887] SCR 577

53. In Geoffery S Lester’s doctoral thesis in jurisprudence at York University, 1981 entitled “The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument”, he opined on the impact of Calvin’s case, as follows:

> " The decision in Calvin's case goes to several basic issues in understanding the problems of aboriginal territorial rights in North America. In discussing the King's possessions in terms of English real property law, itself a product of feudalism, the basic postulate that the whole world was in tenure came into play. There could thus be no acquisition of the territory beyond the realm. The result of this archaic feudalism was that whatever did not come to the King by descent or inheritance came by conquest. The whole of Coke's report of this case proceeds on the basis that the conquest/ inheritance dichotomy is exclusive and closed.
>
> The simple point, therefore is this: Whatever the exact legal status of the antecedent rights of the Indians "discovery" was unknown as a means of acquiring a valid legal title to territory beyond the realm, at least as late as 1608, in English law. Inheritance and conquest were exclusive categories. Since no monarch had ever conquered North America; and since none had acquired title by descent, English titles in North America must be acquired by conquest."
>
> Geoffery Lester – "The Territorial Rights of the Inuit of the Canadian Northwest Territories : A Legal Argument" – Chapter 8 pages 342-355, at pages 345-6

54. Geoffery Lester then goes on to identify where the real problem for indigenous people arises in the consciousness of the newcomers when he observes as follows:

> "The Doctrine of Continuity holds that there is a presumption that antecedent rights under the lex loci survive the acquisition of a new territory by the sovereign. But according to Coke's judgement in Calvin's Case the Doctrine of Continuity was subject to a vital exception: it did not apply to territories acquired by conquest of infidels. Coke reasoned :

> "All infidels are in law perpetui inimici, perpetual enemies, (for the law presumes not that they will be converted, that being remota potentia (remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace…"

He continued

> "And upon this ground there is a diversity between a conquest of a Kingdom of a Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian Kingdom by conquest, seeing that he hath vitae at necis potestatem, he may at his pleasure alter and change the laws of that Kingdom; but until he doth make an alteration of those laws the ancient laws of that kingdom remain. But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, then ipso facto the laws of the infidel are abrogated for that they be not only against Christianity, but against the law of God and nature contained in the decalogue; and in that case, until certain laws be established amongst them, the King himself and such judges as he shall appoint, shall judge them and their causes according to natural equity, in such sort as Kings in ancient time did with their Kingdoms, before any certain municipal laws were given, as before hath he said."

Calvin's case – ibid
Quoted in "The Territorial Rights" – ibid at pages 353-4

55. On February 10th 1763 the Royals of Britain, France, Spain and Portugal divided amongst Themselves all of North and South America with no indigenous involvement and identified a Royal Order, which continues this day to inform the consciousness of the dominant society, when they appointed the negotiators:

> "For this purpose, the high contracting parties have named and appointed their respective Ambassadors Extraordinary and Ministers Plenipotentiary V:3. His Sacred Majesty the King of Great Britain, the Most Illustrious and Most Excellent Lord, John Duke and Earl of Bedford, Marquis of Tavistock, c. his Minister of State, Lieutenant General of his Armies, Keeper of his Privy Seal, Knight of the Most Noble Order of the Garter and his Ambassador Extraordinary and Minister Plenipotentiary to his most Christian King;"
>
> Treaty of Paris 1763

56. Today, in most Superior Courts in the Province of Ontario we find the symbol of the Royal Order of the Garter prominently displayed in the courtrooms, with the motto, "honi soit qui mal y pense" surrounding the symbol of the garter, accompanied by a lion on one side and a unicorn, with a chain across its body on the other side. "Honi soit qui mal y pense" which means "Shame on him who thinks ill of it" and at the bottom of the symbol, the motto "Dieu et mon droit" – "God and my Right" or "God and my Law" which would seem to echo the sentiments and consciousness of saying

Calvin's case- divine right of Kings and no rights for the infidel.

> Order of the Garter – Wikipedia – TAB 23

Royal Proclamation October 7th 1763

57. The above paragraphs naturally leads to a discussion of the Proclamation of October 7th 1763, a relevant and important document in the constitutional discussion and having more importance than assigned to it by the Crown in their factum. In a book entitled "The Original People", Robert J.

Surtees commented as follows:

“Equally important was a second development
of this period, the Royal Proclamation of 1763.
This document established a government for the
newly-acquired province of Quebec (Canada)
and outlined its boundaries. For the Indians,
however, this was also a vital document. This
can be readily recognized from the passages
of that proclamation, which are reproduced
at the end of this chapter.

When this Proclamation was formulated the
British had just received the shock of
Pontiac’s Mutiny in the Ohio Valley region.
Allies and forces guided by this Ottawa
chieftain engaged in vengeful warfare against
frontier settlements, and they also captured
eight British forts, forced another to be
abandoned, and laid siege to two more.
Pontiac was eventually beaten, but he had
frightened the British who became determined
to prevent another such outbreak. Accordingly
the Royal Proclamation was intended to
avoid hostilities between Whites and Indians.
Since trade and land were the root of all
such troubles the British decided that
transactions in both were to be regulated
and controlled by the Indian Department,
which would operate in the name of the
British Crown. A careful reading of this
document should reveal why it has been
called the “Magna Carta of the Canadian
Indian.” Its significance lies not only in
what it states, but also in the fact that it
was the guide for British Indian policy
for the next sixty-seven years, and in the
fact that its principles continued to be
followed in several cases throughout the
rest of Canadian history”

“The Original People” Robert J. Surtees
Published 1971 Holt, Rinehart and Winston at page 23, 24

58. Today, the Royal Order of the Garter is not mere symbolism, but an active club of monarchy, including the Emperor of Japan, which upholds a standard of materialism and Western World (European Monarchy) dominant view usually inimical to the indigenous way of life. Each indigenous person called before a Court of Justice must stand before the motto "honi soit qui mal y pense" and the consciousness of precepts expressed in Calvin's case and the results of the Treaty of Paris in 1763.

> Calvin's Case, ibid
> Treaty of Paris, 1763 ibid

59. In an article entitled "Wampum at Niagara : The Royal Proclamation, Canadian Legal History, and Self-Government" by Professor John Borrows, he observes as follows:

> "The Royal Proclamation of 1763 is a 'fundamental document' in First Nations and Canadian legal history. Yet, recent Canadian commentators have often treated the Royal Proclamation of 1763 as a unilateral proclamation of the Crown's will in its provisions relating to First Nations. It is time that this misunderstanding was corrected. First Nations were not passive objects, but active participants, in the formulation and ratification of the Royal Proclamation. In the colonial struggle for North America, and in the foundational development of principles to guide the relationship between First Nations and the British Crown, First Nations were not dependent victims of a greater power. In these early confrontations with the Crown, First Nations possessed their own power and a range of choices to which they could bring their own considerations and alternatives. First Nations faced a pivotal period of choice and decision-making between 1760 and 1764,

> after the British had asserted control over the French North America. The options then chosen are important today because the principles agreed upon form the foundation upon which the present First Nations/Crown relationship rests.
>
> This article will show that the Royal Proclamation is a part of a treaty between First Nations and the Crown which stands as a positive guarantee of First Nations self-government. The other part of the treaty is contained in an agreement ratified at Niagara in 1764. Within this treaty are found conditions that underpin the Proclamation and that lie outside of the bare language of the document's words. The portion of the treaty confirmed in Niagara has often been overlooked, with the result that the manuscript of the Proclamation has not been integrated with the First Nation understandings of this document. A reconstruction of the events and promises of 1763-4, which takes into account of the treaty of Niagara, transforms conventional interpretations of colonialism which allow the Crown to ignore First Nations participation. Through the re-evaluation of early Canadian legal history, one is led to the conclusion that the Proclamation cannot be interpreted to undermine First Nations rights. As will be illustrated, Proclamation/Treaty of Niagara rights persisted throughout the early colonization of Canada. These Aboriginal rights survived to form and sustain the foundations of the First Nations/Crown relationship, and to inform Canada's subsequent treaty-making history. The approach developed in this paper will provide an example of the partiality of conventional ethnocentric colonial interpretations of Canadian legal history."
>
> Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government. Published in Aboriginal and Treaty Rights in Canada at page 155.

60. Further in the article, Professor Borrows outlines the policies developed by the Royal Proclamation regarding indigenous lands, where he observes as follows:

> "The Proclamation uncomfortably straddled the contradictory aspirations of the Crown and First Nations when its wording recognized Aboriginal rights to land by outlining a policy

> that was designed to extinguish these rights. These rights and their potential removal were affirmed by three principles or procedures: 1) colonial governments were forbidden to survey or grant any unceded lands; 2) colonial governments were forbidden to allow British subjects to settle on Indian lands or allow private individuals to purchase them; and 3) there was an official system of public purchases developed in order to extinguish Indian title. In implementing these principles an area of land was designated as First Nations territory. The boundaries were determined by past cessions and existing First Nation territory. These principles codified pre-existing First Nation/colonial practice and reflected some First Nation preferences in maintaining territorial integrity and decision-making power over their lands. These principles simultaneously worked against First Nation preferences by enabling the Crown to enlarge its powers by creating a process to take land away from First Nations."
>
> Wampum at Niagara, ibid at page 160

61. Professor Borrows discusses the importance of the Treaty at Niagara, the significance of the two row wampum belt with the Hauchenosaunee (Iroquois Confederacy) and subsequent understandings and concludes as follows:

> "The promises made at Niagara echoed in the Royal Proclamation have never been abridged, repeated, or rendered nugatory. Since Aboriginal rights presumed to continue until the contrary is proven, the supposed 'increasing weight' of colonial history and its disregard of the Treaty of Niagara does not render void the Aboriginal rights under its protection. Furthermore, since the Proclamation is not a 'unilateral declaration of the Crown' but part of a treaty into which First Nations had considerable input, it therefore must be interpreted as it would be 'naturally understood' by them. A 'natural understanding'

> of the Proclamation by First Nations prompts an interpretation that includes promises made at Niagara. These promises are; a respect for the sovereignty of First Nations, the creation of an alliance ('the several Nations … with whom we are connected'), free and open trade passage between the Crown and First Nations ('shall not be molested or disturbed'), permission or consent needed for settlement of First Nations territory ('same shall be purchased for use … at some public meeting or assembly of Indians'), the English provision of presents to First Nations, mutual peace, friendship, and respect ('that the Indians may be convinced of our Justice and determined resolution to remove all reasonable cause of discontent'). The promises made at Niagara, and their solemnization in the proclamation and treaty, demonstrate that there was from the outset considerable doubt about the Crown's assertion of sovereignty and legislation power over Aboriginal rights. The securing of these significant promises demonstrates that First Nations treated with the Crown as active and powerful partners in making provisions for the future relationship between the parties."

Wampum at Niagara, ibid at page 168, 169

62. All of the conclusions can be supported by Sir William Johnson's own words to the Lords of Trade, to whom he wrote on Sunday 25th, 1763, describing the "Indians" as Allies and Friends, not subjects, he wrote as follows:

> "During the times in which the French possessed garrisons in there several countrys, many of their Trades were plundered & killed, but the expence which the French were at to conciliate the affections of the Savages, alone prevented any overt Act.- I know, that many mistakes arise for erroneous accounts formerly made of Indians; they have been represented as calling themselves subjects, altho, the very word would have startled them, had it ever been

> pronounced by any Interpreter; they desire to considered as Allies and Friends, and such we may make then at a reasonable expence, and thereby occupy our outpost, and carry on a Trade in safety, until in a few years we shall become so formidable throughout the country, as to be able to protect ourselves, and abate of that charge; but until such nieasures be adopted, I am well convinced, there can be no reliance on a peace with them, and that as interest is the grand tye which will bind them to us, so their desire of plunder, will induce then to commit hostilities whenever we neglect them."
>
> Published in Colonial History of the State of New York, 1856 at page 561.

63. These documents essentially outline a more persuasive interpretation to be giving The Royal Proclamation of 1763 and once an evidentiary basis has been established more favourable conclusion could be arrived at demonstrating a gap in asserted Crown sovereignty at Cornwall Island.

Genocide

64. It is submitted that although the tern "genocide" conjures up certain images in people's mind, the terminology and the definition of genocide must be properly understood in order to realize why the courts can not ignore the phenomenon in the relationship between the Crown and indigenous people in the territory known as Canada. The Crown refers to the term once in their factum – mentioned in the overview – and never addressed again. It is submitted that the principle of genocide, enunciated and defined in the United Nations Treaty on the Prevention and Punishment of the crime of genocide, intertwine with the principle in Section 15 (1) of the Charter to provide the reason why this delicate subject must be addressed.

> Convention on the Prevention and Punishment of the Crime of Genocide, United Nations, 9 December 1948.

65. Genocide is defined as genus-race, cide-murder and was coined by Raphael Lemkin in coming to terms with the Holocaust inflicted, by Hitler on the Jewish Nation in the Second World War. The Convention defines genocide as consisting of five distinct acts, any one which is defined as genocide:

(1) Killing members of a group
(2) Causing serious bodily or mental harm to members of a group
(3) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part
(4) Imposing measures intended to prevent births within the group
(5) Forcibly transferring children of the group to anther group

Both genocide and complicity in genocide are considered punishable acts.

> Convention on Genocide, ibid.

66. Although Canada is a signatory to this convention, it is in breach of its international obligation as only two of the five principles are reproduced in the Criminal Code of Canada

Section 318 (2) Criminal Code of Canada.

67. The devastation of the indigenous population on the North American continent is much higher then the holocaust of Nazi Germany, and although the Nuremberg trials provided some redress for the actions of the German nation, there is no measurable redress in North America. In fact, abject denial of genocide is the order of the day. Professor Ward Churchill of the University of Colorado, in his book "A little matter of Genocide- Holocaust and Denial in the Americas 1942 to the present" states as follows:

> "From the time Juan Ponce de León arrived in North America in 1513, searching for gold and a mythical fountain of youth in what the Spanish called *La Florida* (or *Pascua Florida*), until the turn of the twentieth century up to 99 percent on the continent's indigenous population was eradicated.* As of 1900, the US Bureau of the Census reported barely over 237,000 native people surviving within the countries claimed boundaries, and the Smithsonian Institution reported less than a third of a million for all of North America, including Greenland. 1. Although the literature of the day confidently predicted, whether with purported sadness or with open jubilation, that North America Indians would be completely extinct within a generation, two at the most, the true magnitude of the underlying demographic catastrophe has always been officially denied in both the United States and Canada."

68. Professor Ward Churchill suggests that Adolf Hitler reflected on the removal of North American Indians when he was contemplating his own devious plans regarding the Jewish nation. Professor Churchill observed as follows:

> "It was the example of nineteenth- century U.S Indian Removal policy upon which Adolf Hitler relied for a practical model when articulating and implementing his lebensraum politik during the 1930's and 40's" 72.

footnote 72:

"Perhaps the very clearest articulation and practical linkages between Nazi performance in Eastern Europe and the prototypical U.S Indian removal policy may be found in a lengthy memorandum prepared by Colonel Freiedrich Hossbach to record the content of a Fuhrer conference conducted on November 5, 1937; the relevant portion is contained in "Trial of the Major War Criminals before the International Military Tribunal" p.386-95

Indians are us? Culture and Genocide in Native North America, Ward Churchill at page 36 and footnote 72 at page 57

69. Further, Professor Churchill speaks of the spreading of disease through infected blankets as against the Algonquin Nation when he observed as follows:

> "During the latter portion of the seventeenth century and throughout most of the eighteenth, Great Britain battled France for colonial primacy in North America. The resulting sequence of four "French and Indian wars" greatly accelerated the liquidation on indigenous people as far west as the Ottio River Valley. During the last of these, concluded in 1763, history's first document able case of biological warfare occurred against Pontiac's Algonquin Confederacy, a powerful military alliance with the French.
>
> > "Sir Jeffery Amherst commander- in chief of the British forces-wrote in a postscript of a letter to Bouquet…that small pox be sent among the disaffected tribes. Bouquet replied also in postscript, "I will try to (contaminate) them… with some blankets that may fall into their hands, and take care not to get the disease myself…" To Bouquet's postscript Amherst replied "you will do well to (infect) the Indians by means of blankets as well as try to every other method that can serve to extirpate this execrable race." On June 24, Captain Emyer, of the Royal Americans, noted in his journal: "…We gave them two blankets and a handkerchief out of the smallpox hospital. I hope it will have the desired effect." 65.
>
> Footnote 65- E Wagner and Allen E. Stearn,

The Effects of Smallpox on the Destiny of the Amerindian (Boston: Bruce Humphries Inc.1945 p44-5

Indians Are Us?, ibid at page 34 and footnote 65 at p 57

70. In a book. "Rivers of Blood, Rivers of Gold- Europe's Conquest of Indigenous Peoples" Mark Crocker observed in the preface as follows:

> "Europe's encounter with and treatment of the world's tribal peoples in an immense theme, sprawling over five centuries and across all the inhabited continents. Yet it is also a phenomenon whose outline retains a fundamental clarity. In essence it is the story of how a handful of small, highly advanced and well-populated nation-states at the western extremity of Eurasia embarked on a mission of territorial conquest. And how in little more then 400 years they had brought within their political orbit most of the diverse peoples across five continents.
>
> It is in equal measure a tale of extraordinary human achievement in adversity, conferring on the victors possession of much of the world's physical resources, and a tragedy of staggering proportions, involving the deaths of many millions of victims and the complete extinction of many distinct peoples. <u>In fact, when viewed as a single process the European consumption of tribal society could be said to represent the greatest, most persistent act of human destructiveness ever recorded.</u>
>
> The most obvious challenge that faces and inquirer into this subject is the sheer mass of material. Clearly, no single volume can hope to document very episode. Nor is the book's purpose an exhaustively detailed overview. Yet I believe it is important to attempt to convey the whole picture between two covers, since one can at least suggest both its full time-scale and its international embrace. The method I choose for this purpose is a detailed examination of four widely spaced episodes- the Spanish conquest of Mexico, the British near-extermination of the Tasmanian Aborigines, the white American dispossession of the Apache, and the German subjugation of the Herero and Nama of South West Africa."

71. In documents entitled "The Fair Play Papers" The future of our Indians "1981, comprising <u>3</u> papers and published in "A Victim Missionary and Canadian Indian

Policy" by David A Nock, the papers outline the plight of the Natives in Canada and from the perspective of the Natives and observes as follows:

> "There are plenty of persons ready enough to deal with the Indian question from the white man's point of view. All the actions of our government, of our Indian Department, of our education institutions, even the organizations and carrying on of our Christian missions, are from the white man's stand point. The Indian is not asked whether he prefers living on an Indian reserve to roaming the country; whether he likes his children to be educated or to lead a wild life; whether he prefers Government beef or buffalo flesh; whether he is to retain the language and the customs of his forefathers, or to give them up; whether in his worship he is to follow the ancient rituals of his ancestors, address the sun as his god, and the rivers, or accept the Christian teaching of the white man and become thereby a Methodist, Episcopalian, a Presbyterian or a Roman Catholic. He is not asked these things. There is no nay or yay about it. They are simply one after another forced upon him. Not only is he expected to accept them without a word, but he is expected also to be grateful, to coin words for which there is no equivalent in his simple, primitive language, to express his gratitude- otherwise he may be dubbed an "ungrateful savage" or even something worse by his white neighbours."
>
> A Victorian Missionary and Canadian Indian Policy- David A Nock- the Fair Play Papers.

72. In a District court of Oregon decision of November 15th 2000, Justice Janice M Stewart refused to extradite James Pitawanakwat, after he violated his parole from a conviction resulting from the late Gustafsen Standoff, by leaving Canada without permission. She observed as follows:

> "The lake Gustafsen incident was not an isolated violent incident incited by a mere handful of insurgents, as contended by the government. Instead according to the evidence submitted by the defendant, it was part of a broader protest in 1995 and aimed at the Canadian Government in support of sovereignty by the native people over their land. The trespassing dispute was an opportunity

> for the native people to affirm their sovereignty against the Canadian Government, which if successful, could have dramatically altered the political landscape of Canada…
>
> Although Canada seeks defendants return only for parole violation, this court concludes that defendants crimes for which he was convicted and later paroled were "of a political character" and therefore may not provide the basis for extradition of defendant to Canada. Extradition Treaty Act IV (I) (iii)"
>
> U.S.A v Pitawanakwat U.S District Court of Oregon Nov 15 2005

73. The principles enunciated in the United Nations Convention, that is the five principles outline therein have all been offended in the territory known as Canada. The genocide began with spears and muskets, progressed to bullets and infected blankets, demoting the ranks of native people and graduated to pen and paper (laws) all decimating to eliminate the culture and the people of the nation. The Indian act of Canada since 1857 has imposed conditions of life designed to bring physical and mental harm to the group and the existence of residential schools is an undeniable truth. All of this has gone unaddressed for 500 years.

<u>Genocide and Section 15 (1) of the Charter</u>

74. The Supreme Court of Canada, in the Law decision outlined the three central elements of focus in assessing discriminatory behaviours.

1. Whether a law imposes differential treatment between the claimant and others;
2. Whether an enumerated or analogous ground of discrimination is the basis for different treatment; and
3. Whether the law in question has a "discriminatory" purpose or effect.

Wilson. J. explained at p 152:

> "that a ground may qualify as analogous to those listed in S 15 (1) if persons characterized by the trait in question are among other things: lacking in political power, vulnerable to having their interests overlooked and their rights to equal concern and respect violated and vulnerable to becoming a disadvantaged group on the basis of the trait"

It is submitted that these criteria are at work, in the particular circumstances of this case and a consciousness of genocide is the cause of discriminatory treatment.

Law v Canada, 178 at page 152

75. The Supreme Court of Canada, in the Quebec Secession Reference Case identified some of the constitutional principles when a ruling that a unilateral declaration of sovereignty by Quebec would be unconstitutional. The Court observed that in the Canadian constitutional tradition, <u>legality</u> and <u>legitimacy</u> are <u>linked</u>. Any Consideration of the diminishment of Aboriginal rights should therefore review these broader legal principles to assess the legitimacy of the Crown's assertion of sovereignty in Canada.

Re secession of Quebec (1998) 2 S.C.R 217

76. The effects of genocide have impacted on all four areas observed by Wilson J.: The natives in Canada have no political power (Indian Act disfranchises the natives from traditional ways), are vulnerable to having their interests overlooked and their rights to equal concern and respect violated (governments ignoring the recommendation of the Royal Commission on Aboriginal people, not applying the Proclamation of 1763) and are vulnerable to becoming a disadvantaged group (highest rate of alcoholism, imprisonment and disease on a per capita basis in Canada). The key elements in the discrimination analysis involve factors such

as prejudice, stereotyping and disadvantage and the determination of whether each of these elements exists in a particular case is always to be undertaken in a purposive manner, taken into account the full social, political and legal context of the claim.

Law v. Canada, ibid, at page 17

77. It is submitted that there are historical documents, which if properly interpreted, would afford equal benefit to aboriginal people. The Order in Council of Queen Anne 1704, allowing for independent third party adjudication in territorial disputes and the Proclamation of 1763 forbade the newcomer from usurping.

78. The Indian Act provisions and the imposition of the criminal law sanctions against this individual, imposes an unequal burden in the facts of the case. The distinction is discriminatory and is based on all the grounds enunciated in Section 35 (1). As the Chief Justice of the Supreme Court of Canada observed:

> "The contextual approach to Section 15 requires that the equality analysis of provisions relating to Aboriginal people must always proceed with consideration of respect of Aboriginal heritage and distinctiveness, recognition of Aboriginal and treaty rights and with emphasis on the importance for Aboriginal Canadians of their values and history"

Corbiere v. Canada (1999) 2 S.C.R 203

79. L'Heureux Dube. J. in Corbiere (supra) cited five issues to be determined in that case and they are applicable here (and I paraphrase):

1. The approach to be taken to the S 15 (1) analysis in the particular facts of this case:
2. The effect of S 25 of the Charter and S 35 of the constitution act, 1982 on the S 15(1) analysis in the facts of this case:

3. Whether the impugned sections of the Criminal code violate S 15(1);
4. If S 15(1) is infringed, whether it is justified under section 1 of the Charter;
5. The appropriate remedy.

The analysis of discriminatory impact must be conducted with a careful eye to the context of who is affected by the legislation and how it affects them.

Corbiere v. Canada ibid

Rule of law

80. The rule of law is a "fundamental postulate of our constitutional stature" (Roncarelli v. Duplessis) that lies "at the root of our system of government" (reference re Secession of Quebec). It is expressly acknowledged by the preamble to the constitution Act, 1867 (reference re Manitoba Language Rights)

> Roncarelli v. Duplessis [1959] S.C.R. 121 at p142.
> Reference re Secession of Quebec [1998] 2 S.C.R. 271 at p 70.
> Reference re Manitoba Language Rights [1985] 721 at 750.

81. The applicant relies on the thesis advanced by Professor John Borrows in his article, Question Canada's Title to Land" and submits that his conclusion properly advances the argument, which would be supported by evidentiary base, wherein he stated the following:

> "This article has illustrated how the Crown's assertion and the Courts acceptance pf a subsequent claimant's non-consensual assertion of rights over prior owner's land is not consistent with the laws highest principles. Any judicial sanction of the colonization, subjugation, domination and exploitation of Aboriginal people in Canada is not a "morally and politically acceptable conception of Aboriginal right." It's "perpetuates historical injustice suffered by aboriginal people at the hands of colonizer and illegitimate and illegal. In such situations, The Supreme Court has held that this treatment may ultimately raise a claim of a legal right to self-determination for those who suffer such abuse, if this treatment is not ended through negotiation and reconciliation. Aboriginal self-determination must receive negotiation expression within Canada through and appropriate extension of the rule of law in matters of federalism democracy and minority protection."

> Questioning Canada's Title To Land, ibid at p 16 of 35.

Rights Of The Aboriginal Peoples of Canada

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

82. The aboriginal peoples of Canada have a right of sovereignty and self determination, as sovereignty for them has always existed, has not been taken away and cannot be said to have been extinguished as it is legally impossible. There has been an absence of challenge to the bold assertion of Crown sovereignty our Aboriginal peoples enunciated by the Supreme Court of Canada, which only allows a deep dysfunctionality to continue to flourish. Many scholars, academics, lawyers, and judges are beginning to see the law develop theories and arguments, which support openings for Aboriginal peoples that go beyond the issues of fishing, hunting and logging. Sovereignty, self-determination and the need to redress genocidal practices, with the correct application of the rule of law, intertwine in the debate raised by this constitutional challenge. In "Box of Treasures or Empty Box- twenty years of Section 35, the Editors Ardith Walken and Halie Bruce posit the following:

> "Section 35 recognizes and affirms "existing" Aboriginal Rights. A problem that Indigenous Peoples face is that both Canadian court and governments are remarkably unwilling to admit that any Aboriginal Rights exist. The denial of Indigenous Peoples rights is a form of ahistoricism which re-frames the solid, political, cultural and economic injustices faced by Indigenous Peoples. Ahistoricism denies, and therefore perpetuates, the colonial past.
>
> In Delgamuukw the province argued that Indigenous People were such low scale of social and political evolution that we were incapable of holding title or exercising jurisdiction over our territories. The Supreme Court of Canada rejected the doctrine of terra mullius advanced by the province, but nonetheless imposed a

> psychological terra nullis by insisting that Indigenous Peoples prove title. The starting point is the assumption that Indigenous title does not exist. The very process of "land claims" indicates the strength and power of the psychological terra mullis that pervades Indigenous – settler relations, as it is based on the assumption that the Crown owns the land, validly controls it, and Indigenous Peoples must make a claim to that land. Where Indigenous peoples refuse to accept a psychological terra nullis and insist on the truth of our title and continued validity of our own laws, we are punished by the courts for not being "reasonable"
>
> Box of Treasures or Empty Box? Twenty years of Section 35, National Library of Canada 2003 at page 353

83. The Mohawk Nation, which is one of the Six Nations, or Haudenosaunee (Iroquois Confederacy- People of the Longhouse), the Seneca, Oneida, Onondaga, Cayuga, and Tuscarora making up the other five, was founded as a Confederacy around 1452 by the Great Peacemaker and his helper Ayowatha. There is a wampum belt commemorating this event and to also insure that the five chiefs would never forget their titles and their positions in the Council House. The large circle on the wampum belt means respectively The Great Peace and the Great Law (Gayanasalagowayenerlkowa) that was established by the initial five nations.

> Wampum Belts by Tehanetorens, Six Nations Indian Musuem, Onchiota, New York 12968

84. In a statement made by Senator Daniel K Inouye before a U.S Senate Committee on Indian Affairs, celebrating the contribution made by the Great Law of Peace to the United States Constitution, he has this to say:

> "As Americans we take great pride in the rule of law. And we are proud that our fundamental governing document,

the Constitution, has withstood the test over two hundred years of dynamic and sometimes dramatic changes in American society. However, I have found that the origins of our constitution are not well known.

Today, in an age of mass media and satellite technology, we are able to know what is happening in a country halfway around the world in a matter of moments. We witness live events as they are happening. So it is interesting when you stop to think about the world at the time our founding fathers were contemplating the basis of government upon which the country would be built. At that time, there were no democracies in Europe, Asia or Africa- There were dictatorships, and oligarchies, but no democracies. From where then, was the concept of government drawn? It may surprise some to know that this concept of government came directly from the Six Nations if the Iroquois Confederacy, and the Great Law of Peace and that governed those nations- A document which had its origins in the 10th through 15th century.

The Great Law of Peace was founded upon principles of law-The principles of Peace, equity, justice and the power of good minds. Families were organized into clans and leaders of the clans were chosen. The Great Law established that the league of peace would be matriarchal and that each clan would have a clan mother. Thus established in that early law were the equal rights of women."

"Sovereignty and the United States"- Senator Daniel K Inouye- U.S Senate Select Committee on Indian Affairs 10-5-1990

The Constitution Of Iroquois Nations: The Great Binding law (Gayanaslagowa) prepared by Gerald Murphy and distributed by the National Public Telecompeting Network.

85. In a book entitled "A Narrow Vision" by Brian E Titley, the author chronicles the draconian measures of Indian Affairs in their attempt to replace traditional government with Indian Affairs regime, in chapter 7, entitled "the Six Nations Status Case," and commented as follows:

"when Indian political organizations attempted to oppose the policies of the federal government, measures were

> taken to disrupt or destroy them. Yet their agitation proved far less troublesome than that which was instigated during the 1920's by the Six Nations. The largest and wealthiest native group in the country, they put forward claims to special states that went far beyond those sought by other Native Peoples and they proved particularly resourceful and persistent in advancing those claims. As a result, the response from Indian Affairs was all the more draconian"
>
> A narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada,
>
> Brian E Titley, Chapter 7 at page 110

86. A vulnerability, which exposes Canada's judicial system to aboriginal challenge exist in Ontario courts which can be exercised on behalf of aboriginal people to there great benefit. Constitutional challenges through the prism of S., 35 (1) pf the Constitution Act of Canada 1982 (recognized and affirm Aboriginal and treaty rights vs. deny and negate rights) a strong case can be made that Aboriginal sovereignty has never been surrendered and imposition of British common law jurisdiction is highly questionable in Aboriginal matters in the territory known as Canada. Dr. John Borrows puts the proposition this way:

> "the inclusion of Aboriginal right Constitution was important because of the troubled relationship between Aboriginal People and the Canadian state. For most of the country's history there has been very little recognition or protection of Aboriginal Peoples' fundamental human rights and personal freedoms.18 This has resulted in their individual and collective lives being unduly "susceptable to government interference" 19 institutions of government 20, the denial of land 21, the forced taking of children 22, the criminalization of economic pursuits23, and the negation of the rights of religious freedom24, association25, due process26 and equality27. The people who created this country and those who subsequently preside over its growth did not ensure that, as a vulnerable group, Aboriginal peoples were "endowed with institutions and rights necessary to maintain and promote their identities against

> the assimilative pressures of the majority"28. This defincency has lead to further vulnerability and increased governmental intervention as Aboriginal Peoples were not extended the institutional means to resist the violations of their rights.29 The absence of political and legal remidies to contest the injustices faced by Aboriginal Peoples has contributed to their unacceptable socioeconomic status within a generally prosperous society.30 As a result of this treatment, Aboriginal Peoples became "uncertain citizens", the institutions, rights and/or resources necessary to meaningfully participate in the life of the country, either collectively or as individuals. As a result, Aboriginal Peoples have not enjoyed social cohesion, political stability and civic peace in their relationships with other Canadian citizens. The Constitutional recognition of existing Aboriginal Rights promised positive change"2

Book of Treasures, ibid at pages 224-5

87. An emerging body of knowledge coupled with these seeds of change is developing around the ability of counsel to present the problems which exist in the bald and bold assertion of sovereignty by Crown officials. Again, Dr. John Borrows opines on this matter as follows:

> "The Supremes' Court concern for a conception of citizenship that incorporates political stability and civic peace is also apparent in the way it approaches the underlying purpose of S35(1)'s inclusion in the Constitution. In Van der Peet, the Court struggled with the fact that the Constitution granted special protection to only one part of Canadian society when it affirmed Aboriginal rights.96 They noted that such a result seemed inconsistent with the principles of liberal enlightenment that recognized "general and universal" rights by all people in society regardless of their collective status. The Court thus had to offer an explanation as to how special rights could co-exist with universal rights in Canadian society. The course it took in providing this explanation was to hold that Aboriginal Rights had to be given a purposive, large and liberal construction consistent with their favoured constitutional status. When the Court applied this approach, and articulated a rationale for the existence of special rights,

> it held that the reasons Aboriginal Peoples had special rights was that when the Europeans arrived in North America they were "already here, living in communities on land and participating in their distinctive cultures, as they had done for centuries.97 The factor of prior Aboriginal presence therefore became on half of the purpose of justifying the special grant of rights in the Constitution. The other half of the purpose underlying the special regime of Aboriginal Rights, which once again reveals the Court's concern for social cohesion, was that these pre-existing rights "must be directed towards reconciliation…with the sovereignty of the Crown"98 The Court's formulation of the purpose of S35(1) in this manner makes reconciliation the centre-piece of its jurisprudence dealing with Aboriginal Rights.
>
> The concept of reconciliation is very definitely a concept concerned with social cohesion, political stability and civic peace. It implies a search for a middle ground, between conflicting positions. The Language of reconciliation has been particularly prominent in South Africa where that country's political rejuvenation is heavily dependent on "Truth and Reconciliation" to being social and political unity to a deeply divided citizenship.99 This language is gaining strength in Canada because of the Court's reliance on this concept in its recent jurisprudence. Reconciliation conveys the idea that there is a rift between peoples that needs to be bridged. In fact, the Court employs the metaphor of a bridge in discussing reconciliation when it notes that the essence of Aboriginal Rights is their bridging of Aboriginal and non-Aboriginal legal cultures.100"
>
> Box of Treasures, ibid at page 238-9

88. Professor Sidney Harring PH.D, Professor of Law at New York City University, has written extensively on Indigenous sovereignty issues in Australia, New Zealand, United States and Canada and as a proposed expert witness in this case, his curriculum vitae is attached to the end of this factum. The foreword to his book "White Man's Law: Native People in the 19th Century Canadian

Jurisprudence" written by Chief Justice Roy McMurtry communicated as follows:

> "The purpose of The Osgoode Society for Canadian Legal History is to encourage research and writing in the history of Canadian law. The society, which was incorporated in 1979 and is registered as a charity, was founded at the initiative of the Honourable R. Roy McMurtry, a former attorney general for Ontario, now chief justice of Ontario, and officials of The Law Society of Upper Canada. Its efforts to stimulate the study of legal history in Canada include a research-support program, a graduate student research-assistance program, and work in the fields of oral history and legal archives. The Society publishes volumes of interest to the Society's members that contribute to legal historical scholarships in Canada, including studies of the courts, the judiciary and the legal profession, biographies, collections of documents, studies in criminology and penology, accounts of significant trials, and work in the social and economic history of the law.
>
> Current directors of The Osgoode Society for Canadian Legal History are Jane Banfiels, Tom Bastedo, Brian Bucknall, Archie Campbell, J. Douglas Ewart, Martin Friedland, Charles Harnick, John Hosenberger, Kenneth Jarvis, Allen Linden, Virginia MacLean, Wendy Matheson, Colin McKinnon, Roy McMurtry, Brendan O'Brien, Peter Oliver, Paul Reinhardt, Joel Richler, James Spence, Harvey Strosberg, and Richard Tinsley.
>
> The annual report and information about membership, can be obtained by writing: The Osgoode Society for Canadian Legal History, Osgoode Hall, 130 Queen Street West, Toronto Ontario. M5H 2N6
>
> In recent years numerous important books have appeared which deal with the history of aboriginal populations in early Canada. Although these studies add enormously to our understanding of the role played by native peoples in the British North American and Canadian communities, there has been to date significant study of the dynamic and at times tragic relationship between Euro-Canadian law and the legal traditions of aboriginal populations.
>
> Professor Sidney L.Harring now addresses that lacuna in this sweeping reinvestigation of Canadian legal history. In the Nineteenth century, many Canadians commented proudly on what they regard as this country's

> liberal treatment of Indians. In challenging that conception, Professor Harring draws on scores of nineteenth- century cases. His study demonstrates that colonial and early Canadian judges were sublimely ignorant of British policy concerning Indians and their lands and arrogantly indifferent to native rights and traditions. A great strength of the study demonstrates is its account of the remarkable tenacity of First Nations in continuing their own legal traditions despite obstruction by the settler society that came to dominate them.
>
> Today, legal decisions respecting native rights and land claims reverberate throughout our society, affecting the rights and obligations of all Canadians. This study helps us to understand and some to terms with how we arrived at our present condition. It leaves no doubt that Canadian native legal culture requires further study by scholars and that aboriginal history demands more serious attention by the courts in rendering decisions."

89. In the article published in the University of British Columbia Law Review, the author deals with the subject of "International law on the acquisition of territory and related British Constitutional law principles relevant to the correct application S35(1)" from pages 20-36 and the applicant relies on the argument set out therein. Furthermore, she deals with a case entitled Connolly v Woolrich (1876) also dealt with exclusively by Professor Herring in his Book "White Man's Law" She observes as follows:

> "Walters also cites Connolly V Woolrich, a Canadian case in which a marriage under Cree law was held to be valid in a lower Canada Court, despite the existence of a later marriage performed under British Law. This case supports the proposition that Aboriginal Law was perceived as having continued validity after the introduction of British Law. Walters calls this result the complex settlement rule and he asserts that it must apply in Canada. Had the doctrine of terra mullis not been incorrectly applied in Canada, the situation would have been parallel to that in Calcutta. Case law supports this adoption of the settlement where Indigenous populations are present. It also serves to

> avoid the wrongful application of the terra nullius doctrine."
>
> Aboriginal Rights, ibid at p 30
> Connolly v Woolrich [1867] 17R.J.R.Q75

90. Professor Kent McNeil of Osgood hall Law School. In an article entitled "Sovereignty and the Aboriginal Nation of Rupert's Land (1999) opined as follows:

> "Where the rights of the Aboriginal people of Canada are concerned, history and law are inseparable, lawyers working on Aboriginal claims ignore history at their peril. But the converse is, also true – historians whose work involves the Aboriginal peoples cannot afford to disregard laws. Now here is this more apparent than in Rupert's Land, out of which the province of Manitoba was at least partially created. Solutions to lingering question of sovereignty territorial boundaries, jurisdiction, title to land, and so on, all must be sought in the middle ground where law and history overlap. In this article, we will venture on to this ground in an effort to resolve a long-standing debate over the validity of Aboriginal and British claims to sovereignty in that Region"
>
> "Sovereignty and the Aboriginal Nation of Rupert's Land" Spring/Summer 1999 37 Manitoba History 2 at page 5.

91. The applicant relies on the position advanced by Michael Asch and Patrick Macklem in their article "Aboriginal Rights and Canadian sovereignty" (1991) and in particular, the following conclusion:

> "In our own view, the re-emergence of a contingent theory of aboriginal rights in the context of S35(1) jurisprudence ultimately depends on a belief in the superiority of European nations and is therefore antiethical to principles that ought to underpin Canada's constitution self-definition. In it's place, we suggest the embrace of an inherent theory of aboriginal right, which would protect aboriginal sovereignty and native forms of self-government from state interference. Such an approach would begin to reverse the historical pattern of systematic exclusion of Canada's First Nations from constitutional discourse and acknowledge the importance of native difference <u>in</u> the constitution of

> Canada. In the alternative we suggest that the judiciary attempt to shore up the tentative acceptance of a constitutional right to self-government."
>
> Aboriginal Rights and Canadian Sovereignty-
> Michael Asch and Patrick Macklem[1991]
> 29 ALTA Law Rev.498

92. In Aboriginal and Treaty Rights in Canada, a chapter entitled "Challenging Assumptions = The Impact of Precedent in Aboriginal Rights Litigation" authored by Catherine Bell and Michael Asch is relied upon by the Applicant and particularly the conclusion as follows:

> "Reliance on precedence is fundamental to the process of legal reasoning and to the presumption that this reasoning is based on logic rather than whim, on law rather than policy. It is a time-honoured legal principle which has much relevance to jurisprudence. It is not our intent to eviscerate it. Still, as the *persons* 173 case, as well as *Brown v Board of Education*174 in the United States attest, there comes a time when it is necessary to reassess precedent in light of more contemporary knowledge. Now is the time to undertake this reassessment with respect to Aboriginal title litigation and in particular the use of an outmoded and biased theory of culture to interpret the facts of Aboriginal society that are contained in the leading precedents of *Re Southern Rhodesia* and *Baker Lake*. It is a view anticipated by Mr. Justice Hall (as he was then) when eh stated in *Calder* that the courts must not base the interpretation of fact on a conceptual framework that arose in a period when Aboriginal people 'were thought to be without cohesion, laws, culture, or in effect a subhuman species.'175 If this dictum applies anywhere, surely, as the evidence provided here indicates, it applies to the methods of interpretation of fact found in *Re Southern Rhodesia* and *Baker Lake.* Hall's words provide sage advice, and we merely recommend that it be followed."

93. The Applicant submits that Worcester v Georgia 31 U.S. 515, remains good law and establishes the indicia for the right to sovereignty of Indigenous peoples. The

full decision of Chief Justice Marshall is relied upon by the Applicant, and in particular the following statement of the Chief Justice:

> "The actual state of things at the time, and all history since, explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what belonged to his Crown. These newly asserted titles can derives no aid from the articles so often repeated in Indian treaties; extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self government. The very fact of repeated treaties with them recognizes it; and the settled *561 doctrine of the law of nations is, that a weaker power does not surrender its independence—it's right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for it's safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state." At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies"

94. In discussing the sovereignty of the Crown, it must be remembered that in Canada we refer to three Crowns- The Queen, the Queen in the Right of Canada, and The Queen in the Right of a Province. However, Section 9 of the Constitution Act 1867-1982, states as follows:

> "The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen."

This demonstrates that not much has changed since the Treaty of Paris, 1763, and the chief negotiation, the Knight of the Royal Order of the Charter.

95. The Applicant requests that the application of the Crown hereby dismissed.

All of which is respectfully submitted this 21st day of January 2007.

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Michael Swinwood
Legal Counsel